Smoking Out the Impact of Tobacco-Related Decisions on Public Health Law

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Tobacco is a product—and public health problem—unlike any other. No other legal consumable product is nearly as addictive or as deadly as the cigarette, which kills approximately 440,000 Americans every year. Moreover, tobacco products have exerted an unparalleled influence over American society and culture. As Allan Brandt wrote in The Cigarette Century, cigarettes have “deeply penetrated American culture,” leaving “few, if any, central aspects of American society that are truly smoke-free.” These and other characteristics make tobacco use a highly unusual public health issue, and therefore courts have often distorted precedents and shaped their decisions to accommodate the unique exigencies of tobacco-related cases. In turn, these decisions have significantly reshaped public health law doctrine, affecting a wide variety of health-related concerns outside the tobacco context.

1 Rob Crane, The Most Addictive Drug, the Most Deadly Substance: Smoking Cessation Tactics for the Busy Clinician, 34 PRIMARY CARE CLINICAL OFF. PRAC. 117, 117 (2007) (“By several measures, nicotine is the world’s most highly addictive drug, and tobacco is its most deadly substance.”).

This Article seeks to uncover and analyze the role that tobacco-related litigation has played in the evolution of public health law doctrine. “Public health law” can be described as the application of administrative and tort law to the field of public health, subject to the limitations imposed by constitutional law. The past twenty-five years have seen substantial shifts in both the administrative and tort law aspects of public health law. In administrative law, the Supreme Court has “gradually erod[ed] the deference accorded to administrative agencies,” including public health entities. This retreat from the highly deferential rule announced in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* has had profound implications for the ability of regulatory agencies to proactively address public health challenges. At the same time, federal court decisions in personal injury and products liability cases have made it substantially more difficult for public health advocates to use tort law in ways that “influence and develop . . . policies directly affecting the public’s health.”

What role have tobacco-related cases played in these developments? Have these cases pushed public health law in particular directions? Or have tobacco-related decisions merely reflected broader cross-cutting trends? This Article suggests that while there have certainly been other factors concurrently driving the development of public health law, a broader perspective reveals that tobacco cases have had a considerable influence that has been generally unrecognized. In several different areas, doctrines developed or extended in tobacco-related cases have engrained an anti-regulatory bias into

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public health law, and this has made it more difficult for plaintiffs seeking redress for other types of health-related injuries to have their cases heard in court. Overall, if it had not been for tobacco-related cases, today’s health-related litigation would likely encounter a markedly different legal landscape. Reconsidering the history of tobacco-related cases is important for understanding the dynamics of public health law’s evolution and the ways in which public health goals can (or cannot) be pursued through regulation and litigation. This, in turn, raises questions for legal scholars, judges, and public health experts alike as to how tobacco-related cases should be treated by the courts.

Part I of this Article discusses whether tobacco cases are “exceptional,” and suggests several reasons why courts have approached smoking-related litigation differently from other public health cases. Part II reviews the impact of tobacco cases in the regulatory context, focusing on the wide-ranging impact of the Supreme Court’s decision in *FDA v. Brown & Williamson Tobacco Corp.* There, the Court rejected the FDA’s jurisdiction over tobacco products, after struggling with what it termed tobacco’s “unique place in American history and society.” In the process of reaching this conclusion, the Court collapsed the two-part *Chevron* test into a one-step process that provided far less deference for administrative action. The impact of this decision has reached far beyond tobacco cases, limiting the ability of other regulatory agencies to address emerging public health concerns. Part III assesses the influence of tobacco cases on personal injury litigation and products liability lawsuits. This Part covers three primary subjects: preemption, class certification, and punitive damages. Part IV concludes the Article by raising the normative question of how the courts should have approached tobacco-related cases, and suggests that the courts’ failure to directly confront this question has allowed tobacco litigation to have a distorting impact on the rest of public health law.

I. **IS TOBACCO EXCEPTIONAL?**

As an initial matter, it may be necessary to explore the concept of uniqueness and disentangle two meanings of the

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8 *Id.* at 159-60.
word “exceptionalism.” In various fields of law, scholars have argued that if a particular subject is “exceptional,” it must be subjected to a unique set of legal rules because the existing legal framework cannot accommodate it. For example, claims have been made that distinct legal structures (whether statutory or judicially developed) are needed to address modern phenomena such as the Internet, genomics, and nanotechnology. In the context of public health, Ronald Bayer argued in 1991 that despite the existence of a legal framework for combating communicable diseases, “HIV exceptionalism” had produced a unique set of laws to deal with the AIDS epidemic.  

This Article will not explore that type of exceptionalism, i.e., whether a different legal framework is necessary to address the issue of tobacco. Tobacco products do have their own regulatory regime, which is clearly “exceptional” in the world of food and drug law. Though warning labels are required on cigarette packages by the Federal Cigarette Labeling and Advertising Act (FCLAA), “[c]igarettes have been specifically exempted from coverage under the Fair Labeling and Packaging Act of 1966, the Controlled Substances Act of

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9 See generally Lawrence Lessig, The Law of the Horse: What Cyberlaw Might Teach, 113 HARV. L. REV. 501 (1999) (arguing that the “law of cyberspace” should be considered a distinct and specialized area of law); Lainie Friedman Ross, Genetic Exceptionalism vs. Paradigm Shift: Lessons from HIV, 29 J.L. & MED. & ETHICS 141 (2001) (considering, but ultimately rejecting, the arguments in favor of “genetic exceptionalism”); Frederick A. Fielder & Glenn H. Reynolds, Legal Problems of Nanotechnology: An Overview, 3 S. CAL. INTERDISC. L.J. 593 (1994) (“Some of the problems posed by nanotechnology may be sui generis . . . and may therefore be addressable only through the creation of entirely new rules.”).

10 Ronald Bayer, Public Health Policy and the AIDS Epidemic: An End to HIV Exceptionalism?, 324 NEW ENG. J. MED. 1500, 1501 (1991) (“[I]n the end, it was those who called for ‘HIV exceptionalism’ who came to dominate the public discourse.”). Scott Burris later responded that the response to HIV was better viewed as a typical response to a new public health threat. Scott Burris, Public Health, “AIDS Exceptionalism,” and the Law, 27 J. MARSHALL L. REV. 251, 261 (1994) (“in other words, unique but not exceptional”).

11 After years of inaction, Congress recently passed the Family Smoking Prevention and Tobacco Control Act, which for the first time grants the FDA limited authority to regulate cigarettes. See Pub. L. No. 111-31, 123 Stat. 1776 (2009); see also Jeff Zeleny, Occasional Smoker, 47, Signs Tobacco Bill, N.Y. TIMES, June 23, 2009, at A15. This 83-page law sets out an intricate and unique set of regulatory provisions that will govern the tobacco industry. The FDA’s authority over tobacco products is limited in several respects. Most notably, the FDA is prohibited from “(A) banning all cigarettes, all smokeless tobacco products, all little cigars, all cigars other than little cigars, all pipe tobacco, or all roll-your-own tobacco products; or (B) requiring the reduction of nicotine yields of a tobacco product to zero.” H.R. 1256, 111th Cong. § 907(d)(3) (2009). The law also specifically states that it should not be read to “establish a precedent with regard to any other industry.” Id. § 4(a)(1).
1970, the Consumer Product Safety Act of 1972 (establishing the Consumer Product Safety Commission), and the Toxic Substances Act of 1976.” That Congress has chosen to regulate (or not regulate) tobacco differently from other public health concerns has certainly had implications for tobacco-related litigation, as discussed below. But whether such unique treatment by Congress is itself warranted or unwarranted is a policy debate beyond the scope of this Article.

Rather, this Article suggests that tobacco cases are treated in an “exceptional” manner by the courts, and that such treatment has had a distorting effect on judicial decision-making in the field of public health. Courts purport to apply the same legal doctrine to tobacco cases that they apply to all other public health issues, and they do so in a facially neutral way. In actuality, however, courts tend to be unusually skeptical of attempts to regulate tobacco and of plaintiffs’ claims against the tobacco industry. Because tobacco-related cases then stand as precedent for other public health cases, this legal “exceptionalism” exerts a significant influence on the overall direction of public health law.

By analogy, scholars have noted a similar phenomenon in the field of criminal procedure, where courts purport to apply the Fourth Amendment in a facially neutral way, but seem to operate with less concern for privacy interests when illegal drugs are involved. Limiting Fourth Amendment rights in drug cases then has a distorting impact on Fourth Amendment jurisprudence more generally, leading to weakened privacy protections for defendants even when illegal drugs are not involved. Although there are surely other factors beyond the “war on drugs” that have led the Supreme Court towards a more pro-prosecution posture in Fourth Amendment cases, scholars have persuasively argued that the unique exigencies of drug cases have played a significant role in shaping the law.

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13 Erik Luna, Drug Exceptionalism, 47 V Ill. L. REV. 753, 766-72 (2002) (suggesting as possible explanations for this phenomenon the “sheer magnitude of drug crime and enforcement activities” and the “substantial personal and professional pressures of any given judge” to support the government’s efforts to combat illegal drugs); see also Steven Wisotsky, Crackdown: The Emerging “Drug Exception” to the Bill of Rights, 38 HASTINGS L.J. 859, 926 (1987) (predicting that dangerous precedents developed in drug prosecutions would inevitably “spill over to other areas of law”).
Similarly, as discussed below, courts purport to apply existing legal doctrine to tobacco cases, but the results in key cases have departed from prior precedent in significant ways. Just as illegal drug cases have played a prominent role in reshaping Fourth Amendment doctrine, tobacco cases have facilitated or furthered broader changes in the contours of public health law doctrine for all future cases—even when tobacco is not involved.

But what is it about tobacco cases that causes courts to approach these cases differently? Though this is by no means an exhaustive list, tobacco’s unique history, the volume of tobacco litigation, and the saliency of the cultural and economic issues involved have all been significant factors.

A. History and Entrenchment in Society

Although many people assume that cigarettes have been popular for centuries, it was not until the early Twentieth Century that the cigarette rolling machine was invented, allowing tobacco companies to mass produce and mass market cigarettes. Cigarettes soon became hugely popular, helped in part by the distribution of free cigarettes to U.S. soldiers in World War II.\(^{14}\) By the early 1950s, when the first credible reports of the link between smoking and cancer were published in medical journals, “[n]early one out of two Americans could be counted as a regular smoker.”\(^{15}\)

The rapid growth of the industry was impressive, but it was the industry’s response to revelations of the cigarette’s dangers that set its history on a unique course. Instead of removing the product from the market or providing explicit warnings to consumers, the tobacco companies chose a third option—a cover-up. With the help of a public relations firm, Hill & Knowlton, the industry began its fifty-year campaign to deceive the public about the health effects of smoking.\(^{16}\) As

\(^{14}\) Deb Reichmann, Military Encounters Resistance to Proposed Ban on Smoking, BOSTON GLOBE, Aug. 30, 2009, at 4 (“Soldiers got cigarettes in their C-rations during World War II.”).


Judge Kessler summarized in *United States v. Philip Morris USA, Inc.*:

From at least 1953 until at least 2000, [the cigarette manufacturers] repeatedly, consistently, vigorously—and falsely—denied the existence of any adverse health effects from smoking. Moreover, they mounted a coordinated, well-financed, sophisticated public relations campaign to attack and distort the scientific evidence demonstrating the relationship between smoking and disease, claiming that the link between the two was still an “open question.” Finally, in doing so, they ignored the massive documentation in their internal corporate files from their own scientists, executives, and public relations people that, as Philip Morris’s Vice President of Research and Development, Helmut Wakeham, admitted, there was “little basis for disputing the findings [of the 1964 Surgeon General’s Report concluding that smoking causes lung cancer].”

Although manufacturers of other products have delayed reporting known dangers of their products, the scope and duration of the tobacco industry’s campaign of deception stands alone. The success of this fraudulent campaign had substantial legal implications, as the tobacco companies were able to successfully argue in court for decades that cigarettes did not cause cancer (or, in each specific case, that cigarettes had not caused the plaintiff’s cancer). By the time that defense was no longer tenable, the tobacco companies were able to pivot—amazingly, without conceding the connection between smoking and disease—to the defense that the plaintiff’s own decision to smoke (in light of the “common knowledge” that smoking causes disease) should absolve the companies of any responsibility.

The tobacco companies, however, were not able to fully escape legal liability. Most notably, the tobacco companies signed the Master Settlement Agreement (MSA) in 1998, committing themselves to paying more than $200 billion to state governments. Although the MSA (and the avalanche of document disclosures that both preceded and followed the

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18 See infra Part III.B.
19 At times, the industry attempted to assert these two arguments simultaneously: “Its lawyers and executives would deny that there was any proof that cigarettes caused cancer. At the same time, they maintained that anyone . . . who chose to smoke assumed the risk of getting such a disease.” Michael Orey, *Assuming the Risk* 49 (1999).
agreement) wounded the tobacco industry’s reputation, it permitted the industry to continue operating and it provided a measure of immunity from state-initiated lawsuits. It also provided some amount of protection from private lawsuits, as the industry was later able to argue in court that the MSA had forced it to fully account for its past misdeeds and reform its conduct.\(^{21}\)

Looking at this history as a whole, the continued existence of tobacco in the marketplace can be seen as a historical accident. As Thomas Merrill has written, “If cigarettes were introduced today, knowing what we know about them as a product, there is little doubt that they would be banned.”\(^{22}\) (This is in contrast to other public health concerns such as firearms and alcohol, where the risk/benefit trade-off has been more or less apparent for centuries.) However, because the cigarette became so deeply engrained in American society before its dangers were acknowledged—and because roughly 45 million Americans remain addicted to cigarettes—prohibition is not seen as an attractive or realistic policy option.\(^{23}\) Thus, tobacco remains a legal product, but one that poses unique challenges for the courts and public health regulators because of its entrenchment in society and the massive number of people addicted to this highly dangerous product.

B. Volume of Litigation

Both the scope of the devastation caused by tobacco products and the profitability of the industry made it a uniquely appealing target for plaintiffs’ attorneys. In addition, the fact that tobacco products, despite their enormous death

\(^{21}\) See, e.g., Brown & Williamson Tobacco Corp. v. Gault, 627 S.E.2d 549, 550-51, 553-54 (Ga. 2006) (holding that private plaintiffs could not seek punitive damages from Brown & Williamson because the MSA had vindicated the state’s interest in punishing the tobacco companies). Provisions which would have explicitly limited the tobacco companies’ liability were included in earlier versions of the agreement, but not the final draft of the MSA.


\(^{23}\) See, e.g., Jonathan Turley, A Crisis of Faith: Tobacco and the Madisonian Democracy, 37 Harv. J. on Legis. 433, 435 (2000) (“While various contemporary leaders . . . have denounced tobacco as a leading killer of Americans, there has been no call from the White House or Congress to ban the product.”). For an argument in favor of gradually phasing out cigarettes, see Richard A. Daynard, Doing the Unthinkable (and Saving Millions of Lives), 18 Tobacco Control 2 (2009).
toll, were uniquely unregulated, led public health advocates to turn to the courts as an alternative channel through which to impose limits on the industry. In some cases, the goal was compensation for injured clients, while in others, plaintiffs’ attorneys sought to use litigation to “get [the tobacco companies] out of business.”

These efforts by plaintiffs’ attorneys confronted a “scorched earth” litigation strategy by the tobacco industry that was “unique in the annals of tort litigation.” As Sara Guardino and Richard Daynard write, “The industry’s success in the litigation [was] primarily because at the outset a decision was made to fight the lawsuits all out, never considering settlement in even the smallest sum.” This strategy set the industry apart from most other defendants:

[I]n mass tort litigation—that is, litigation involving a huge number of claims arising out of a single hazardous course of conduct or event, such as the asbestos, Dalkon Shield, and DES cases—there has always come a point when the beleaguered defense has decided that at least some of the persistently arising claims are worth settling. By contrast, over a period of thirty-five years, the tobacco industry never offered to settle a single case.

The collision of aggressive litigation against the tobacco industry and the no-compromise strategy adopted by the defendants has meant that more smoking-related cases have been (and will continue to be) brought to trial, in comparison to cases dealing with other public health concerns. This is especially true given the length of time that cigarettes have been on the market and the millions of Americans with potential legal claims. Compare, for example, the recent litigation over Merck’s pain reliever Vioxx. When it became clear that there was a connection between Vioxx use and heart attacks, Merck was hit with a flood of thousands of lawsuits. After litigating fewer than twenty cases to trial, Merck agreed

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24 See BRANDT, supra note 2, at 439 (“Attempts to regulate the tobacco industry had usually—when they yielded any results at all—ended in legislation that protected the industry from regulation. The resort to litigation grew out of these long-standing failures of political and regulatory efforts.”).
to a massive $4.85 billion settlement that resolved more than 26,000 claims at once.\textsuperscript{29} As Merck no longer sells Vioxx, having withdrawn it from the market in 2004,\textsuperscript{30} the settlement seems to have effectively ended litigation over the drug. The decision to settle was thus a logical business calculation, despite the existence of viable defenses. By contrast, Cliff Douglas et al. report that at least seventy-five smoking-related cases were tried to a verdict between 1995 and 2005, while nearly 3000 individual actions are still pending.\textsuperscript{31} Since cigarettes, unlike Vioxx, remain on the market, and since there are literally millions of plaintiffs who could have similar claims, the tobacco companies are strongly predisposed against settling or conceding liability in any of these cases (which is, similarly, a logical business decision). The trajectory of the Vioxx litigation—a short-term outburst of cases followed by settlement of most claims—appears to be the more common pattern for public-health related claims. Yet it is the steady flow of tobacco-related cases that continues to produce more trials, more appeals, and ultimately more case law.\textsuperscript{32}

This high volume of litigation is a direct result of the uniqueness of tobacco as a product. Whereas other dangerous products have been either banned by regulators (lead paint, DDT, thalidomide) or litigated out of business (asbestos),


\textsuperscript{31} Clifford E. Douglas et al., Epidemiology of the Third Wave of Tobacco Litigation in the United States, 1994-2005, 15 TOBACCO CONTROL (Supp. IV) iv9, iv11-12 (2006). Thousands more individual cases have since been filed in Florida, following the decertification of the Engle v. Ligget Group, Inc. class action. Stephen Hudak, Smokers Crowd Court to Sue Big Tobacco, ORLANDO SENTINEL, Jan. 11, 2008, at A1 (citing projections that as many as 10,000 individuals may file individual lawsuits). In Engle, the Florida Supreme Court decertified a massive smoking-related class action following a jury verdict for the plaintiff class. Engle v. Liggett Group, Inc., 945 So. 2d 1256, 1268 (Fla. 2006); see also infra text accompanying note 194. In decertifying the class, the Florida Supreme Court held that factual findings made by the Engle jury would be given res judicata effect in future individual lawsuits. Engle, 945 So. 2d at 1269.

\textsuperscript{32} The tobacco industry’s pattern of appealing each adverse verdict until it receives a more favorable ruling has resulted in more precedential law being established in the context of tobacco claims, with the vast majority of these cases leaning in industry’s direction. Douglas et al. found that that of the thirty-one jury verdicts that plaintiffs won in litigation against tobacco companies between 1995 and 2005, all of them were appealed. In only three cases was the initial jury verdict upheld and the defendant ordered to pay the plaintiff. Douglas, supra note 31, at iv12 tbl. 2.
tobacco remains on the market despite its status as the leading cause of preventable death. With some dangerous products, such as firearms, Congress has made the policy decision to prohibit most litigation against the industry. But with Congress unwilling to either ban tobacco litigation or ban the product, the steady drumbeat of tobacco litigation is set to continue indefinitely.

C. Cultural & Economic Significance

Although cultural and economic pressures frame the background in all legal proceedings, these pressures have been particularly acute in the case of tobacco litigation. At the time the first medical studies linking smoking to cancer emerged in the mid-1950s, “cigarette smoking rivaled baseball as America’s national pastime.” “The cigarette was a cultural icon in Western society—tobacco smoking was viewed as chic, promoted ubiquitously, and portrayed by sports and movie stars as an accoutrement of the good life.” Although the allure of smoking gradually declined as the health effects of smoking were revealed, the industry has worked hard to maintain the cigarette’s status as a cultural icon, spending more than $15 billion a year in advertising in the U.S. alone.

Perhaps due in part to this unique history, tobacco litigation has sparked intense debate—both inside and outside the courtroom—about the role of government in regulating individual conduct. Tobacco lawsuits have become the stage for

33 See, e.g., Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 (2006) (prohibiting, with limited exceptions, “a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of [firearms or ammunition], or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a [firearm or ammunition] by the person or a third party”).

34 It has yet to be seen whether Congress’s recent enactment of the Family Smoking Prevention and Tobacco Control Act will at all alter this dynamic. The law does not ban tobacco products, see supra note 11, nor does it bar further litigation against the tobacco industry. See, e.g., H.R. 1256, 111th Cong. § 916(b) (2009) (“No provision of this chapter relating to a tobacco product shall be construed to modify or otherwise affect any action or the liability of any person under the product liability law of any State.”).


37 Judith Mackay et al., THE TOBACCO ATLAS 60 (2d ed. 2006).
“morality play[s], with judges and juries responsible for scripting which party is most deserving of blame.”38 The tobacco industry has worked to “reframe[] tobacco from a public health problem to an issue of individual choice . . . tap[ping] into American ideals of individual freedom, and in turn portray[ing] public health advocates as extremists who support government intrusion into private decision making.”39 These efforts have made tobacco litigation a socially contentious issue, as much about preserving “free choice and personal responsibility” as about the industry’s misconduct.40

Although issues of personal choice and individual responsibility are central to many public health threats (drug addiction, sexually transmitted disease, etc.), only tobacco litigation has seen this subject intensely litigated in the courtroom.41 Some have suggested that food-related litigation, which clearly implicates the issue of personal responsibility, is “the next tobacco.”42 Obesity-related lawsuits, however, face numerous challenges and thus far have not been legally significant.43

Economic pressures are also a significant—though somewhat less unique—feature of tobacco litigation. In Barbarians at the Gate, Warren Buffet was quoted as saying, “I’ll tell you why I like the cigarette business . . . . It costs a penny to make. Sell it for a dollar. It’s addictive. And there’s


39 P.A. McDaniel & R.E. Malone, Understanding Philip Morris’s Pursuit of U.S. Government Regulation of Tobacco, 14 TOBACCO CONTROL 193, 197 (2005). For a recent example, see Lorrilard Tobacco Company’s efforts to prevent Congress from regulating menthol cigarettes. Menthol Choice, http://www.mentholchoice.com/ (last visited Sept. 21, 2009) (“Freedom of choice isn’t a privilege. It’s a right. But unless you speak up, you may not have the right to choose menthol cigarettes for much longer. Legislators are being pushed by some self-appointed activists to ban all menthol cigarettes . . . . Speak now . . . [or run the risk of starting a trend that may end up with all of us having fewer rights to choose.”).

40 See Kagan & Nelson, supra note 35, at 32 (“By appealing to values of free choice and personal responsibility, the tobacco industry has been largely able to deflect potentially devastating lawsuits and perhaps helped dampen public support for higher taxes.”).

41 In illegal drug cases, for example, there is no legal industry that can be sued.


43 See Kyle Graham, Why Torts Die, 35 FLA. ST. U. L. REV. 359, 404 (2008) (“No plaintiff has ever prevailed at trial on an obesity claim alleging common law fraud or negligence, and it is uncertain whether anyone ever will in light of the problems of pleading and proof attendant to a suit pursued under those theories.”). For example, although causation can be a significant hurdle in tobacco cases, causation would be far more complex—if not impossible—to establish in an obesity-focused lawsuit.
fantastic brand loyalty."

Although taxes and inflation have increased the price of cigarettes, that fundamental equation remains true. Despite having to pay billions in settlement payments to the states, the major tobacco companies remain extremely profitable. Altria (the parent company of Philip Morris) is by far the largest U.S. tobacco company, with $70 billion in revenue and nearly $10 billion in profits in 2007. As tobacco companies are such an integral part of corporate America, both courts and legislatures have at times expressed their concerns that curtailing or eliminating the tobacco industry could have destabilizing effects on the entire national economy.

The cultural and economic prominence of tobacco has loomed over tobacco litigation, leading many judges to assume that any decision adverse to the tobacco industry defendant may have severe cultural and economic ramifications. Consequently, the safe, risk-averse path is the one that protects the industry from liability. For example, in FDA v. Brown & Williamson the Supreme Court referenced both tobacco’s “unique place in American history and society” and its status as a “significant portion of the American economy” in concluding that the Food and Drug Administration did not have the authority to regulate tobacco. The Court repeatedly emphasized that tobacco is not just another product; it is a product of unparalleled cultural and economic significance.

These factors—the pervasiveness of tobacco in society, the sheer volume of tobacco litigation, and the cultural and

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47 See infra note 77 and accompanying text; see also Yussuf Saloojee & Elif Dagli, Tobacco Industry Tactics for Resisting Public Policy on Health, 78 BULL. WORLD HEALTH ORG. 902, 905 (2000) (quoting a Philip Morris executive as stating that “[e]conomic contribution arguments form the cornerstone of tobacco industry public affairs”).
economic significance of the industry—may explain why tobacco cases have seemingly diverged from prior case law. Moreover, the intensity with which tobacco cases have been litigated helps account for why tobacco cases have been so influential in the subsequent development of public health law.

The following sections explore these developments, focusing on (1) the creation of new doctrine in the context of tobacco cases, and (2) the subsequent impact of these decisions on public health law doctrine. While the “exceptionalism” of tobacco has not been the sole factor causing these various areas of public health law to evolve, it is clearly significant that tobacco cases have played a prominent and consistent role in the development of several different doctrinal fields of public health law.

II. TOBACCO LITIGATION AND REGULATORY AUTHORITY

Much of public health law is administrative law. At the federal level, an alphabet soup of regulatory agencies and cabinet departments—the FDA, CDC, OSHA, EPA, USDA—have the primary responsibility for ensuring that we have safe workplaces, healthy (or at least nontoxic) food, rigorously-tested pharmaceuticals, and coordinated responses to chronic and infectious diseases. At the state level, local and state health departments do the day-to-day work of enforcing food and sanitation codes, conducting safety inspections, controlling infectious diseases, and, in many cases, providing preventive health services.

At both the federal and the state level, regulatory agencies derive their powers from the legislature, and their authority is limited by statute. Delegations of power relating to public health, however, have tended to be quite broad and liberally construed. For example, the Massachusetts General

49 This is not intended to be an exhaustive list; there may be other factors that account for the unique manner in which tobacco has received in the courts. For example, at the state court level, an additional factor may be campaign contributions by the tobacco companies to elected judges. See, e.g., Kevin McDermott, Donations Complicate Philip Morris Tobacco Suit, ST. LOUIS POST-DISPATCH, Dec. 18, 2005, at D1.


51 See, e.g., Columbia v. Bd. of Health & Envtl. Control, 355 S.E.2d 536, 538 (S.C. 1987) (“The delegation of authority to an administrative agency is construed
Laws provide that “[b]oards of health may make reasonable health regulations,” and this expansive provision has been interpreted to mean that “boards of health [have] plenary power to issue reasonable, general health regulations.”

Similarly, at the federal level, the Supreme Court has recognized that the FDA “has been delegated broad discretion by Congress in any number of areas” relating to the regulation of food and drugs. Such broad delegations of power are deemed necessary because public health authorities may be called upon to respond to “unanticipated and rapidly emerging needs and threats.”

Indeed, because of changes in science, medicine, and society, the major public health concerns of today bear little resemblance to the primary public health concerns of a century ago. Broad delegations of power have allowed public health authorities to refocus their missions to address new and unexpected public health needs. The Massachusetts statute quoted above has remained more or less unchanged since 1816, despite the fact that the 1816 legislature could not possibly have imagined the issues boards of health confront today—West Nile Virus, lead paint exposure, childhood obesity, bioterrorism preparedness, and others.

In the 1990s, however, when the FDA and state regulatory agencies attempted to use their broadly-worded regulatory authority to address tobacco-related harms, the tobacco industry fought back in court. The resulting decisions set new precedents that undermined the ability of regulators to respond to emerging public health threats.

In FDA v. Brown & Williamson, the Supreme Court blocked the Food and Drug Administration (FDA) from exerting regulatory authority over the tobacco industry, and in the process restricted the amount of deference provided to public health authorities. In that case, the Court developed new rules for statutory interpretation that gave future courts greater flexibility to strike down public health regulations in

non-tobacco settings. In particular, the Court collapsed the two-part *Chevron* test into one step by using the statute's “context” to conclude that the statute in question did not contain any ambiguity.\(^\text{57}\) By addressing the issue this way, the Court was able to circumvent *Chevron*’s far more deferential second step. Although the Supreme Court’s decision was likely driven by the cultural and economic importance of tobacco, this legal mechanism developed in *Brown & Williamson* was later used to strike down public health regulations in other fields.

A. FDA v. Brown & Williamson

In 1996, the FDA, for the first time in its history, promulgated rules “concerning tobacco products’ promotion, labeling, and accessibility to children and adolescents.”\(^\text{58}\) The FDA based this departure from previous practice—the FDA had previously stated that it lacked authority to regulate tobacco products\(^\text{59}\)—on new revelations that the tobacco companies were fully aware of the addictive properties of nicotine and had in fact manipulated nicotine levels in tobacco products in order to create and sustain addiction.\(^\text{60}\) The text of the Food, Drug, and Cosmetic Act (FDCA) provided the FDA with broad authority to regulate “drugs” and “devices” that were “intended to affect the structure or any function of the body.”\(^\text{61}\) Following a year-long investigation, the FDA concluded that nicotine was a “drug” and that cigarettes and smokeless tobacco products were “drug delivery devices” subject to the FDA’s jurisdiction.\(^\text{62}\) Several tobacco companies immediately filed suit in the U.S. District Court for the Middle District of North Carolina.

Given the plain language of the statute and the FDA’s extensive investigative work, it appeared the FDA had a strong argument.\(^\text{63}\) Its position was seemingly bolstered by the

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\(^{57}\) See infra notes 68-75 and accompanying text.

\(^{58}\) *Brown & Williamson*, 529 U.S. at 128.

\(^{59}\) *Id.* at 146-56 (quoting various statements from FDA officials that the FDA lacked authority to regulate tobacco products).


\(^{61}\) *Brown & Williamson*, 529 U.S. at 126 (quoting 21 U.S.C. § 321(g)-(h) (1994) (internal quotation marks omitted)).


Chevron doctrine that the Supreme Court used (and still uses) to analyze an administrative agency’s construction of its authorizing statute.” Pursuant to the Chevron doctrine, if Congress has “directly spoken to the precise question at issue,” the agency must “give effect to the unambiguously expressed intent of Congress.”64 However, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”65 This doctrine—also known as “Chevron deference”—was intended to give administrative agencies wide latitude in interpreting enabling statutes. The Court was clear in Chevron that “a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.”66

Despite the plain language of the statute and the Chevron doctrine’s deference towards agency rulemaking, the Court concluded in a 5-4 ruling that the FDA lacked authority to regulate tobacco products.67 Although the statute said nothing explicitly about whether tobacco could be characterized as a “drug delivery device” (in contrast to numerous other federal statutes that expressly exempted tobacco products from their scope), the Court nonetheless found that Congress had “directly spoken” to the issue and precluded FDA regulation.68

Instead of reviewing whether the statute was “ambiguous” and, if so, whether the FDA’s construction of the statute was “permissible,” the Court collapsed these two steps into one and conducted its own investigation into the “contextual” meaning of the FDCA’s terms. It first reviewed the structure of the FDCA and concluded that “if tobacco products were ‘devices’ under the FDCA, the FDA would be required to remove them from the market.”69 While perhaps a plausible

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65 Id. at 842-43.
66 Id. at 843.
69 Id. at 160-61.
70 Id. at 135.
reading of the FDCA, the FDA had considered and rejected this interpretation of the FDCA during its rulemaking process. It had instead concluded that “the record does not establish that . . . a ban is the appropriate public health response under the [FDCA]” and that the FDCA allowed the agency to adopt regulatory restrictions short of an outright ban. Rather than view this provision of the statute as ambiguous and then consider whether the FDA’s interpretation of the statute was reasonable, the Court substituted its own interpretation of the statute for the FDA’s.

Although the FDA had not attempted to ban tobacco products, the Court then used its first conclusion (if the FDA had authority to regulate tobacco products, it would have to remove them from the market) as the starting point for its subsequent analysis. It then concluded that because Congress had made several statements in other statutes implicitly suggesting that tobacco products would remain available for sale, it could not have intended for the FDA to ban tobacco products. Thus, Congress had “spoken directly to the FDA’s authority to regulate tobacco” and denied it such authority.

Contextual clues—in this case, subsequent congressional actions regarding tobacco—would surely have been relevant for determining whether the FDA’s application of the FDCA was “reasonable.” The Court, however, used its questionable analysis of the statute’s context in order to conclude that the statute itself was unambiguous with respect to the FDA’s authority to regulate tobacco. In essence, it read the patent ambiguity out of the statute instead of deferentially reviewing whether the FDA’s application of the statute was “reasonable.” Rather than employing the two-step *Chevron* test, the Court collapsed the *Chevron* analysis into a one-step

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71 *Id.* at 139.
72 For a forceful argument that the FDCA did permit the FDA to take remedial action short of a complete ban of cigarettes, see *id.* at 174-81 (Breyer, J., dissenting).
73 *Id.* at 143-44 (majority opinion).
74 Beyond the Court’s problematic restructuring of the *Chevron* test, its decision ran contrary to the general scheme of public health law, which typically provides regulatory agencies with broad authority to address new public health threats. Writing in a different administrative law context, Justice Stevens wrote that the Court should be particularly deferential to agency interpretations “in a statutory regime so obviously meant to maximize administrative flexibility.” [MCI Telecom. Corp. v. AT&T Co., 512 U.S. 218, 244 (1994)](Stevens, J., dissenting).
“contextual” reading that allowed it to avoid a more deferential review of the agency’s action.\footnote{Matthew Stephenson and Adrian Vermeule argue that Chevron's inquiry is really only one step and that the distinction between the two steps has always been artificial. See Matthew Stephenson & Adrian Vermeule, Chevron Has Only One Step, 95 Va. L. Rev. 597, 597 (2009). They claim that “[t]he single question is whether the agency's construction is permissible as a matter of statutory interpretation.” Id. at 599. Thus, while Brown & Williamson was decided under Step One, they write that “[i]t would have been equally easy . . . for the Court to find under Step One that the full scope of the FDA's statutory jurisdiction is ambiguous . . . but to declare that the FDA's assertion of jurisdiction over tobacco products was unreasonable under Chevron Step Two.” Id. at 599-600. In my view, this analysis misses the mark. While the question asked under the two steps may be similar, the deference with which the question is approached is not. If the Court construed the statute to have a narrow meaning under Step One, it need not provide deference to the agency's interpretation. In Brown & Williamson, had the Court conceded that there was ambiguity in the statute, it would have been nearly impossibly to find that the FDA was not “reasonable” in concluding that tobacco met the statutory definition. That is why the Court labored so hard to force its analysis into Step One.}

The Court's sleight of hand was legally questionable, but it seems to have reflected the majority's point of view that tobacco products were simply different. It is hardly unusual for regulatory agencies to assert jurisdiction over new products or activities when new facts warrant it, and prior to Brown & Williamson those extensions of regulatory oversight were generally upheld. For example, consider Cass Sunstein's discussion of the regulation of DDT:

[I]t is generally agreed that the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizes the EPA to regulate DDT as a product raising “a substantial question” of human safety, but that this authority does not rest on a judgment that the Congress that enacted FIFRA believed that the EPA could regulate DDT. On the contrary, when introduced, DDT was thought to be unproblematic and entirely safe, and hence the enacting Congress did not contemplate that FIFRA would authorize EPA regulation of DDT. The EPA nevertheless possesses just such authority. Statutes regulating health and safety quite routinely contain broad language authorizing agencies to regulate articles or substances if the statutory criteria are met. Whether Congress believed that the statutory criteria were met when it enacted the relevant legislation is beside the point unless Congress embodied that belief in law.\footnote{Sunstein, supra note 63, at 1030-31.}

In Brown & Williamson, however, the majority went out of its way to emphasize the uniqueness of tobacco. It wrote:

This is hardly an ordinary case. Contrary to its representations to Congress since 1914, the FDA has now asserted jurisdiction to regulate an industry constituting a significant portion of the American economy . . . . Owing to its unique place in American
history and society, tobacco has its own unique political history . . . . [W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.77

Perhaps driven by the political salience of the tobacco issue, the Brown & Williamson case also caused several justices to depart from their typical approach to administrative cases. The Court’s most ardent textualists—Justice Scalia and Justice Thomas—joined an opinion that avoided addressing the plain meaning of the text and instead looked carefully at post-enactment Congressional actions.78 Meanwhile, the majority opinion made a point of noting that Justice Breyer—author of the dissenting opinion—had previously written a law review article suggesting that judges should be more hesitant to find a broad delegation of authority to an administrative agency when “the legal question is an important one.”79

The majority was of course correct that tobacco presented a unique case. As discussed above, tobacco has certainly had its own “political history” and a powerful influence on American society.80 The majority clearly felt that tobacco regulation was not just a new application of broad regulatory authority, but instead that tobacco (even if it were to be considered a “drug delivery device”) was somehow different, deserving of an implied exception to the statute’s broad language.

The majority’s conclusion can also been seen as an example of inter-branch communication that addressed unstated political tensions. According to Jonathan Turley, the Court’s decision is better read as a response to the FDA’s attempt to circumvent Congress. Turley writes:

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77 Brown & Williamson, 529 U.S. at 159-60. As detailed in the Court’s decision, previous FDA commissioners had expressed the view that the FDA did not have the authority to regulate tobacco. Id. at 145. The FDA, led by Commissioner David Kessler, changed its position after its investigation indicated that the tobacco companies were aware of nicotine’s addictive properties and had engineered their tobacco products in order to create and maintain addiction. Previous FDA commissioners had not been aware of such facts. See Kessler, supra note 62, at 381 (“[The Supreme Court justices] were unable to recognize how much had changed, how much more we understood, not only about the effects of nicotine, but about the extent of the industry’s knowledge. We finally had evidence of intent.”).


80 See supra Part I.C.
The circumvention of Congress in the FDA case was open and notorious. Not only did the FDA break from its long-held position that it lacked the authority to regulate tobacco, but prior to seeking this authority through the courts, the Clinton administration was rebuffed in an attempt to secure a legislative mandate. In this view, the Court was trying to strike down an end-run around Congress and simply restore tobacco regulation to the status quo ante. Since this reasoning was not made explicit, however, the Court’s facially neutral application of the *Chevron* test—which Turley characterizes as “a strikingly contextual view”—was established as precedent for future plaintiffs to utilize in challenging other regulatory actions.

B. Subsequent Applications of *Chevron* and FDA v. Brown & Williamson

Even without the tobacco-focused *Brown & Williamson* decision, perhaps the Supreme Court would have moved towards a less deferential application of the *Chevron* test in any event. Other notable decisions preceding *Brown & Williamson*—in particular, *MCI Telecommunications Corp. v. AT&T*—have been similarly described as “discretion-denying” decisions that evaded the requirements of *Chevron*. Moreover, later cases that did not cite or reference *Brown & Williamson* also imposed further limitations on the reach of *Chevron* deference. In general, this long-term effort by the Court to undermine or limit *Chevron* deference has been attributed to

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81 Turley, supra note 23, at 457.
82 Id. at 456.
83 As previously noted, nine years after the *Brown & Williamson* decision, the U.S. Congress did grant the FDA limited regulatory authority over the tobacco industry. See supra note 11. Congress’s decision to belatedly revisit the issue does nothing to limit the ability of future litigants to use *Brown & Williamson* as a precedent when seeking to strike down administrative actions.
84 512 U.S. 218 (1994).
85 Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 243, 244 (2006). In *MCI*, the Supreme Court held that the FCC had exceeded its authority in ruling that long-distance carriers other than AT&T would no longer have to file their rates with the FCC. 521 U.S. at 218; see also Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 970 (1992) (“[I]n recent Terms the application of *Chevron* has resulted in less deference to executive interpretations than was the case in the pre-*Chevron* era. Thus, instead of functioning as a ‘counter-Marbury,’ there are signs that *Chevron* is being transformed by the Court into a new judicial mandate ‘to say what the law is.’”).
86 See, e.g., United States v. Mead Corp., 533 U.S. 218 (2001) (suggesting that less formal administrative rulemaking processes were not entitled to full *Chevron* deference).
the Court’s desire to assert its own authority and retain some oversight over administrative decisions, a desire obviously in tension with the dictates of *Chevron*.\(^87\) One could read *Brown & Williamson* as one example among many of the Court asserting its right to restrict agency discretion, and thus its uniqueness should not be overstated. Nonetheless, subsequent applications of the precedent established in *Brown & Williamson* show that the case was particularly influential in the field of public health, where, as discussed above, a significant degree of agency flexibility is needed to protect against emerging public health threats.\(^88\)


It did not take long for the ruling of *Brown & Williamson* to start impacting public health cases outside the tobacco control arena. Even before *Brown & Williamson* was decided, a group of diet supplement manufacturers filed a lawsuit challenging the FDA’s regulatory authority in another area.\(^89\) To deal with the problem of iron poisoning—a leading cause of death among young children—the FDA had issued regulations requiring dietary supplements containing high doses of iron to be distributed in unit-dose packages.\(^90\) In

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\(^87\) See, e.g., Merrill, supra note 85, at 998 (“*Chevron* reduc[es] the role of the courts to a point that threatens to undermine the principal constitutional constraint on agency misbehavior. Given these failings, it is small wonder that the Court often seems wary of the *Chevron* doctrine, applying it inconsistently at best.”); Eric R. Womack, *Into the Third Era of Administrative Law: An Empirical Study of the Supreme Court’s Retreat from *Chevron* Principles in United States v. Mead*, 107 DICK. L. REV. 289, 291 (2002) (“T]he Supreme Court has chosen to limit the scope of *Chevron* and refocus the inquiry into congressional intent in order to limit unprincipled deference and delegation to agencies that can exercise such power without sufficient procedural protections.”); cf. William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*,* 96 GEO. L.J. 1053, 1202 (2008) (suggesting that the Supreme Court applies a “continuum of deference” and is less deferential when agency decisions involve “larger normative concerns”).

\(^88\) See, e.g., Linda Jellum, *Chevron’s Demise: A Survey of Chevron from Infancy to Senescence*, 59 ADMIN. L. REV. 725, 779-80 (2007) (“In *Chevron*, one of the Court’s rationales for deferring to the agency’s interpretation was that by enacting gaps and creating ambiguities, Congress intended to delegate implicitly to the agency. But in a series of cases, starting with *FDA v. Brown & Williamson Tobacco Corp.*, the Court rejected, or at least limited, this rationale.”); James T. O’Reilly, *Losing Deference in the FDA’s Second Century: Judicial Review, Politics, and a Diminished Legacy of Expertise*, 93 CORNELL L. REV. 939, 976 (2008) (“[*Brown & Williamson*] was a dramatic decision that has had ripple effects on the law of deference to administrative rules.”).

\(^89\) *Nutritional Health Alliance v. FDA* (*Nutritional I*), 2000 U.S. Dist. LEXIS 22330 (E.D.N.Y. Nov. 1, 2000), rev’d, 318 F.3d 92 (2d Cir. 2003).

\(^90\) Id. at “3-5.
Nutritional Health Alliance v. FDA, an association of manufacturers challenged the rule, asserting that the FDA had exceeded its authority in promulgating the regulations. They argued that the FDCA did cover issues of poison prevention and that such concerns could only be addressed by the Consumer Products Safety Commission (CPSC). 91

As the case was pending, the Supreme Court issued its decision in FDA v. Brown & Williamson, and the plaintiffs immediately brought it to the attention of Judge Sterling Johnson, Jr. Presumably relying on the Supreme Court’s statement that FDA v. Brown & Williamson was a “unique” case, Judge Johnson wrote that “the nature of the tobacco-specific legislation makes the case inapplicable here,” and that he would instead follow the dictates of Chevron. 92 Judge Johnson went on to conclude that the FDA rule was authorized under either prong of the Chevron test; by its plain meaning, the FDCA authorized the FDA’s exercise of authority, and even assuming arguendo that there was some ambiguity in the statute, the FDA’s construction of the statute was a permissible one. 93

Saying nothing about the uniqueness of tobacco, the Second Circuit relied heavily on the “instructive guidance” from FDA v. Brown & Williamson in reversing the district court’s opinion. 94 Using Brown & Williamson as precedent, it concluded the language of a statute must be read in light of subsequent congressional action. The court wrote:

Following [United States v. Estate of] Romani and Brown & Williamson, we would not defer to the FDA regarding its interpretation of ambiguous language in the [FDCA] where doing so would allow the FDA to circumvent the detailed regulatory scheme...set forth by Congress in the [Poison Prevention Packaging Act (which granted limited authority for poison control to the CPSC)]. 95

As the FDA had argued, however, the Poison Prevention Act did not in any way directly limit the FDA’s authority (though Congress certainly could have included such a provision). 96

91 Nutritional Health Alliance v. FDA (Nutritional II), 318 F.3d 92, 94 (2d Cir. 2003).
92 Nutritional I, 2000 U.S. Dist. LEXIS 22330 at *9 n.3.
93 Id. at *11-12.
94 Nutritional II, 318 F.3d at 102.
95 Id. at 104.
Although the court purported to apply step two of the *Chevron* test, it was clear that the Second Circuit was, like the Supreme Court in *Brown & Williamson*, using a “contextual” reading of the FDCA as the basis for substituting its own judgment for that of the FDA.


*FDA v. Brown & Williamson* has also been used as authority by several district courts that have struck down health-related regulations. In these cases, *FDA v. Brown & Williamson* seems to have tipped the scales, providing these courts with legal support for overturning a regulation where a more deferential posture would have led to the opposite result.

For example, in *Supreme Beef Processors v. United States Department of Agriculture*, the regulation at issue involved the testing of processed beef for salmonella. Under the relevant statute, the USDA was authorized to bar the sale or transport of meat if “it has been prepared, packed or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health.” Since salmonella results from unsanitary conditions and is the leading cause of food-borne illness, USDA developed a salmonella test to measure compliance with this provision. Supreme Beef Processors—which had failed the salmonella test three different times—argued that the USDA had exceeded its authority in testing for salmonella, because the salmonella could have resulted from contaminated beef entering the assembly line, and not (or not solely) from unsanitary conditions in the plant itself. The court agreed with this reasoning, concluding that the USDA could not block the sale of Supreme Beef Processor’s meat because “the agency—in effect—never found the conditions of Supreme Beef’s plant insanitary”—only the meat itself. This exercise in semantic nitpicking, which produced a result quite unsettling to anyone who eats meat, runs contrary to the deferential approach of *Chevron*. The court, however, based its approach

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97 113 F. Supp. 2d 1048, 1048 (N.D. Tex. 2000), aff’d, 275 F.3d 432 (5th Cir. 2001).
98 Id. at 1052 (citing 21 U.S.C. § 601(m)(4)).
99 Id.
100 Id. at 1052-53.
101 Id. at 1054 (emphasis added).
on Brown & Williamson, quoting its language that “[t]he meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.”\textsuperscript{102} Like the Supreme Court in Brown & Williamson, the district court then proceeded to read the ambiguity out of the statute by finding a “contextual meaning” (in this case, based on the court’s analysis of the overall structure of the Federal Meat Inspection Act) that limited the USDA’s authority.\textsuperscript{103} Nowhere in the decision was there a mention of the “uniqueness” of tobacco (or, for that matter, any discussion of the facts of Brown & Williamson).

In dealing with a somewhat more complex issue, the D.C. District Court in Association of American Physicians and Surgeons, Inc. v. FDA struck down an FDA regulation requiring most new pharmaceuticals to be tested for efficacy in pediatric populations.\textsuperscript{104} The FDA had claimed authority to act under broad enabling provisions of the FDCA.\textsuperscript{105} The plaintiffs, citing a later statute that addressed pediatric testing more specifically (though without directly limiting the broader provisions of the FDCA), argued that the FDA had exceeded its authority.\textsuperscript{106} In ruling for the plaintiffs, the court directly rejected the conception that the tobacco issue addressed in Brown & Williamson was a unique or unusual case. Instead, the court wrote:

This situation is therefore analogous to the one faced by the Supreme Court in Brown & Williamson; the FDA and Congress have both spoken and have taken two different approaches to respond to the same public health issue. Brown & Williamson suggests that by enacting a “distinct regulatory scheme” to address a given issue . . . Congress demonstrates its intention to occupy the field, and any attempt by the FDA to intervene with an inconsistent regime shall be deemed in excess of its authority. This militates strongly in favor of concluding that the FDA exceeded its authority when it enacted the [rule requiring pediatric tests].\textsuperscript{107}

Again, other congressional action in a similar field may have been relevant to whether the FDA’s interpretation of the scope of its authority was “reasonable.” But instead of deferentially

\textsuperscript{102} Id. at 1051 (alteration in original) (internal quotation marks omitted) (quoting FDA v. Brown & Williamson, 529 U.S. 120, 132 (2000)).

\textsuperscript{103} Id.

\textsuperscript{104} 226 F. Supp. 2d 204, 205 (D.D.C. 2002).

\textsuperscript{105} Id. at 212-13.

\textsuperscript{106} Id. at 205, 219.

\textsuperscript{107} Id. at 219 (citations omitted).
asking whether the FDA had acted reasonably in applying an ambiguous statute, the court avoided the question by ignoring the statute’s patent ambiguity and collapsing the *Chevron* analysis into one step. Indeed, the court’s analysis—building on *Brown & Williamson*—suggests that anytime Congress has passed a law addressing a public health issue, it has intended to preclude any further regulatory action on the subject. Such a doctrine is a drastic departure from *Chevron’s* deferential approach to agency regulations and would severely tie the hands of public health agencies.

In sum, *Brown & Williamson* “embed[s] an unhealthy status quo bias into administrative law,” making agencies wary of using their existing authority to tackle new challenges, even when the broad language of their authorizing statutes could justify such action.\textsuperscript{108} This “status quo bias” is particularly dangerous in the field of public health, where the next public health challenge is always an unknown, and agency flexibility is therefore crucial.\textsuperscript{109} Ironically, in dealing with the issue of tobacco—a public health challenge with a very long history—the Supreme Court may have weakened the government’s ability to adequately prepare for and address future public health challenges. Although the Supreme Court stated in *Brown & Williamson* that tobacco was a “unique case,” the discussion above demonstrates that *Brown & Williamson* was quickly seized upon by those seeking to challenge government regulations in a variety of other contexts.

### C. State Analogues

The problem of attempted tobacco regulation leading to new constraints on agency authority is not limited to the federal government. The same dynamic plays out at the state level, and given that state public health authorities are often the first line of defense in dealing with public health challenges and crises, this is potentially even more dangerous.

\textsuperscript{108} See Sunstein, *supra* note 85, at 246.

\textsuperscript{109} Of course, a deferential posture towards agency decisions can be problematic from a public health perspective if agencies are interpreting their own authorizing statutes narrowly or using their discretion not to regulate public health concerns. From a long-term perspective, however, this is less troubling. An agency’s decision not to act can be easily reversed (by a subsequent administrator or administration). A Supreme Court ruling explicitly limiting the scope of agency discretion cannot be so easily undone.
Although the legal reasoning has differed from the federal cases, state courts have been similarly reluctant to allow public health entities to apply their broad regulatory authority to the issue of tobacco. In some cases, state courts have relied on the absence of an explicit delegation to strike down tobacco-related regulations, even when the same courts had never insisted on such express delegation in the past.

For example, in *D.A.B.E. v. Toledo-Lucas County*, the Ohio Supreme Court addressed the question of whether a local board of health had the authority to limit smoking in public places.\(^{110}\) As in *Brown & Williamson*, at issue was a novel application of extremely broad statutory authority. In that case, the relevant Ohio law, Ohio Revised Code § 3709.21, stated that “[t]he board of health of a general health district may make such orders and regulations as are necessary for its own government, for the public health, the prevention or restriction of disease, and the prevention, abatement, or suppression of nuisances.”\(^{111}\) The plain language seemed to provide authority for the secondhand smoke regulations at issue, particularly since the Surgeon General of the United States had found that “nonsmokers are placed at increased risk for developing disease as the result of exposure to [secondhand] smoke” and that “measures to protect the public health are required now.”\(^{112}\) Nonetheless, the court went out of its way to avoid directly addressing the plain meaning of the text.

Echoing *Brown & Williamson*, the court wrote:

> [T]he natural meaning of words is not always conclusive as to the construction of statutes. While it is a long-recognized canon of statutory construction that the words and phrases used by the General Assembly will be construed in their usual, ordinary meaning, that is not so when a contrary intention of the legislature clearly appears. Accordingly and for the following reasons, we find that the General Assembly has not indicated any intent through [Ohio Rev. Code § 3709.21], or otherwise, to vest local boards of health with unlimited authority to adopt regulations addressing all public-health concerns.\(^{113}\)

The court went on to conclude—for the first time in the long history of the statue—that § 3709.21 was “a rules-enabling

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\(^{110}\) 773 N.E.2d 536, 539 (Ohio 2002).

\(^{111}\) Id. at 541.


\(^{113}\) *D.A.B.E.*, 773 N.E.2d at 542 (citations omitted).
statute, not a provision granting substantive regulatory authority.””

It explained that in order for public health authorities to address a particular public health issue, they would need to point to another statute providing explicit authority for such an action, in addition to the general rulemaking powers provided in § 3709.21. In order to reach this conclusion, the court had to ignore or reinterpret several Ohio Supreme Court cases that had upheld health authority regulations based solely on the authority provided by § 3709.21 or its predecessor statute. Indeed, in previous cases the court had emphasized the need for regulatory flexibility in addressing public health challenges, writing (when referring to the predecessor of § 3709.21): “Where a law relates to a police regulation for the protection of public health, and it is impossible or impractical to provide specific standards, and to do so would defeat the legislative object sought to be accomplished, such law is valid and constitutional without providing such standards.”

How had the Ohio Supreme Court reached a conclusion that seemed to reject its own precedents? The Court semi-apologetically wrote that “[o]ur disposition of this matter turns on issues of law and not on the deleterious effect of environmental tobacco smoke, more commonly known as secondhand smoke.” Nonetheless, it seems virtually certain that the unique political salience of the issue at hand—the regulation of smoking in public places—was the driving force behind the Court’s decision.

As in Brown & Williamson, the Court likely viewed the Board of Health’s action as an end run around the legislature on a controversial political issue. In a brief aside, the Court wrote:

Administrative regulations cannot dictate public policy but rather can only develop and administer policy already established by the General Assembly. In promulgating the Clean Indoor Air

114 Id. at 547.
115 Id. at 547-49.
118 D.A.B.E., 773 N.E.2d at 547.
Regulation, petitioners engaged in policy-making requiring a balancing of social, political, economic, and privacy concerns. Such concerns are legislative in nature, and by engaging in such actions, petitioners have gone beyond administrative rule-making and usurped power delegated to the General Assembly.\footnote{Id. at 546 (citations omitted). At the time of this decision, there were some state laws addressing smoking in public places. Unlike \textit{Brown \& Williamson}, however, the court did not suggest that these other statutes implicitly limited the authority boards of public health to regulate in this area. \textit{See, e.g.}, \textit{Ohio Rev. Code Ann. § 3791.031} (LexisNexis 2009) (providing for nonsmoking sections in various “place[s] of public assembly”).}

In short, the Court felt that tobacco regulation was a contentious public issue most properly resolved by the legislative branch, and not an unelected Board of Health. Courts rarely view administrative rulemaking as a problem when non-tobacco regulations are at issue, despite the fact that every public health regulation is a policy-making exercise “requiring a balancing of social, political, economic, and privacy concerns.”\footnote{\textit{D.A.B.E.}, 773 N.E.2d at 546. For example, food safety regulations—regulations that can be enforced with intrusive inspections—certainly implicate all of these concerns. It would be significantly cheaper to run a restaurant without complying with food safety regulations and the accompanying paperwork requirements. Public health departments, however, must balance economic efficiency against the concern for the health and safety of the diners. Rarely are public health authorities accused of “lawmaking” when they promulgate new food safety regulations. (Such charges have been leveled against health departments that have recently banned trans-fats. To date however, legal challenges to such bans have not succeeded.)} When tobacco is at issue, however, judges are often sympathetic to the argument that decisions about such a weighty issue—with its powerful historical, social, cultural, and political baggage—cannot be left to public health authorities.\footnote{\textit{See, e.g.}, Boreali v. Axelrod, 71 N.Y.2d 1, 12, 517 N.E.2d 1350, 1355 (1987) (striking down secondhand smoke regulation promulgated by the New York Public Health Counsel, and writing that “[s]triking the proper balance among health concerns, cost and privacy interests . . . is a uniquely legislative function”).}

Ultimately, the \textit{D.A.B.E.} decision did not derail progress towards smoke-free regulations in Ohio—it merely rechanneled the effort away from health departments and into the political arena. In 2006, Ohio voters passed a ballot measure prohibiting smoking in nearly all indoor public places.\footnote{The ballot measure is codified at \textit{Ohio Rev. Code Ann. §§ 3794.01-.09} (West 2009). For general information on the law, see Ohio Dep’t of Health, Smoke-free Workplace Program, http://www.ohionosmokelaw.gov (last visited Sept. 21, 2009).} Like \textit{Brown \& Williamson}, however, \textit{D.A.B.E.} still stands as a precedent that may hamper regulatory efforts in other areas of public health. In essence, the \textit{D.A.B.E.} holding means that boards of public health in Ohio can only be reactive; they are prohibited from

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proactively addressing public health threats that have not yet received the sustained public attention needed to produce legislative action.\textsuperscript{123} The public health implications of such a ruling are impossible to measure, but they will be all too real when public health authorities are unable to address future public health concerns in a timely manner.\textsuperscript{124}

III. TOBACCO LITIGATION AND PERSONAL INJURY/PRODUCTS LIABILITY CLAIMS

As discussed in Part I, tobacco litigation has been, in the words of Robert Rabin, “unique in the annals of tort litigation.”\textsuperscript{125} This section addresses the legal impact of tobacco-related personal injury lawsuits on the field of public health litigation. Tobacco litigation has led to pro-defendant rulings in the areas of preemption, class action certification, and punitive damages that have, in turn, significantly limited the potential impact of public health litigation in other areas. Before exploring the degree to which tobacco cases have influenced personal injury law, two detours are in order: a discussion of the role of personal injury litigation in promoting public health, and a very brief history of early tobacco litigation.

A. Public Health Litigation: Pro and Con

Whether lawsuits brought by private citizens can effectively promote public health goals is a question that has been debated for years. Jon Vernick, et al, present the general argument in favor of public health litigation as follows:

As a society, we make decisions about how to balance the risks and benefits of consumer products. One way we strike that balance is by allowing litigation against product makers when risks become too great. In this way, litigation can act as a public health feedback mechanism to affect manufacturers’ safety practices. If a product is considered unsafe (or society is less willing to accept certain risks),

\textsuperscript{123} \textit{D.A.B.E.}, 773 N.E.2d at 549.

\textsuperscript{124} The \textit{D.A.B.E.} decision has not been the basis for court challenges to health-related regulations, but that is likely because the bright line rule laid down by \textit{D.A.B.E.} has provided clear guidance to regulatory agencies regarding the limits of their authority (though it muddled Ohio’s rules of statutory construction for everyone else). At least one Ohio Attorney General opinion has used \textit{D.A.B.E.} as its authority for concluding that regulations being contemplated by a health department were outside the scope of its authority. See Ohio Op. Att’y Gen. 2007-005, at 5, 6-10 (2007), 2007 WL 1173766 (regarding burial of bodies on private lands).

\textsuperscript{125} Rabin, \textit{Sociolegal History}, supra note 15, at 857.
more litigation may follow. As manufacturers respond, products can become safer, the likelihood of successful litigation is reduced, and fewer lawsuits (and injuries) will result.\textsuperscript{126}

Although this is a standard argument in favor of health-related litigation, it is easy to see how tobacco—a product that cannot be made safe—does not fit easily into this paradigm.

In addition to prompting changes in product design and serving the traditional tort litigation goal of compensating injured victims, others have argued that public health litigation can also (a) increase costs for dangerous products (thereby decreasing demand and/or forcing the industry to internalize costs imposed on others), (b) bring health risks to the attention of regulators and legislators, (c) heighten public awareness of public health risks (potentially leading to social change), (d) uncover industry misconduct, and (e) deter future misconduct.\textsuperscript{127} They point to a list of public health improvements credited to personal injury and products liability litigation: cars with airbags and shoulder restraints, the removal of dangerous products (such as asbestos and the Dalkon Shield intrauterine device) from the marketplace, and the clean-up of environmental toxins.\textsuperscript{128}

On the other hand, some scholars have argued that public health litigation constitutes public policy advocacy by other means (often by parties who have been unable to convince the legislature to adopt their position), and as such, it is an anti-democratic “misuse of the courts.”\textsuperscript{129} Furthermore, some public health specialists have argued that courts are not the proper venue for addressing public health concerns because courts have limited remedies at their disposal (typically monetary damages that may unfairly single out particular defendants) and flexible regulatory bodies are better equipped


\textsuperscript{129} Lytton, supra note 127, at 559.
to deal with public health concerns. Finally, some have argued that lawsuits are simply an ineffective means of promoting public health.

It is unnecessary (and would be futile) to try to resolve this longstanding dispute here. Regardless, it seems clear that the ability of personal injury lawsuits to serve public health ends has been significantly eroded by judicial decisions over the past several decades. It is also clear that tobacco-related decisions have played a prominent role in this erosion. These developments are particularly troubling if one agrees with the premise that private litigation “does play a vital and indispensable role in ensuring the safety and accountability of product manufacturers and industrial polluters.” Even if one rejects the social significance of public health litigation, however, it is still important for those involved in health-related litigation to understand the ways in which relevant legal doctrines have been influenced by tobacco litigation.

B. Early Tobacco Litigation and Cipollone

Tobacco litigation has occurred in three distinct “waves.” The first and longest wave began soon after the initial revelations about the connection between smoking and lung cancer in the 1950s, and lasted until the 1980s. The plaintiffs were almost all lung cancer victims or their families, and their claims were “grounded in varying theories of negligence, misrepresentation and breach of warranty.” Due to the tobacco industry’s early adoption of an aggressive, “scorched earth” strategy, few of these cases made it to trial. Of those that did, the industry’s argument that the connection

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130 See Jacobson & Soliman, supra note 128, at 226-28 (summarizing arguments against using litigation to make public health policy). They note the concern that “[p]ublic policy might well be distorted by an attempt to extract financial concessions at the expense of public health objectives.” Id. at 227.

131 See, e.g., id. at 233 (reviewing cases and finding that “gun litigation has not succeeded at all”). For an extremely critical assessment of public health litigation, see Joe Nocera, Forget Fair; It’s Litigation as Usual, N.Y. TIMES, Nov. 17, 2007, at C1 (“Mass torts have become a rogue form of regulation, and not necessarily in the public interest.”).

132 Wagner, supra note 128, at 731-32.


between smoking and lung cancer had not been conclusively established successfully defeated all claims of liability.

When the causation defense became untenable in the 1980s, the tobacco industry deftly shifted its argument to defend against the “second wave” of tobacco litigation:

For years they had denied their products were unsafe. Now they insisted instead that the hazards they had indignantly denied for so long were no longer preposterous, but were suddenly, in fact, “common knowledge” — so much so that smokers were fully aware of them and had, in fact, “assumed the risk” of death and disease. So well known were these risks, manufacturers argued, that smokers could not claim to have “relied” on the industry’s own denials. Perhaps most audaciously, manufacturers were able to invoke these defenses without so much as acknowledging the inconsistencies of their positions, and without ever conceding that tobacco causes disease.135

As with all of the first wave cases, the hundreds of second wave plaintiffs were similarly unable to win a case against the tobacco industry—until Cipollone v. Liggett Group, Inc., which ushered in the “third wave” of tobacco litigation.136

_Cipollone_ was the first case in which the tobacco industry lost a jury verdict—a $400,000 award to the plaintiff. The breakthrough of _Cipollone_ was driven by the plaintiff’s attorney’s ability to

gain access to internal industry documents and testimony of former industry employees to an extent then unprecedented in the forty-year history of litigation against the industry—documents and testimony indicating the industry had discouraged internal efforts to take cognizance of the health risks of smoking and to develop a safer cigarette.137

This verdict demonstrated that the tobacco industry was not invincible in court, and it seemed to presage an onslaught of litigation that would bury the tobacco industry under the weight of its own documents.

But the tobacco industry survived this “third wave” of litigation intact, and in some ways emerged even stronger than before. Its success was built in large part on its ability to persuade the court to adopt new legal doctrines limiting its liability, including an expansive notion of federal preemption, a narrow view of class action certification, and Due Process

135 Id. at 17.
136 Id.
137 Rabin, Third Wave, supra note 133, at 178 (citations omitted).
limitations on punitive damages. These doctrines not only helped the tobacco industry to endure the “third wave” of tobacco litigation; they also dramatically reshaped the legal landscape for other types of public health litigation.

C. Preemption

1. Cipollone v. Liggett Group Inc.

After decades of frustration, the jury verdict in Cipollone provided the first glimmer of hope for those hoping to defeat the tobacco industry in court. These hopes were quickly dashed, however, when the Supreme Court agreed to hear the Cipollone appeal and ultimately ruled that the common law failure to warn claims against Liggett were preempted by the Federal Cigarette Labeling and Advertising Act (FCLAA).138 The FCLAA is the statute that requires warning labels to be placed on cigarette packs, and the primary purpose of its preemption provision had been to prevent “diverse, nonuniform, and confusing cigarette labeling and advertising regulations.”139 Though the Court interpreted the authorizing clause in FDA v. Brown & Williamson narrowly in order to preclude FDA regulation of tobacco, it took the opposite approach (though with a similar substantive result) in Cipollone, reading the preemption clause of the FCLAA broadly in order to preempt tort suits against the tobacco industry.

The Supreme Court’s opinion did not directly suggest that preemption principles should operate differently in the context of tobacco, but its decision was a striking departure from past precedent. At issue was § 5 of the FCLAA (titled “Preemption”), which read in part:

(b) . . . No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter.140

Every circuit court that had addressed the issue had concluded that the preemption provision of § 5(b) did not expressly

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140 Id. § 1334(b).
Courts assumed that the preemption provision applied only to affirmative regulatory action by state legislatures and regulators, not to common law litigation. For example, the Third Circuit (from which the *Cipollone* appeal originated) had noted that Congress could have easily included a provision in the FCLAA preempting common law tort claims—as it had done in other statutes—but it had not. The plurality opinion, authored by Justice Stevens, gave lip service to the presumption that “the historic police powers of the States [are] not to be superseded by . . . Federal Act unless that is the clear and manifest purpose of Congress,” but then proceeded to blithely ignore the intent of Congress in finding that “[t]he phrase ‘no requirement or prohibition’ sweeps broadly and suggests no distinction between positive enactments and common law.” Justice Stevens wrote that “[a]lthough portions of the legislative history of the 1969 Act suggest that Congress was primarily concerned with positive enactments by states and localities, the language of the Act plainly reaches beyond such enactments.” In other words, the plurality opinion held that since the language of the statute was so abundantly clear, there was no need to consider evidence regarding Congress’s intent. Given that the circuit courts had not found any such clarity in Congress’s words—and given that there was considerable evidence of a different congressional intent—this was an astounding conclusion. In a partial dissent, Justice Blackmun wrote that “[u]nlike the plurality, I am unwilling to believe that Congress, without any

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141 *Cipollone*, 505 U.S. at 542 n.6 (Blackmun, J., concurring in part and dissenting in part) (citing cases).
142 *Cipollone* v. Liggett Group, Inc., 789 F.2d 181, 185 (3d Cir. 1986), rev’d, 505 U.S. 504 (1992). Likewise, the Fifth Circuit wrote: “It is clear, however, that [the FCLAA preemption provision] does not make any reference to a state tort claim, even indirectly, which relates to the effects of smoking upon health. We must conclude that the Act does not expressly preempt [the plaintiff’s] products liability claims.” *Pennington v. Vistron Corp.*, 876 F.2d 414, 418 (5th Cir. 1989).
143 *Cipollone*, 505 U.S. at 516 (alterations in original) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).
144 *Id.* at 521 (plurality opinion).
145 *Id.* (citations omitted).
mention of state common-law damages actions or its intention dramatically to expand the scope of federal pre-emption, would have eliminated the only means of judicial recourse for those injured by the cigarette manufacturers' unlawful conduct."

Although the methodology differed, the Court’s approach in Cipollone presaged the later Brown & Williamson decision. In both cases, the Court was faced with a legal rule instructing it to use a highly deferential approach in interpreting statutory language, yet it refused to recognize any ambiguity in the statutes. In Brown & Williamson, the Court looked at the context of subsequent congressional actions in order to find the statute’s “clear meaning,” whereas Cipollone ignored contrary congressional intent and redefined the relevant terms for itself. In both instances, the Court supported the tobacco companies’ position, applying its own reading of the statute instead of deferring to the administrative agency (in Brown & Williamson) or the states (in Cipollone).

As in Brown & Williamson, it seems likely that unspoken policy concerns and questions of institutional competency lay behind the Court’s decision in Cipollone. Allan Brandt writes:

Tobacco litigation became a lightning rod for a larger public debate about the role of tort litigation in American society. For critics of the liability revolution, suits against tobacco companies epitomized the excesses of tort claims, if not the ultimate perversion of the courts. According to such arguments—encouraged by the industry—tobacco litigation was an abuse of the legal system in several ways. First, it was a veiled attempt to secure through the courts regulatory legislation that Congress had never enacted. This marked a constitutionally inappropriate breach in the separation of powers. Second, the litigation created a radical expansion of torts that threatened to flood all industries with costly and spurious claims from consumers. Finally, tobacco liability was seen as a cultural failure: the refusal of individuals to take responsibility for their own willful actions."

Awareness of these concerns likely influenced the Supreme Court’s decision to limit—but not entirely eliminate—avenues for tobacco-related litigation. The Supreme Court was

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147 Cipollone, 505 U.S. at 542 (Blackmun, J., concurring in part and dissenting in part).
148 BRANDT, supra note 2, at 353.
149 Though the Cipollone case barred failure to warn claims, the plurality opinion held that state law fraud claims were not preempted by the FCLAA. This part of the opinion was recently reaffirmed by a five-to-four margin in Altria Group, Inc. v. Good, 129 S. Ct. 538 (2008). The four dissenting Justices would have held that the
understandably reluctant to place the courts at the center of a broader cultural and political battle, and it sought to protect the lower courts from the flood of litigation that would have inevitably followed a ruling for the plaintiff in *Cipollone*.\(^{150}\)

It is of course possible that the Supreme Court would have built towards an aggressive preemption doctrine anyway. Preemption is the subject of the “fiercest battle in products liability litigation today,” with a variety of industries—supported by a well-organized and well-funded tort reform movement—pushing courts to declare that state tort law claims against them are preempted by federal law.\(^{151}\) Although the Supreme Court might have inevitably moved towards the same position as a more conservative court took the bench, reading a preemption clause broadly in cigarette context—which was perhaps less controversial because of general skepticism about the merits of tobacco litigation—clearly opened the door for the Court to build upon *Cipollone* in subsequent decisions unrelated to tobacco. Furthermore, as discussed below, the *Cipollone* decision immediately opened the door for similar preemption arguments in state courts and lower federal courts, providing for rapid expansion of the preemption doctrine.

2. Post-*Cipollone* Decisions

“Almost immediately after *Cipollone* was decided, the preemption theory permeated tort-claim cases in the lower courts, which began to read *Cipollone* as compelling preemption in a wide variety of circumstances.”\(^{152}\) Unlike in *Brown & Williamson*, the Supreme Court had not suggested that its analysis was in any way limited to tobacco cases, and the lower courts did not imply any such limitation. Lower courts read *Cipollone* broadly for the proposition that the term “requirement,” when used in a preemption clause, now

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\(^{150}\) FCLAA also preempted all fraud-related claims against tobacco companies, which would have granted the companies virtual immunity from all health-related tort suits. *Id.* at 552 (Thomas, J., dissenting).


included all common law tort claims. Courts used this proposition to bar tort claims involving defective medical devices,153 herbicides and insecticides,154 and auto safety.155

Justice Stevens, the author of the plurality decision in \textit{Cipollone}, later retreated from the position he articulated in that case, finding himself on this short side of several subsequent preemption decisions that either reaffirmed or extended \textit{Cipollone}.156 In \textit{Buckman v. Plaintiff's Legal Committee}, which extended \textit{Cipollone} by taking a similarly broad view of \textit{implied} preemption of common law claims, Justice Stevens expressed his concern:

Under the preemption analysis the Court offers today . . . parties injured by fraudulent representations to federal agencies would have no remedy even if recognizing such a remedy would have no adverse consequences upon the operation or integrity of the regulatory process. I do not believe the reasons advanced in the Court's opinion support the conclusion that Congress intended such a harsh result. \textit{Cf. Silkwood v. Kerr-McGee Corp.}, 464 U.S. 238, 251 (1984) (declining to infer that a federal statutory scheme that affords to alternative means of seeking redress pre-empted traditional state-law remedies).157

153 \textit{See}, e.g., \textit{Gile v. Optical Radiation Corp.}, 22 F.3d 540, 542 (3d Cir. 1994) (finding state tort law claims under the Medical Device Act preempted because "the Supreme Court has clearly stated that the word 'requirement,' in the context of an express preemption provision, includes state law claims"); \textit{Stamps v. Collagen Corp.}, 984 F.2d 1416, 1418 (5th Cir. 1993) (rejecting claim that collagen injection had caused autoimmune disease on same grounds).

154 \textit{See}, e.g., \textit{King v. E.I. du Pont de Nemours & Co.}, 996 F.2d 1346, 1349 (1st Cir. 1993) ("The FIFRA [Federal Insecticide, Fungicide and Rodenticide Act] language prohibiting the states from 'impos[ing] or continu[ing] in effect any requirements,' 7 U.S.C. § 136v(b), is virtually indistinguishable from the state-imposed 'requirement' language that \textit{Cipollone} held preempted the state common law tort claims based on inadequate warning. FIFRA's language, too, preempts the state law lack-of-warning claims involved in this case." (alterations in original)); \textit{Levesque v. Miles, Inc.}, 816 F. Supp. 61, 70 (D.N.H. 1993) (finding that plaintiff's claim based on insecticide that ignited without warning in his pocket was preempted by FIFRA).

155 \textit{See}, e.g., \textit{Estate of Montag v. Honda Motor Co.}, 856 F. Supp. 574, 576-77 (D. Colo. 1994) (finding that after \textit{Cipollone}, claims relating to the lack of an airbag are expressly preempted by the National Traffic and Motor Vehicle Safety Act, despite a savings clause in the statute stating that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law"), \textit{aff'd on related grounds}, 75 F.3d 1414, 1421 (10th Cir. 1996).


157 \textit{Buckman}, 531 U.S. at 355 (Stevens, J., concurring). In \textit{Buckman}, the Court held that plaintiffs' state law claims based on injuries caused by orthopedic bone screws were preempted because the screws had been approved by the FDA—even
Of course, by citing all the way back to *Silkwood*, Justice Stevens conveniently overlooked *Cipollone*. His own plurality decision in *Cipollone*, essentially holding that the statutory scheme in the FCLAA had “put a ceiling, as well as a floor, on the common law obligations of manufacturers to communicate the true dangers of their products to consumers,” had laid the groundwork for the majority’s decision in *Buckman* and similar cases.\(^{158}\) The gravamen of the *Cipollone* decision, after all, was that the tobacco companies could not be required to warn customers of known dangers, even if those dangers were much more severe than those recognized on the FCLAA-required warning labels. Justice Stevens has never directly argued that *Cipollone* should be limited to its facts because it involved cigarettes, but his retreat from its holding suggests a belief on his part that tobacco products somehow present a unique case.

Justice Stevens’ reconsideration of his opinion, however, has not stopped the Supreme Court from building on the foundation of *Cipollone*. The most recent—and perhaps most troubling—example is *Riegel v Medtronic*,\(^{159}\) where the Court held that the Medical Device Amendments (MDA) to the FDCA expressly preempted common law tort claims for medical devices that had been approved by the FDA. At issue was a coronary balloon catheter that had ruptured during its use in angioplasty. Noting that the preemption clause included in the MDA precluded contrary “requirements” from being applied under state law, Justice Scalia wrote for the majority: “Absent other indication, reference to a State’s ‘requirements’ includes its common-law duties. As the plurality opinion said in *Cipollone*, common-law liability is ‘premised on the existence of a legal duty,’ and a tort judgment therefore establishes that the defendant has violated a state-law obligation.”\(^{160}\)

The absurdity of *Riegel* was that it read the preemption provision in the MDA in a way that was clearly not intended by its authors. Senator Ted Kennedy, the sole sponsor of the MDA in the Senate, filed an *amicus* brief strenuously arguing that no one in Congress ever considered that the preemption provision in the MDA would preempt state tort claims. He wrote that the term “requirements” was understood to apply only to state

\(^{158}\) Daynard, *supra* note 150, at 286.

\(^{159}\) 128 S. Ct. 999 (2008).

\(^{160}\) *Riegel*, 128 S. Ct. at 1008.
regulations, and Congress did not even consider that the term might apply to lawsuits until the Cipollone decision in 1992 (the MDA was passed in 1976). Senator Kennedy wrote (along with Congressman Henry Waxman):

Congress was fully aware of widespread tort law suits over medical devices, yet there is nothing in the legislative history to suggest an intent [to] preempt such suits. At the time the MDA was enacted, Congress did not understand the term “requirement” to include state tort law verdicts. . . . If Congress had intended to preempt state tort law suits, it would have explicitly done so. Taking into account the plain language of the MDA preemption provision, the absence of any indication in the legislative history that Congress even considered the possibility that the provision would preempt state tort suits, the presumption against preemption, and the legislative purpose of the MDA, it is plain that the “requirements” preempted under the statute do not include state tort law suits.161

The majority neatly dismissed this argument, writing that the preemption of state tort claims “is exactly what [the MDA preemption clause] does by its terms.”162 Therefore, because the meaning of the statute was so clear, the intent of Congress need not even be considered. Though this reasoning is spectacularly circular—because we read the term “requirements” to include tort claims, the term is not ambiguous—it is surely consistent with Cipollone.

3. Public Health Impact

Immunity from tort litigation—which is effectively what federal preemption provides—removes a major incentive for manufacturers to make their products as safe as possible or to alert consumers to newly-discovered dangers. The public health implications of this doctrine are likely to be significant. Consider, for example, the Riegel case itself and the regulation of medical devices. As David Vladeck has explained, the MDA approval process, while important, does not provide manufacturers with any meaningful incentives to alert consumers of new dangers that are discovered after the product is on the market. Vladeck writes:

161 Brief of Senator Edward M. Kennedy et al. as Amici Curiae in Support of Petitioners at 21, Riegel, 128 S. Ct. 999 (No. 06-179).
162 Riegel, 128 S. Ct. at 1008-09. Legislation has been introduced in both houses of Congress to overrule Riegel. Thus far, the legislation has not been brought up for a vote. See Gregory D. Curfman et al., The Medical Device Safety Act of 2009, 360 NEW ENG. J. MED. 1550, 1551 (2009).
[P]remarket approval is a one-time licensing decision that is based on whether the device’s sponsor has shown a “reasonable assurance” of safety. There is no provision in the MDA for devices to be periodically re-certified by the FDA. Medical devices are often approved on the basis of a single clinical trial, often involving very small numbers of patients . . . . Once on the market, the FDA engages in only limited surveillance . . . .

The FDA’s track record demonstrates the agency’s woeful inability to single-handedly protect the American people against defective and dangerous medical devices. Just in the past few years, we have seen massive recalls of defibrillators, pacemakers, heart valves, hip and knee prostheses, and heart pumps — all of which have exacted a terrible toll on the patients who have had them implanted in their bodies, and who often face the daunting prospect of explanation and replacement surgery. [If premarket approval preempts tort claims] . . . all of these people would be left without any remedy at all. Premarket approval is an important process intended to put an end to the marketing of devices without meaningful testing and with no assurance of safety. But while the [premarket approval] process provides minimum safeguards, it cannot replace the continuous and comprehensive safety incentives, information disclosure, and victim compensation that tort law has traditionally provided.\textsuperscript{163}

This is especially troublesome when one considers that “the data supporting a [premarket approval] application are compiled by the device manufacturer and are often unreliable.”\textsuperscript{164}

Beyond medical devices, \textit{Cipollone}, as suggested above, led to federal court decisions preempting state tort law claims in a variety of other contexts. The public health implications of these decisions are exceedingly difficult to track, and in some instances the Supreme Court later held that lower courts had extended \textit{Cipollone} too far.\textsuperscript{165} It is clear, however, that even if the \textit{Cipollone} decision was based in part on the unique context and pressures of tobacco litigation, it armed defendants in a variety of other industries with a powerful (and often


\textsuperscript{164} Brief for the States of New York et al. as Amici Curiae in Support of Petitioners at 17-18, Riegel, 128 S. Ct. 999 (No. 06-179) (citing an FDA Inspector General report revealing “serious deficiencies . . . in the clinical data submitted as part of pre-market applications”) (alteration in original).

\textsuperscript{165} See, e.g., Bates v. Dow Agrosciences, LLC, 544 U.S. 431, 444 (2005) (holding that state law claims regarding negligent manufacturing and breach of warranty with respect to pesticides were not preempted by FIFRA).
successful) new weapon to use in defeating products liability actions and other state tort law claims. Justice Ginsburg, the sole dissenter in *Riegel*, was likely correct when she wrote: “[R]egardless of the strength of a plaintiff’s case, suits will be barred *ab initio*. The constriction of state authority ordered today was not mandated by Congress and is at odds with the MDA’s central purpose: to protect consumer safety.”166 The same can be said of the other cases that followed in *Cipollone*’s wake.167

D. Class Certification

*Cipollone* weakened tobacco litigation, but it did not end it. *Cipollone* held that post-1965 failure to warn cases were preempted, but the plurality decision left a window open for fraud and misrepresentation claims, as well as pre-1965 failure to warn actions. Moreover, the documents exposed in *Cipollone* and in the subsequent investigations of the tobacco industry by state attorneys general provided the means by which to establish the industry’s fraud. Individual litigation, however, remained extraordinarily expensive and risky, due to the industry’s aggressive litigation tactics. In the mid-1990s, the use of class action litigation appeared to be a promising avenue by which to neutralize the industry’s financial advantages and aggregate “individual claims for harm into one massive tort challenge to the industry.”168 Cases in the 1980s had shown the class action to be a powerful tool that could address serious

166 128 S. Ct. at 1020 (Ginsburg, J., dissenting).

167 In an important recent case, the Supreme Court in *Wyeth v. Levine* found that tort claims against the pharmaceutical industry were not preempted by federal law. 129 S.Ct. 1187 (2009). Unlike *Cipollone* and *Reigel*, *Wyeth* did not involve an issue of *express* preemption. The plaintiffs had argued that preemption should be implied because state tort law interfered with the ability of the FDA to exercise its control over the pharmaceutical industry. This argument was rejected six-to-three by the court. *Id.* at 1200 (“If Congress thought state-law suits posed an obstacle to its objectives, it surely would have enacted an express pre-emption provision at some point during the FDCA’s 70-year history. But despite its 1976 enactment of an express pre-emption provision for medical devices, Congress has not enacted such a provision for prescription drugs.” (citation omitted)). Thus, *Wyeth* did not in any way overrule or limit *Cipollone* and its progeny, though it did put some limits on the doctrine of *implied* preemption.

168 Rabin, *Third Wave*, supra note 133, at 179. Class actions also had the potential to “reduce the focus on individual behavior and diagnosis.” BRANDT, supra note 2, at 405.
public health threats such as DES, the Dalkon Shield intrauterine contraceptive, Agent Orange, and asbestos.169

Despite the promise of class action litigation, tobacco-related class actions ultimately failed, and it is now generally agreed that “class action litigation has largely fallen by the wayside as a means of determining collective liability for victims of mass products torts.”170 Although the collapse of the class action is not solely due to the impact of tobacco litigation, tobacco cases appear to have sealed the fate of the mass tort class action. At least when it comes to health-related cases, the consensus is that “the mass tort class action is as dead as a doornail.”171

Two different issues have made it difficult for plaintiffs in tobacco-related cases to achieve class certification. The first is the question of “commonality.”172 In tobacco cases—as in other health-related cases—individual issues play a significant role. Questions about whether the plaintiffs relied on the tobacco companies’ misstatements or whether their injuries were caused by smoking are fact-specific inquiries where the answers likely vary from person to person. For such questions, class action certification may not be appropriate. This problem can be mitigated, however, by seeking issue certification on

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169 Myriam Gilles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 Mich. L. Rev. 373, 382 (2005). If most injured individuals lack either the impetus (due to widely dispersed harm) or the resources to bring individual lawsuits, defendants will be “under-deterred.” The class action held the promise of remedying this problem while also promoting greater efficiency in the court system:

[The class action] deters defendants from externalizing the costs of their actions by causing widespread, but individually minimal harm. Potential defendants know that they will be held accountable for such harm in both monetary and reputational terms, and they therefore have a greater incentive to avoid engaging in harmful activities. This deterrence function ultimately benefits consumers and courts alike, as greater deterrence leads to fewer future injuries and future lawsuits.


171 Gilles, supra note 169, at 388.

172 Under Federal Rule of Civil Procedure 23(b)(3), class action certification is appropriate only when “the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members.” Fed. R. Civ. P. 23(b)(3).
questions shared by the entire class, while leaving individual issues to be resolved later.\footnote{Federal Rule of Civil Procedure 23(c)(4) provides that “[w]hen appropriate, an action may be maintained as a class action with respect to particular issues.” \textit{Fed. R. Civ. P. 23(c)(4)}.}

The second issue is one of magnitude. Courts have been reluctant to allow certification for extremely large classes, particularly in situations where a verdict for the plaintiff class could potentially bankrupt the defendants. Given the number of current and former smokers, tobacco-related class actions inevitably present this issue. The concern about magnitude was famously outlined by Judge Richard Posner in \textit{In re Rhone-Poulenc Rorer, Inc.}\footnote{51 F.3d 1293, 1297-98 (7th Cir. 1995); \textit{cf.} Elizabeth J. Cabraser, \textit{The Class Action Counterreformation}, 57 \textit{Stan. L. Rev.} 1475, 1481 (2005) (“The Rhone-Poulenc decision has been vastly influential in all aspects of class action jurisprudence. Its ‘free market’ attitude toward the maturation of mass torts through repetitive trials in multiple jurisdictions has held sway across the country . . . .” (citations omitted)).} In \textit{Rhone-Poulenc}, a case involving a plaintiff class of hemophiliacs who had been exposed to the AIDS virus, Judge Posner advanced the novel argument (indeed, one that the defendant had not raised until oral argument) that high-stakes class actions unfairly pressure defendants to either settle or “stake their companies on the outcome of a single jury trial.”\footnote{51 F.3d. at 1299. Although Judge Posner advanced other reasons for decertifying the class, this concern appeared to be his “core reason.” Gilles, \textit{supra} note 169, at 386.} He argued that class action treatment might be appropriate where “individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation,” but he found that “[t]hat plainly is not the situation here.”\footnote{\textit{Rhone-Poulenc}, 51 F.3d at 1299. This reasoning leads to the odd result that in life-and-death cases, where a group of plaintiffs have been killed or seriously injured by the defendant, class action treatment is almost never appropriate. On the other hand, class actions can be used for cases with trivial damages such as lawsuits involving overpriced cosmetics or “junk faxes.” \textit{See, e.g.}, Azizian v. Federated Dep’t Stores, Inc., 243 Fed. Appx. 311, 312 (9th Cir. 2007) (affirming certification of class action and approval of final settlement in cosmetics-related antitrust case); CE Design v. Beatty Constr., Inc., 2009 U.S. Dist. LEXIS 5842 (N.D. Ill. Jan. 26, 2009) (certifying class action in “junk faxes” case). This is a perverse result given that, as several commentators have noted, it is attorneys who are most likely to benefit from class action settlements where the plaintiffs have little stake in the matter. By contrast, in health-related cases, class actions present the opportunity for meaningful redress for plaintiffs.}

Courts have not always distinguished between these two concerns when denying class certification in tobacco-related cases, but the concern about class size and potential unfairness to the defendants has likely played the more
significant (though often unrecognized) role. In *Castano v. American Tobacco Co.*, a class action brought on behalf of addicted smokers, this concern was clearly central to the court’s decision. In this way, they hoped to avoid some of the “commonality” questions that had doomed previous attempts at class actions. Although the district court certified the class (with respect to whether the industry had defrauded the plaintiffs and whether punitive damages were warranted), the Fifth Circuit reversed, relying heavily on *Rhone-Poulenc*. Characterizing the plaintiffs’ claim as a “novel and wholly untested theory,” the Fifth Circuit wrote that the case presented unique concerns:

> [C]lass [action] certification creates insurmountable pressure on defendants to settle, whereas individual trials would not . . . . These settlements have been referred to as judicial blackmail.

> The traditional concern over the rights of defendants in mass tort class actions is magnified in the instant case. . . . This is because certification of an immature tort results in a higher than normal risk that the class action may not be superior to individual adjudication.

This deference for “the rights of defendants” does not appear anywhere in Rule 23. Nonetheless, there is no reason not to take the Fifth Circuit’s statements at face value when it expressed its concern that class action certification might unfairly force the tobacco industry to either settle (regardless of meritorious defenses it might have) or “roll the dice” on one massive trial. The stakes involved were indeed huge. The plaintiffs were a class of roughly 40 million people in what was

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177 See 84 F.3d 734, 746 (5th Cir. 1996).
179 *Castano*, 84 F.3d at 746, 748.
180 Id. at 737, 746-47 (footnote omitted). For a rebuttal to the charge of “judicial blackmail,” see Charles Silver, “We’re Scared to Death”: *Class Certification and Blackmail*, 78 N.Y.U. L. Rev. 1357 (2003).
181 See Richard L. Marcus, *Reassessing the Magnetic Pull of Megacases on Procedure*, 51 DePaul L. Rev. 457, 484 (2001) (“Had the plaintiffs succeeded in preserving class certification in *Castano* . . . the availability of the class device itself would have been a generating factor behind litigation of almost unimaginable dimensions.”).
quite possibly “the largest class action ever attempted in federal court.”

Even without seeking health-related damages, the economic damages and punitive damages could plausibly have bankrupted the tobacco industry. Given the circumstances, it is not at all surprising that the Fifth Circuit was reluctant to allow a “winner-takes-all shootout at the OK Corral.”

Judge Posner, as noted above, had suggested in Rhone-Poulenc that individual treatment might be appropriate where “individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation.” The Fifth Circuit determined that Castano was not such a case, but its conclusion that “individual suits are feasible” proved to be mistaken. In fact, individual plaintiffs have not been able to afford lawsuits based on Castano’s addiction-focused theory. The Castano plaintiffs’ attorneys’ threat that they would “inundate the courts with individual claims if class certification is denied” was revealed to be idle bluster. Thus, in retrospect, Castano’s reliance on Rhone-Poulenc was arguably misplaced. Nonetheless, by loosening the conditions under which Rhone-Poulenc’s “blackmail” theory would be applied, the Fifth Circuit made it easier for subsequent cases to further unmoor Rhone-Poulenc’s holding from Judge Posner’s articulated limitations.

Myriam Gilles writes:

The Castano decertification was followed, in quick succession, by the Sixth Circuit’s decertification of a class involving penile implants, the Ninth Circuit’s decertification of medical products liability classes, and the Third Circuit’s decertification of an asbestos class. Finally, the Supreme Court got into the act [in Amchem Prods. v. Windsor, 521 U.S. 591 (1997)], rejecting a prepackaged settlement deal in which plaintiffs and defendants agreed to certify an asbestos class for settlement purposes only. Once again, the refusal to certify

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182 Castano, 84 F.3d at 737; Rabin, Tentative Assessment, supra note 178, at 333.
183 Gilles, supra note 169, at 387.
184 In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1299 (7th Cir. 1995).
185 Castano, 84 F.3d at 748. Thus, Castano may have been the unusual case where the individual damages were not significant enough to support individual lawsuits, but class certification created a case so large it could have destroyed the industry.
186 Id. Following the decertification of Castano, some individual lawsuits against the tobacco industry have succeeded, but the successful claims have not been based upon the addiction-based theory put forward in Castano. See Robert L. Rabin, Tobacco Control Strategies: Past Efficacy and Future Promise, 41 Loy. L.A. L. Rev. 1721, 1742-44 (2008) (surveying recent individual lawsuits against the tobacco industry).
was driven, in part, by concerns with “fairness” to the defendants, given the coercive settlement power of a certified class proceeding.187

More recent cases have similarly relied on Castano to deny class certification in lawsuits involving allegedly defective pharmaceuticals,188 exposure to radiation,189 welding fumes,190 and toxic chemical leaks.191 In most of these cases (with the exception of the asbestos cases), the discrepancy in power between the parties and/or the stakes involved would not have exerted undue pressure on the defendants to either settle the case or risk bankruptcy. Thus, the reasoning behind Rhone-Poulenc and Castano was inapplicable. Nonetheless, cases following Castano have ignored the context of the case and focused instead on its holding or its ancillary concerns about commonality.

Several subsequent tobacco cases have followed Castano, thus setting additional precedents making class action certification more difficult in health-related cases. Overreaching by plaintiffs’ attorneys—as in the recent case of McLaughlin v. American Tobacco Co., which sought $800 billion in damages for a massive class consisting of all “light” cigarette smokers since 1971—has not helped.192 In the notable Engle case in Florida, a Miami jury awarded a class of Florida smokers $145 billion in punitive damages against the tobacco industry.193 Though the Florida Supreme Court later decertified the class on “commonality” grounds,194 it is likely that the court’s decision was also due in part to astonishment at the size of the jury verdict and concern about unfairness to the tobacco

187 Gilles, supra note 169, at 387-88 (citations omitted).
191 Steering Comm. v. Exxon Mobil Corp., 461 F.3d 598, 604-05 (5th Cir. 2006). In all, Castano has been cited by more than 600 cases. Some of these have focused on Castano’s remarkably broad statement that “a fraud class action cannot be certified when individual reliance will be an issue.” Castano, 84 F.3d at 745.
193 Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1254 (Fla. 2006).
194 Id. at 1268 (writing that “individualized issues such as legal causation, comparative fault, and damages predominate”).
companies. The suspicion that the Florida Supreme Court was more troubled by the outcome than the procedure is heightened by the fact that the court had previously refused the defendants’ request to decertify the class before the trial.

In leading the decline of the class action in health-related cases, tobacco cases have been joined by asbestos cases. With respect to class action certification, asbestos cases share the salient characteristics of tobacco litigation: extremely large numbers of potential plaintiffs who present widely varied medical conditions and histories of exposure. In Amchem, the Supreme Court decertified a settlement class action in an asbestos case, noting the same problems highlighted in Castano. It highlighted the massive size of the proposed class, and it emphasized that courts must exercise caution when “individual stakes are high and disparities among class members great.” This was followed by the rejection of an asbestos-related class action settlement two years later in Ortiz v. Fibreboard Corp., where the Court again signaled its distaste for the use of class action settlements to resolve mass tort cases.

Thus, it was perhaps not the “tobacco-ness” of the tobacco cases that led to their decertification, but rather a set of characteristics common to both tobacco and asbestos litigation. Together, these two types of cases have created precedents in nearly every circuit that can be seized upon to decertify mass tort class actions. These cases have precipitated the collapse of the class action as a public health tool, even though the unusual features of tobacco and asbestos litigation are absent in many other public health contexts.

E. Punitive Damages

Because tobacco companies have historically been so successful in defending against liability, tobacco-related cases contributed nothing to the law of punitive damages until recently. Indeed, it was not until 2005, in Henley v. Philip Morris, that a tobacco industry defendant actually made a payment of punitive damages to a plaintiff in a personal injury case.

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195 Id. at 1265 n.8 (“We also conclude that the punitive damages award was clearly excessive . . . . [T]he award would result in an unlawful crippling of the defendant companies.”).
lawsuit. Over the last ten years, however, the tobacco companies have begun to face more adverse judgments that have included awards of punitive damages. In keeping with their reputation as tenacious litigators, the tobacco companies have consistently pursued every possible avenue to appeal these verdicts and delay paying claims. This strategy—though not always successful in vacating damages awards—has often worked (as it did in Henley) to significantly reduce the amount of punitive damages. It has also meant that tobacco cases are more frequently the subject of precedent-making decisions involving punitive damages awards—particularly in cases interpreting the Supreme Court’s rapidly-shifting Due Process jurisprudence on the topic.

The use of tobacco-related cases to set new precedents can have unintended consequences that severely limit the availability of punitive damages for subsequent litigants. For example, in Boerner v. Brown & Williamson Tobacco Co., the Eighth Circuit slashed an Arkansas jury’s award of punitive damages by two-thirds, finding that a 1:1 ratio between compensatory and punitive damages was appropriate. The court, astoundingly, concluded that despite clear evidence that American Tobacco (a predecessor company to Brown & Williamson) “actively misled consumers about the health risks associated with smoking,” there was “no evidence that anyone at American Tobacco intended to victimize its customers.” It is easy to see how all sorts of defendants—in other public health contexts and beyond—could subsequently argue that punitive damages greater than a 1:1 ratio were not warranted.

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199 The Henley case demonstrates the resources the tobacco industry has been willing to invest in appealing adverse verdicts. In 1999, a San Francisco jury awarded Patricia Henley $1.5 million in compensatory damages and $50 million in punitive damages. It was not until six years later that Philip Morris exhausted its appeals and was forced to pay. By that time, the case had made two trips to the California Supreme Court and the punitive damages awards had been slashed from $50 million to $9 million. See Myron Levin, High Court Turns Away Philip Morris, L.A. TIMES, March 22, 2005, at C1.
200 See, e.g., Bullock v. Philip Morris USA, Inc., 71 Cal. Rptr. 3d 775 (Ct. App. 2008) (overturning award of $28 billion in punitive damages); Boeken v. Philip Morris, Inc., 26 Cal. Rptr. 3d 638 (Ct. App. 2005) (reducing punitive damages award from $3 billion to $50 million); Philip Morris, Inc. v. French, 897 So. 2d 480, 487 (Fla. Dist. Ct. App. 2004) (noting that in response to Philip Morris' motion, the trial judge had reduced the award of damages from $5.5 million to $500,000).
201 394 F.3d 594, 603 (8th Cir. 2005).
202 Id.
because their conduct, however egregious, paled in comparison to the actions of the tobacco companies.\footnote{See Anna Van Duzer, Boerner v. Brown & Williamson Tobacco Co.: The Eighth Circuit Misapplied the Second Gore Guidepost to Erroneously Decide a Punitive Damages Award Was Excessive, 39 CREIGHTON L. REV. 387, 416, 440 (2006) (writing that the Boerner decision was a misapplication of both Supreme Court and Eighth Circuit precedent, and that “by imposing a ratio of approximately 1:1 in Boerner without identifying particular facts from the case that supported doing so, the court essentially locked in a 1:1 ratio for all future cases involving large compensatory awards”).}

Though Boerner and cases like it can be characterized as (perhaps dubious) applications of the Supreme Court’s Due Process jurisprudence, the Supreme Court’s decision in Philip Morris USA v. Williams unquestionably broke new ground.\footnote{549 U.S. 346, 349 (2007).} This decision—which has been roundly criticized by commentators as unintelligible\footnote{See, e.g., Michael P. Allen, Of Remedy, Juries, and State Regulation of Punitive Damages: The Significance of Philip Morris v. Williams, 63 N.Y.U. ANN. SURV. AM. L. 343, 359 (2008) (‘I have read this passage scores of times. I have also taught it to hundreds of students in Remedies courses so far. I confess, however, to being truly perplexed as to how the Court envisions the jury complying with this requirement.”); Keith N. Hylton, Reflections on Remedies and Philip Morris v. Williams, 27 REV. LITIG. 9, 30 (2007) (“Philip Morris instructs courts that it is permissible to consider harm to other victims in determining reprehensibility, but impermissible to actually increase an award in an effort to punish the defendant for the harms inflicted on others. It is a distinction that many will find confusing, as the dissenting opinions noted.”).}—is likely to have a significant impact on future public health litigation.

1. Philip Morris USA v. Williams

Williams involved a suit by the estate of Oregon resident Jesse Williams, a longtime smoker of Marlboro cigarettes who began smoking in the 1950s and died of smoking-related lung cancer in 1997. The jury found for the plaintiff on claims of negligence and fraud. On the fraud claim, the jury awarded compensatory damages of $821,000 and punitive damages of $79.5 million.\footnote{Williams v. Philip Morris, Inc., 48 P.3d 824, 828 (Or. Ct. App. 2002). The jury awarded no punitive damages on the negligence claim (finding that Williams was fifty percent at fault); the $79.5 million in punitive damages was awarded on the fraud claim. The compensatory damages were later reduced by the trial judge. Id.} After the award was affirmed for a second time by the Oregon Supreme Court,\footnote{Williams v. Philip Morris Inc., 127 P.3d 1165 (Or. 2006).} Philip Morris appealed to the U.S. Supreme Court. The tobacco company was optimistic that the Supreme Court would apply its holdings in State Farm Mutual Automobile Insurance Co. v.
Campbell and BMW of North America v. Gore to find that a nearly 100:1 ratio between punitive damages and compensatory damages (on the fraud claim) was unconstitutionally excessive. Instead, in a 5-4 decision written by Justice Breyer, the Supreme Court avoided the question of excessiveness, finding alternate grounds on which to remand the case to the Oregon Supreme Court.

The Court held that “the Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for [an] injury that it inflicts upon nonparties . . . those who are, essentially, strangers to the litigation.” This holding, as Justice Breyer acknowledged, was a new interpretation of the Due Process Clause. It was also an interpretation likely to confuse state courts, as Justice Breyer’s opinion further explained that evidence of harm to nonparties could be introduced in order to show that the defendant’s conduct was sufficiently “reprehensible” to justify an award of punitive damages. In dissent, Justice Stevens outlined the problem:

The majority relies on a distinction between taking third-party harm into account in order to assess the reprehensibility of the defendant’s conduct—which is permitted—and doing so in order to

210 See Philip Morris USA v. Williams, 549 U.S. 346, 357-58 (2007). On remand, the Oregon Supreme Court declined to reduce or reconsider the damages award, finding that there had been independent state law grounds for rejecting the jury instruction requested by Philip Morris. Williams v. Philip Morris, Inc., 176 P.3d 1255, 1260 (Or. 2008), cert. granted, 128 S. Ct. 2904 (2008). This decision, arguably a “provocation to the United States Supreme Court,” led the Supreme Court to grant certiorari again, and in December 2008, the Supreme Court heard arguments in the case for the third time. Anthony J. Sebok, The Unusual Story of Williams v. Philip Morris, and Its Third Trip to the Supreme Court—Including Some Predictions About What the Court Will Do This Time, FINDLAW, Dec. 16, 2008, available at http://writ.news.findlaw.com/sebok/20081216.html. However, on March 31, 2009, the Supreme Court unexpectedly dismissed the writ of certiorari as improvidently granted. Philip Morris USA, Inc. v. Williams, 129 S. Ct. 1436 (2009).
211 Williams, 549 U.S. at 353 (emphasis added).
212 Id. at 356-57 (“We did not previously hold explicitly that a jury may not punish for the harm caused by others. But we do so hold now.”). As Michael Rustad notes, the conclusion of Williams appears to run contrary to the Court’s previous statement in BMW v. Gore that “evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant’s disrespect for the law.” Michael L. Rustad, The Supreme Court and Me: Trapped in Time with Punitive Damages, 17 WIDENER L. J. 783, 820 (2008) (quoting BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 576-77 (1996)).
punish the defendant “directly”—which is forbidden. This nuance eludes me.\textsuperscript{213}

The Williams decision has been characterized as just another step in the Supreme Court’s recent efforts to use the Due Process Clause to place both procedural and substantive limits on awards of punitive damages. To some extent, that is unquestionably true. Previous cases had suggested that the Court’s conception of damages was based on a model of “one-on-one torts” that discounted broader social or deterrence-based goals that of punitive damages could serve. Williams appears to extend that approach, taking “further steps in limiting the remedial goals punitive damages could serve” with its narrow focus on punishment for the particular facts of the given case.\textsuperscript{214} But were there other factors—factors unique to the tobacco-related context of the case—that caused the Court to move its punitive damages jurisprudence in this particular direction?

There are several reasons why the convoluted result of Williams may have been attributable to the fact that the case involved a smoking-related claim. First, the issue of assumption of risk, which has “hovered like a storm cloud over every smoker’s claim against the tobacco companies,”\textsuperscript{215} seems to have played a particularly significant role. Keith Hylton more specifically refers to the issue in Williams as one of “heterogeneity.”\textsuperscript{216} In short, the majority seemed particularly concerned that punishing Philip Morris for harm caused to other, non-plaintiff smokers would be unfair to Philip Morris because those other cases may have been significantly different (heterogeneous) from this one. Smoking-related cases raise these heterogeneity issues in abundance, but assumption of risk seems to have been of particular concern to the Court. Would the other, nonparty smokers have chosen to smoke anyway with full knowledge of the dangers? Should they be assigned some portion of the fault for continuing to smoke after the dangers of smoking were known? Justice Breyer highlighted this concern in his decision, writing:

\textsuperscript{213} Williams, 549 U.S. at 360 (Stevens, J., dissenting).
\textsuperscript{214} Allen, supra note 205, at 365; see Rustad, supra note 212, at 803-04 (“The Court’s latest decision in Philip Morris USA v. Williams was the last rites, if not the obituary, for the crimtort paradigm. The Court’s punitive damages cases, taken as a whole, are a step backward into the jurisprudence of the eighteenth and early nineteenth centuries.” (citations omitted)).
\textsuperscript{216} Hylton, supra note 205, at 19.
[A] defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge, by showing, for example in a case such as this, that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant’s statements to the contrary.\footnote{217}

Yet, at least in terms of public health cases, tobacco-related cases are particularly unusual in the degree to which they raise the issue of assumption of risk. In many (though not all) public health cases, it would be absurd to argue that the plaintiff had voluntarily chosen to encounter the risk. For example, imagine a lawsuit involving a company that had secretly polluted the local water supply, causing hundreds of people to become sick. In such a case, there could be no argument that anyone had chosen to risk illness (unlike the argument that many people choose to smoke, knowing the risks). In such a case, “[c]omplete deterrence of the offender’s conduct is the socially appropriate goal . . . [and] there is no reason on deterrence grounds to limit aggregation [i.e., basing punitive damages in part on harm caused to non-parties] because of the problem of claim heterogeneity.”\footnote{218} Thus, the fact that \textit{Williams} was a smoking-related case may have led the Supreme Court to extend Due Process limitations on punitive damages, even though the concern raised by Philip Morris is inapplicable to a wide variety of other contexts.\footnote{219}

Secondly, the problem identified by Philip Morris in its appeal—that it was being unfairly punished for acts directed to non-parties in the litigation—is a much more acute issue in tobacco cases than in other types of litigation. If juries actually tried to punish Philip Morris for similar harms suffered by non-parties, the results would be astronomical awards—perhaps along the lines of the $145 billion punitive damages verdict in \textit{Engle}. If Philip Morris’s conduct is generically described as defrauding smokers by lying about the harmfulness of cigarettes, there are literally millions of Oregonians who would have claims similar to Williams’s. The unparalleled scope of

\footnote{217} \textit{Williams}, 549 U.S. at 353-54.  
\footnote{218} Hylton, \textit{supra} note 205, at 20.  
\footnote{219} As Hylton writes, the argument about heterogeneity would have been “preposterous on its face” if made by the defendant in \textit{State Farm}. \textit{Id.} at 21. State Farm could not have argued that “there were some victims of bad faith conduct in the insurance market that did not mind being victimized in this way at all.” \textit{Id.} Yet the rule in \textit{Williams} will operate to shield defendants like State Farm from higher punitive damages in the future.
Philip Morris's fraud (and that of the other tobacco companies) created the possibility for massive punitive damages verdicts that would run counter to the Supreme Court's ongoing efforts to rein in such awards as well as its previously-expressed concern (or deference to Congress's concern) for the tobacco industry's important role in the national economy. It seems that the plaintiff's attorneys were put in a bind—in order to argue that it was appropriate to exceed a single-digit ratio between punitive and compensatory damages in this case, they had to emphasize the fact that Philip Morris had "engaged in one of the longest running, most profitable, and deadliest frauds in the annals of American commerce." By emphasizing the scope of the fraud, however, they may have inadvertently highlighted the potential for nearly limitless punitive damages awards in the future.

The Supreme Court’s attempt to finesse these two competing concerns—recognizing the reprehensibility of the tobacco industry's conduct while at the same time protecting it from crippling punitive damages awards—may explain the Court's decision to rule on grounds that allowed it to dodge the question of the single-digit ratio. The role of Justice Breyer may have been particularly significant. Justice Breyer has been a reliable vote to constrain the scope of punitive damages. He was in the majority in State Farm, Gore, Cooper Industries, and other cases supporting Due Process limits on punitive damages. At the same time, he has consistently been in the dissent on cases that sought to limit regulation of the tobacco industry, including Brown & Williamson and Lorillard Tobacco Co. v. Reilly. (Breyer was not on the Court when it decided Cipollone.) In particular, Justice Breyer's dissent in Brown & Williamson went out of its way to highlight in detail the tobacco industry's history of deception regarding the addictiveness of nicotine. It seems that Justice Breyer was reluctant to write a decision that would minimize the severity of the tobacco industry's conduct, and yet he also had serious overarching concerns about the role of unconstrained punitive damages. The result was a decision in Williams that not only avoided addressing how Philip Morris's conduct fit into State

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221 Brief for Respondent at 1, Philip Morris USA v. Williams, 549 U.S. 346 (2007) (No. 05-1256).
223 529 U.S. at 172-74 (Breyer, J., dissenting).
Farm's suggested guideposts for punitive damages, but it also (unlike previous punitive damages decisions) studiously avoided any detailed discussion of the facts of the case.\textsuperscript{224} The decision reads more like a theoretical discussion that even avoids applying its holding to the facts of the case. Nowhere in the decision does Justice Breyer specifically say whether the jury instruction proposed by Philip Morris (which had been rejected) should have been accepted or what a proper jury instruction might look like.\textsuperscript{225} Instead, it merely provided the vague directive that states must “provide some form of protection” to ensure that punitive damages would not be used to punish for harm to non-parties.\textsuperscript{226}

2. Public Health Impact

With regard to punitive damages, the impact of tobacco-related cases, and Williams in particular, is a bit harder to predict. As long as the tobacco-related cases remain at the forefront of the justices' minds, it is likely that at least some (and, for now, a majority) of the justices will decline to impose a hard-and-fast single-digit ratio limit on punitive damages. At the same time, a majority of the justices continue to have intellectual problems with punitive damages awards that they view as unpredictable, unconstrained, and unconstitutionally unfair. For this reason, there may be more decisions like Williams that attempt to split the difference but instead end up causing more confusion.

Is this result better or worse than a hard-and-fast rule limiting punitive damages? In part, that will depend on how lower courts choose to apply Williams. It is certainly possible, however, that Williams provides the more problematic rule from a public health perspective. Indeed, attorneys for corporate defendants are optimistic that Williams may not only reduce punitive damages awards, but it may eliminate them

\textsuperscript{224} The entire discussion of the facts of the case is limited to three brief sentences. Williams, 549 U.S. at 349-50; see Heather R. Klaasen, Punishment Defanged: How the United States Supreme Court has Undermined the Legitimacy and Effectiveness of Punitive Damages [Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007)], 47 WASHBURN L.J. 551, 569 (2008) (“Even though the Court's decisions in Browning-Ferris, Hostip, TXO, Cooper Industries, Gore, and Campbell included extensive factual analysis, the Court ignored the substantive facts of Philip Morris.”).

\textsuperscript{225} See 549 U.S. at 364 (Ginsburg, J., dissenting) (“The Court ventures no opinion on the propriety of the charge proposed by Philip Morris, though Philip Morris preserved no other objection to the trial proceedings.”).

\textsuperscript{226} Id. at 357 (majority opinion).
altogether. As one attorney who represents both Ford and Wal-Mart put it, the ruling that punitive damages cannot be used to punish defendants for harm to non-parties “gives defendants not only the ability to challenge punitive[] damages] as excessive but an avenue to eliminate or prevent such a verdict in the first place.”

Early applications of Williams support this prediction. In Moody v. Ford Motor Co., for example, a U.S. District Court granted Ford’s motion for a new trial in a case involving a Ford Explorer that rolled over on the highway. The driver died of asphyxia when the roof of the Explorer collapsed and prevented him from breathing. In granting the motion for a new trial, the judge suggested that after Williams, Oklahoma’s punitive damages statute might be facially unconstitutional. The statute in question provided that punitive damages could be awarded only if the plaintiff has established that the defendant “has been guilty of reckless disregard for the rights of others.”

Judge Eagan wrote:

The reckless disregard standard under Oklahoma law [Okla. Stat. tit. 23, § 9.1] is based on harm to others, not just harm to the plaintiff. . . . Under Philip Morris, Ford has a due process right to ensure that the jury uses punitive damages to punish it for harm suffered by plaintiff only, not all third parties that may have been injured in a rollover accident. The Court would consider a limiting instruction based on Philip Morris, but there is a strong possibility that this would be contrary to the legislative intent and may void any award of punitive damages under section 9.1.

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227 Margaret Cronin Fisk, Punitive Damages Shrink as Court Reins in Lawyers, KAN. CITY DAILY REC., Jan. 21, 2008 (quoting Ted Boutrous of Gibson, Dunn & Crutcher).
230 Moody, 506 F. Supp. 2d at 849 n.14. Indeed cases in several states suggest that the only legitimate function of punitive damages is a public purpose, focused on the impact that the misconduct has had on the public generally. See, e.g., Fabiano v. Philip Morris, Inc., 862 N.Y.S.2d 487, 490 (App. Div. 2008) (“A claim for punitive damages may, of course, be rooted in personal injury, but for such a claim to succeed the injury must be shown to be emblematic of much more than individually sustained wrong. It must be shown to reflect pervasive and grave misconduct affecting the public generally, to, in a sense, merge with a serious public grievance, and thus merit punitive, indeed quasi-criminal sanction.” (citations omitted)) (reversing award of punitive damages in smoking-related cases because public purpose of punishing tobacco industry misconduct had already been served by the payment provision of the Master Settlement Agreement); Moskovitz v. Mt. Sinai Med. Ctr., 635 N.E.2d 331, 343 (Ohio 1994) (“The purpose of punitive damages is not to compensate a plaintiff, but to punish and deter certain conduct.”). Williams provides an argument for eliminating all punitive damages awards in these states.
Even without completely barring awards of punitive damages, the Williams rule may prove to be more problematic than a hard-and-fast ratio limiting punitive damages. A ratio limit may be problematic in certain cases, particularly cases where compensatory damages are low or the misconduct was exceedingly profitable or hard to detect. The Williams holding, however, more directly weakens the ability of punitive damages to act as an effective deterrent in all mass tort cases, thereby both jeopardizing public health and undercutting a major argument that litigation has an appropriate role to play in the public health context. Michael Rustad explains:

The Court’s “other bad acts” rule of evidence will have the most impact in mass product liability cases where a single defect or failure to warn will result in a portfolio of claims. If this rule had been applicable in the Ford Pinto cases, evidence of other fatalities associated with crash-induced fuel leakage would have been admissible for the purposes of determining reprehensibility, but would not have been admissible to set the punitive damages award. . . . Corporate wrongdoers will be tempted to perform a socially harmful cost-benefit analysis deciding that it is profitable to risk the consuming public, especially where the risk of detection is low.

Thus, in mass tort cases, if juries are not allowed to consider the impact on non-parties when fashioning punitive damages awards, the defendants will almost by definition be under-deterring (because not nearly all of those harmed by the conduct will bring their own lawsuits).

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231 See Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 677 (7th Cir. 2003) (Posner, J.) (“If a tortfeasor is ‘caught’ only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.”); see also A. Mitchell Polinsky & Steven Shavell, Punitive Damages: An Economic Analysis, 111 HARV. L. REV. 869, 874 (1998) (“When an injurer has a chance of escaping liability, the proper level of total damages to impose on him, if he is found liable, is the harm caused multiplied by the reciprocal of the probability of being found liable.”).


233 Id. at 497, 500. In upholding the amount of a punitive damages award in one of the Ford Pinto cases, the California Appeals Court wrote that “[u]nlike malicious conduct directed towards a single specific individual, Ford’s tortious conduct endangered the lives of thousands of Pinto purchasers.” Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 388 ( Ct. App. 1981). After Williams, this appears to be an invalid basis for upholding the size of a punitive damages award.

234 See Hylton, supra note 205, at 31 (“[T]he only sturdy reason that can be discerned for the Court’s decision [in Williams] is the notion that every person not before the court is capable of bringing his own lawsuit and having it decided on the basis of the issues in his case. While this sounds fine in theory, it is far from what happens in real life. The truth is that relatively few people bring lawsuits.”); Klaasen,
fact that companies with deep pockets—having learned from the model of the tobacco industry—can deter lawsuits by making any suit against the company an extremely expensive (and therefore risky) endeavor. Without the potential for punitive damages serving as an effective deterrent, there is little doubt that some companies will choose to endanger the public’s health in their pursuit of profit.

IV. CONCLUSION

The legal developments catalyzed by tobacco decisions—an expansive preemption doctrine, limits on class certification, and constraints on punitive damages—have severely weakened the ability of personal injury litigation to effectively deter corporate misconduct and protect public health. On the regulatory side, legal decisions shielding the tobacco industry from regulation have opened the door to weakening other important public health regulatory regimes.

In many of the cases discussed above, the unusual context of tobacco litigation—a huge volume of cases (and potential cases) at the intersection of intense cultural and political cross-currents—may have shaped the contours of the decisions. These decisions then served to reshape legal paradigms that were subsequently applied across the field of public health law, even when those context-dependent considerations were absent. In this manner, the “exceptionalism” of tobacco litigation has significantly influenced the development of public health law. Each one of these doctrinal strands discussed above was clearly driven by other broader forces as well. Cause and effect is virtually impossible to establish, given the general movement of the courts towards more conservative positions over the time

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supra note 224, at 576-77 (“In fashioning an appropriate measure of deterrence, the jury must be allowed to consider how many other persons the defendant’s conduct endangered so that the jury’s interest in deterrence has an objective goal: the cost of the misconduct should be greater than or equal to the benefit.”).

235 Sara Guardino and Richard Daynard have argued that a defendant’s “secondary reprehensibility” in obstructing litigation should also be taken into account when calculating punitive damages. Guardino & Daynard, supra note 27, at 36-38.

236 See Ciraolo v. City of New York, 216 F.3d 236, 243 (2d Cir. 2000) (Calabresi, J., concurring) (“When the perceived benefits of an activity accrue to the actor, but some significant part of the costs is borne by others, the cost-benefit analysis will necessarily be distorted. In such a case, the actor will have an incentive to undertake activities whose social costs exceed their social benefits. In other words, the actor will not be adequately deterred from undesirable activities. And society will suffer.”).
period examined. Nonetheless, the discussion above suggests that the centrality of tobacco litigation has itself been a significant factor influencing doctrinal development.

The remaining question is the normative issue of how the courts should have addressed tobacco cases—and how they should do so in the future. Here, there are at least three options. First, one could conclude that the cases discussed above were simply wrongly decided and constituted unwarranted departures from past precedent. In Brown & Williamson, for example, a strong argument could be made that Chevron deference called for a more deferential approach that would have sustained the FDA’s actions. This viewpoint would suggest that there is no cause to treat tobacco differently from other products; judges should ignore the uniqueness of the cultural/social/political context and focus solely on the application of precedent.

Second, one could argue that the tobacco cases were correctly decided, but were justified by their unique context and thus should not be applied and extended in non-tobacco cases. In this view, the Supreme Court may have been correct in denying the FDA regulatory authority over tobacco products, but that decision should have been viewed as a one-time exception to the general rules of administrative deference that was justified by the unique political and cultural history of tobacco regulation. This is essentially an argument for tobacco exceptionalism in the broader sense of the word; a claim that a unique set of rules should apply to tobacco cases.

The third possible position is that tobacco cases are just one example of a type of litigation that does not fit well within the current public health law paradigm. When one industry has (allegedly) caused harm on a scale so massive that litigation of all claims would overwhelm the tort system and destroy the industry in question, the typical rules simply cannot be applied. Many of the legal developments discussed above must be seen as having occurred in the shadow of the “asbestos crisis” which, in the words of the Supreme Court, constituted an “elephantine mass [that] . . . defies customary judicial administration and calls for national legislation.” Since far more people die from tobacco-related disease every year than have died from asbestos exposure in the past forty years, it is no wonder that the courts have looked for ways to

\footnote{Ortiz v. Fibreboard Corp., 527 U.S. 815, 821 (1999).}
keep tobacco cases from overwhelming their dockets.\footnote{Vinicius C. Antao et al., Asbestosis Mortality in the United States: Facts and Predictions, 66 J. OCCUP. & ENVTL. MED. 335 (2009) (finding that there were 25,564 asbestosis deaths in the U.S. from 1968 through 2004).} Furthermore, beyond the sheer volume of cases, others have argued that since “tobacco is a product bound up with a series of overlapping and often conflicting philosophical, economic, social, political and religious values,” the resolution of such a complex issue is properly left to the legislative process.\footnote{Turley, supra note 23, at 435.} Thus, the inability of the courts to coherently address the issue of tobacco may simply reflect the fact that some issues are simply too complex for judicial administration.\footnote{Cf. Orey, supra note 19, at 367 (“[U]sing individual court cases to resolve such a complex issue—a legal product that causes grievous harm to millions of people’s health when used as intended—makes no sense.”).}

While both the size and the complexity of the issue of tobacco call out for comprehensive legislative action, this conclusion fails to provide any guidance as to how the courts should act in the interim. Congress recently passed the Family Smoking Prevention and Tobacco Control Act. It remains to be seen how effective this new Act will be in reducing tobacco-related death and disease.\footnote{The Congressional Budget Office estimated that the Senate version of the bill (nearly identical to the final Act) would reduce youth smoking by eleven percent over the next decade, and would reduce adult smoking by two percent over the same period. Cong. Budget Office, Congressional Budget Office Cost Estimate, S. 982, FAMILY SMOKING PREVENTION AND TOBACCO CONTROL ACT 6 (2009), available at http://www.cbo.gov/ftpdocs/102xx/doc10254/s982.pdf.} But, as is relevant here, the Act does not prohibit future litigation and does not give any new guidance to courts as to how they should address tobacco-related cases. Since simply rejecting jurisdiction over tobacco cases is not a viable option, how should the courts address future tobacco cases?

A full resolution of this difficult question is beyond the scope of this Article, but is a ripe subject for discussion by legal scholars, judges, and public health experts. Indeed, the failure of the courts to address this issue head-on is a major source of the problem discussed in this Article. Instead of adopting a clear policy on tobacco cases—that they either will or will not be treated differently from other public health concerns—the courts have stumbled towards a third path: they purport to apply the law in a facially neutral manner, but the unique exigencies of tobacco litigation inevitably influence the outcomes. As a result, tobacco cases are permitted to exert an
outsized and troublesome influence on the rest of public health law.

Until these questions are resolved, tobacco litigation will likely continue to produce anomalous outcomes driven by the unusual pressures of smoking-related cases. Just like the cigarettes themselves, tobacco-related decisions should come with a warning label: CAUTION: MAY BE HAZARDOUS TO PUBLIC HEALTH LAW.
Stare Decisis Is Cognitive Error

Goutam U. Jois

[A]fter [courts] have proceeded a while they get their own set of precedents, and precedents save “the intolerable labor of thought,” and they fall into grooves, just as judges do. When they get into grooves, then God save you to get them out of the grooves.

—Learned Hand

I. INTRODUCTION

For hundreds of years, the practice of stare decisis—a court’s adherence to prior decisions in similar cases—has guided the common law. However, recent behavioral evidence suggests that stare decisis, far from enacting society’s “true preferences” with regard to law and policy, may reflect, and exacerbate, our cognitive biases.

The data show that humans are subconsciously primed (among other things) to prefer the status quo, to overvalue existing defaults, to follow others’ decisions, and to stick to the well-worn path. We have strong motives to justify existing legal, political, and social systems; to come up with simple explanations for observed phenomena; and to construct coherent narratives for the world around us. Taken together, these and other characteristics suggest that we value precedent not because it is desirable but merely because it exists. Three case studies—analyzing federal district court cases, U.S. Supreme Court cases, and development of American policy on torture—suggest that the theory of stare decisis as a heuristic

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† J.D., 2007, Harvard; A.B., 2003, M.P.P., 2004, Georgetown. gjois@post.harvard.edu. I have benefited from feedback at various stages of this project from Anuj Desai, Jon Hanson, Frederick Schauer, Cass Sunstein, Adrian Vermeule, and participants in the Student Association for Law and Mind Sciences speaker series at Harvard Law School. Three excellent research assistants have also been invaluable to the completion of this Article, Tina Gonzalez, Rachel Furman, and Debbie Chung. As always, I am grateful to my family for their love and support: my parents, Umesh and Indira; my sisters, Malasa and Mallika; and my wife, Elizabeth. Any errors the reader perceives may be attributed to cognitive bias.

has substantial explanatory power. In its strongest form, this hypothesis challenges the foundation of common law systems.

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A hundred and fifty years ago, Tocqueville wrote that the greatest outrage to an Anglo-American lawyer was accusing him of having an original thought. If one characterized the lawyer as being an innovator, “he will be prepared to go to absurd lengths rather than to admit himself guilty of so great a crime.” The common law system and its reliance on precedent, he wrote, forced lawyers to argue as though all of the rationale for their clients’ position was compelled by pre-existing case law. Tocqueville was “surprised to hear [the common lawyer] quoting the opinions of others so often and saying so little about his own.” Conversely, a lawyer in the civil law system would “deal with no matter, however trivial, without . . . carry[ing] the argument right back to the constituent principles of the laws.”

Change comes slowly to the common lawyer. He “values laws not because they are good but because they are old,” and if the law must be changed in some respect, “he has recourse to the most incredible subtleties in order to persuade himself that in adding something to the work of his fathers he has only developed their thought and completed their work.” Innovation is anathema to him.

Recent social psychological evidence suggests that Tocqueville was on to something—about all of us, not just those of us trained in the common law. Across a wide range of contexts, the data provide compelling evidence of humans’ tendencies to prefer existing social systems and status quo endowments and a simultaneous subconscious “priming” to justify those existing defaults. If this is true, then the Anglo-American legal system, with its emphasis on stare decisis and adherence to precedent, exacerbates this human shortcoming.

Thence arises the title of this Article. Relying on precedent might be a good idea, or it might not. But it is clear that, rather than reflecting our “true preferences,” the theory and practice of stare decisis are at least partially rooted in our cognitive biases. There are two ways this could be the case.

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2 Alexis de Tocqueville, Democracy in America 268 (George Lawrence trans., J.P. Mayer ed. 1969).
3 Id. at 267.
4 Id.
5 Id. at 268.
First, the practice of stare decisis may have evolved merely as a reflection of cognitive bias, and nothing more. This is the strongest, and most provocative, version of my argument. Second, the current practice of stare decisis may be yielding judicial decisions that are at least partially the product of heuristic judgments, resulting in socially-suboptimal results.

I use the term “precedent” very broadly here. Legal doctrine may expand or limit the role of precedent in various contexts. However, as Frederick Schauer points out in his seminal article, Precedent:

Appeals to precedent do not reside exclusively in courts of law. Forms of argument that may be concentrated in the legal system are rarely isolated there, and the argument from precedent is a prime example of the nonexclusivity of what used to be called “legal reasoning.” Think of the child who insists that he should not have to wear short pants to school because his older brother was allowed to wear long pants when he was seven. Or think of the bureaucrat who responds to the supplicant for special consideration by saying that “we’ve never done it that way before.” In countless instances, out of law as well as in, the fact that something was done before provides, by itself, a reason for doing it that way again.

Reliance on precedent is part of life in general. Even though most of my examples are from court decisions, I use this broad conception of precedent in this Article—the form of reasoning that we humans use on a regular basis and one that affects almost every mode of legal analysis. This does not mean that reliance on precedent will always produce bad results. It does mean that we should be skeptical of legal rules that become entrenched merely by virtue of their longevity. As Oliver Wendell Holmes, Jr. wrote in The Path of the Law:

It is revolting to have no better reason for a rule of law than that it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

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6 See, e.g., infra notes 29-31 and accompanying text.
7 Frederick Schauer, Precedent, 39 STAN. L. REV. 571, 572 (1987) [hereinafter Schauer, Precedent]. Of course, I do not want to overplay this point. Schauer himself acknowledges that reasoning from precedent is certainly concentrated, and more important, in law than elsewhere. Id.
8 Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 469 (1897).
A century earlier, Thomas Jefferson espoused a similar view. Requiring one generation to live under a Constitution set out by its predecessor, he wrote, was like “requir[ing] a man to still wear the coat which fitted him when a boy.” To right this perceived wrong, he believed that the Constitution should contain a provision “for its revision at stated periods.” Jefferson suggested that a mechanism for “doing this every nineteen or twenty years, should be provided by the Constitution; so that it may be handed on, with periodical repairs, from generation to generation.”

In this sense, Jefferson’s ideas were anti-Burkean. Edmund Burke, the father of modern conservatism, implored men to trade on the “general bank and capital of nations, and of ages,” and to distrust their own “private stock of reason.” Jefferson disagreed: “Each generation is as independent as the one preceding, as that was of all which had gone before. It has then, like them, a right to choose for itself the form of government it believes most promotive of its own happiness . . . .”

Yet the common law system does not allow each court, or even each generation, to “choose for itself” that which “it believes most promotive of its own happiness,” making it more Burkean than Jeffersonian. In the American system, if an issue under consideration has been directly decided by the Supreme Court, lower courts are bound to reach the same result, “unless and until [the Supreme] Court reinterpret[s] the binding precedent.” A lower court cannot disregard the rule merely because it thinks an alternative would be “most promotive of [the current generation’s] happiness.” It cannot even disregard the legal rule if “the grounds upon which it was laid down have vanished long since.” As the Supreme Court has explained, “If a precedent of [the Supreme] Court has direct application in a

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9 Letter from Thomas Jefferson to Samuel Kercheval (June 12, 1816), in 15 THE WRITINGS OF THOMAS JEFFERSON 32, 42 (Andrew A. Lipscomb & Albert E. Bergh eds., 1904).
10 Id.
11 Id. at 41. Jefferson did not arrive at the time frame by accident. The mortality tables of his day suggested that the majority of adults living in a given generation would be dead within nineteen years. Id. This gives rise to the shorthand formulation, that Jefferson believed that the Constitution should be rewritten every generation.
13 Jefferson, supra note 9, at 42.
15 Holmes, supra note 8, at 469.
case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." As a result, "[j]udges are . . . obliged to answer the same question in the same way as others have answered it earlier, even if they would prefer to answer it differently." 17

And so Jefferson and Holmes have not been heeded. Despite their protestations, we are old men wearing boys' coats, abiding rules laid down in the time of Henry IV. 18

However, there is more to this story. The provocative title notwithstanding, the thesis of this Article is not (only) that stare decisis is cognitive error. I want to draw further conclusions about the implications of cognitive bias for the common law system. Over the years, evidence from social psychology has made increasingly clear that humans' actions do not conform to the "rational actor model," as had been supposed, implicitly or explicitly, by economic and legal theory for decades. Evidence in the behavioral literature suggests that we humans tend to overvalue existing, historical, and traditional arrangements. Our cognitive biases are correlated, and they all suggest an undue reliance on the past. This ought to be of concern to lawyers, because the cornerstone of our legal system is reliance on prior decisions.

There are three possibilities: First, our common law system, and stare decisis, might be nothing more than reflections of a constellation of correlated cognitive biases. If this is true, then we are substantially worse off for relying on precedent, in all cases and at all levels, than we would be in a system where each case was approached with a blank slate. Second, in the weaker version of the argument, reliance on

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17 Frederick Schauer, Why Precedent in Law (and Elsewhere) is Not Totally (or Even Substantially) About Analogy, 3 PERSP. ON PSYCHOL. SCI. 454, 454-60 (2008) [hereinafter Schauer, Analogy].
18 This may actually understate the problem somewhat. King Henry IV ruled from 1589 to 1610. See John P. McKay et al., 2 A HISTORY OF WORLD SOCIETIES, 466 (8th ed. 2008). Meanwhile, the Rule in Shelley's Case, (1581) 1 Co. Rep. 93b (K.B.), actually predates the time of Henry IV. And there are several United States jurisdictions that still adhere to the rule, at least in part. See Jesse Dukeminier & James E. Krier, PROPERTY 298-99 (5th ed. 2002) (describing the rule); id. at 300 (noting that the rule still applies in Arkansas and to pre-abolition wills in jurisdictions that have abolished the rule non-retroactively, including Ohio, Illinois, and North Carolina).
precedent might generally be desirable. However, in close cases, judges should not rely on precedent, absent special justification, because they might be relying on precedent as a heuristic—a cognitive shortcut—and not because it yields the desirable result. Third and last, in the weakest version of the story, the fact that humans (and courts) are susceptible to these biases, while perhaps noteworthy, should not lead to any doctrinal change. In this weakest version, the argument in this Article would likely have little role to play in the context of “vertical stare decisis,” but some role in the context of “horizontal stare decisis.”

This is not the first article to explore the implications of behavioral phenomena on the law. Nonetheless, it fills a gap in the existing literature in at least three ways. First, it builds on the extensive literature that has explained, in general terms, how insights from social psychology can and should change our understanding of legal theory. Second, it continues the tradition of authors like Cass Sunstein (on information cascades), Lawrence Lessig (on social norms), and Adrian

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19 Vertical stare decisis refers to the obligation of a lower court to follow the binding precedent set by a higher court in its jurisdiction. Horizontal stare decisis refers to the presumption that a court will decide current matters in line with the earlier decisions of the same court. See, e.g., Jonathan Remy Nash & Rafael I. Pardo, An Empirical Investigation into Appellate Structure and the Perceived Quality of Appellate Review, 61 VAND. L. REV. 1745, 1750-51 (2008) (describing the two kinds of stare decisis).

20 Jon Hanson and his co-authors have been most prolific in this regard. The tandem articles The Situation and The Situational Character were groundbreaking articles that displaced the rational actor model with the “situational” model, informed by insights from social psychology. See generally Jon Hanson & David Yosifon, The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture, 152 U. PA. L. REV. 129 (2003) [hereinafter Hanson & Yosifon, The Situation]; Jon Hanson & David Yosifon, The Situational Character: A Critical Realist Perspective on the Human Animal, 93 GEO. L.J. 1 (2004) [hereinafter Hanson & Yosifon, The Situational Character]. Hanson’s more recent three-part project explains how situational insights explain recent trends in the development of legal doctrine and legal theory. See generally Adam Benforado & Jon Hanson, The Great Attributional Divide: How Divergent Views of Human Behavior are Shaping Legal Policy, 57 EMORY L.J. 311 (2008); Adam Benforado & Jon Hanson, Naive Cynicism: Maintaining False Perceptions in Policy Debates, 57 EMORY L.J. 499 (2008); Adam Benforado & Jon Hanson, Legal Academic Backlash: The Response of Legal Theorists to Situationist Insights, 57 EMORY L.J. 1087 (2008).


Vermeule (on group decision-making), who explore the implications of specific psychological findings on the law. Third, the Article expands on works of authors who have focused on discrete psychological phenomena and written about them in the context of specific legal doctrines: the stickiness of default rules in contract law; the endowment effect with regard to injunctions; reimagining tort law or corporate law in light of social psychology; and so on.

The literature has thus far focused on broad questions of legal theory (by authors like Hanson) or on specific phenomena and doctrines (by Sunstein, Lessig, Vermeule, and others). This Article, focusing on the process of legal reasoning, is situated at the niche between broader questions of legal theory and more specific doctrinal questions.

This Article has three main parts. In Part II, I survey arguments for stare decisis. These arguments sound one (or more) of three themes: stare decisis (1) is more likely to lead to correct results; (2) fosters stability, predictability, and efficiency; (3) enhances the legitimacy of the courts.

In Part III, I catalogue various psychological phenomena that undercut arguments for stare decisis: we humans have a tendency to prefer the status quo (status quo bias); to overvalue existing entitlements (endowment effect); to make decisions based on others’ choices (information cascades); and more. In addition, we are motivated to seek reasons for our choices that support existing legal, political, and social systems (system justification theory); to create coherent patterns from past occurrences (motive to cohere); and to develop simple explanations for observed phenomena (motive to simplify). Taken together, these phenomena cast significant doubt on arguments for stare decisis.

In Part IV, the heart of the Article, I describe three case studies that support my hypothesis. First, I make a series of

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predictions regarding when a court’s decision is more likely to reflect heuristic judgments rather than cogent reasoning. I examine court cases analyzing whether there is an implied private right of action under section 304 of the Sarbanes-Oxley Act, and conclude that the evolution of this legal rule over the past several years strongly suggests that the decisions reflect cognitive bias. In the second case study, I summarize Anuj Desai’s recent articles regarding the Supreme Court’s jurisprudence on certain First and Fourth Amendment doctrines to argue that this line of cases reflects the Supreme Court’s reliance on precedent as a heuristic. Third, I find evidence of cognitive bias in the recent (and still-unfolding) series of developments with regard to the debate over the definition of torture and the treatment of detainees at Guantanamo Bay, Cuba. The issue of torture, in this context, arose against the background of the Global War on Terror. The war has led the American legal system into uncharted territory. In this situation, if anywhere, one might expect courts and policymakers to approach the questions presented with a clean slate. I will attempt to show that their unwillingness (or inability) to do so suggests a reliance on precedent not for its informational value, but because of decision-makers’ attempt to seek out patterns and coherent doctrinal stories.

With these lessons in mind, Part V lays out three possible versions of my argument, which I alluded to above: that the practice of stare decisis is always unreliable; that stare decisis should be abandoned in close cases only; or that the Article’s insights should result in no doctrinal changes. I leave it to the reader to decide which explication of the theory is most persuasive.

II. ARGUMENTS FOR STARE DECISIS

We are afraid to put men to live and trade each on his own private stock of reason, because we suspect that this stock in each man is small, and that the individuals would do better to avail themselves of the general bank and capital of nations, and of ages.

—Edmund Burke

In general, this Article takes aim at the practice of stare decisis and argues that, at least in certain situations and within

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28 BURKE, supra note 12, at 183.
certain constraints, stare decisis may be unreliable. It is not my intention here to describe all of the arguments for stare decisis. Indeed, the nature and doctrinal scope of stare decisis vary by context: constitutional cases versus non-constitutional cases;\(^\text{29}\) “pure” common-law cases, like contracts or torts, versus statutory cases;\(^\text{30}\) in specific states, federal courts, or international courts;\(^\text{31}\) and so on. These fine distinctions have practical and theoretical relevance in context. However, in this Article, I paint with a broad brush. I rely on the more general conception of stare decisis: “[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.”\(^\text{32}\) Stare decisis may have a horizontal component (where a court follows its own earlier-decided cases) and a vertical component (where a lower court follows a higher court’s earlier decided cases).\(^\text{33}\) I also use the terms “stare decisis” and “precedent” interchangeably, although

\(^{29}\) See, e.g., Thomas E. Lee, Stare Decisis in Historical Perspective: From the Founding Era to the Rehnquist Court, 52 VAND. L. REV. 647, 703-04 (1999) (“Amidst all the contradictions and retractions in the modern Court’s doctrine of precedent, one point has achieved an unusual degree of consensus: that stare decisis has ‘great weight . . . in the area of statutory construction’ but ‘is at its weakest’ in constitutional cases.” (quoting Neal v. United States, 516 U.S. 284, 295 (1996); Agostini v. Felton, 521 U.S. 203, 235-38 (1997))); cf. Lee J. Strang & Bryce G. Poole, The Historical (In)accuracy of the Brandeis Dichotomy: An Assessment of the Two-Tiered Standard of Stare Decisis for Supreme Court Precedents, 86 N.C. L. REV. 969 (2008) (criticizing the dichotomy described above). Strang and Poole cite opinions by a variety of justices to demonstrate that this dichotomy has purchase on the Court along the political spectrum. See id. at 971-72 (citing Chief Justice Rehnquist, Justice Scalia, Justice O’Connor, and Justice Breyer).


\(^{32}\) BLACK’S LAW DICTIONARY 1537 (9th ed. 2009).

\(^{33}\) See, e.g.; Nash & Pardo, supra note 19, at 1759-51.
there is a slight difference between the two terms.\textsuperscript{34} I use them interchangeably because “[w]hat I say here applies to both kinds of precedent.”\textsuperscript{35} The argument in this Article may have more or less relevance in a particular doctrinal context, as the scope and role of precedent varies, but the basic point is the same.

Nonetheless, regardless of the context, stare decisis is defended for one or more of three primary reasons. First, stare decisis is defended because it is more likely to lead to correct results. This line of argument has its roots in Edmund Burke and other Burkean scholars, who argue that the reasoning ability of any given individual is small and that he would do better to rely on the received wisdom of his forebears. The Condorcet Jury Theorem is a different, but related, version of this argument.\textsuperscript{36} The Theorem argues that under certain constraints, as the number of decision-makers increases, the probability of reaching the correct result approaches one.\textsuperscript{37} Therefore, individual decision-making power is low; answers by large groups, over time, are more likely to be correct.

Second, stare decisis is defended on legal positivist grounds. These arguments generally bracket the question of whether the received rule is correct or not. Instead, they contend that reliance on established legal doctrines makes the law more stable over time; more predictable so that parties can arrange their matters in accordance with the law; and more efficient and therefore welfare-enhancing. In this Article, I use the shorthand “stability, predictability, and efficiency” to refer to these related arguments in support of stare decisis.

Finally, stare decisis is defended on the grounds that it preserves the legitimacy of the judiciary. In \textit{Planned Parenthood v. Casey},\textsuperscript{38} the plurality reasoned that it was obligated to uphold the “essential holding” of \textit{Roe v. Wade}, in

\textsuperscript{34} See Schauer, \textit{Analogy}, supra note 17, at 6 n.2 (“Technically, the obligation of a court to follow previous decisions of the same court is referred to as \textit{stare decisis} (‘stand by what has been decided’), and the more encompassing term \textit{precedent} is used to refer both to \textit{stare decisis} and the obligation of a lower court to follow decisions of a higher one.”).

\textsuperscript{35} Id.


\textsuperscript{38} 505 U.S. 833 (1992).
part to preserve “institutional integrity.” The plurality noted, among other things, that “the Court’s legitimacy depends on making legally principled decisions.” If courts’ rulings were subject to the whims of the particular judge, then the public would lose faith in the judiciary.

A. Burkean Traditionalism

In its most basic form, stare decisis—“[t]he doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation”—acts as a check on radical change. If a court at time $t+1$ is obligated to follow the decision of the court at time $t$, then it is less likely to be able to propound its own view of the case. Stare decisis acts as a limit on the ability of a given court to rely on its “private stock of reason.” In this sense, stare decisis has Burkean elements to it, undergirded by a sense that prior decisions are more likely to be correct than newer decisions.

In Reflections on the Revolution in France, Burke explained his disagreement with the French Revolution: though the movement’s values were ostensibly desirable, it was essentially a quick attempt to change the political structure of the French government. Rather than sudden change, Burke favored the wisdom found in tradition and noted the importance of connecting the current political system to the past:

By this unprincipled facility of changing the state as often, and as much, and in as many ways as there are floating fancies or fashions, the whole chain and continuity of the commonwealth would be broken. No one generation could link with the other. Men would become little better than the flies of a summer.

Burke explains that by abandoning traditions, people actually limit their own capabilities since they falsely believe they possess enough knowledge to create new political structures. Instead of working with the structures of the past to create a more stable government, they reduce themselves to “flies of a summer” with fleeting notions of how government ought to function.

39 Id. at 845-46.
40 Id. at 866.
41 BLACK’S LAW DICTIONARY, supra note 32, at 1537.
42 BURKE, supra note 12, at 91-92.
43 Id.
Although Burke was not opposed to generating new ideas in general, he was opposed to their rapid implementation since he believed such an act was an insult to past generations of thinkers, as well as an abandonment of their legacy. The present generation, according to Burke, were simply “temporary-possessors” of their laws and constitutional heritage. Therefore, “they should not think it amongst their right to cut off the entail, or commit waste on the inheritance, by destroying at their pleasure the whole original fabric of their society.” If they did, they would not only “leave . . . a ruin” to those who came after them but also “teach[] these successors as little to respect the[ new institutions] as they had themselves respected the institutions of their forefathers.” The past ought to be bellowed not merely because it was probably correct, but also because failure to do so demonstrated a lack of respect for one’s forebears.

Russell Kirk reflects on Burke’s desire to retain the wisdom of our predecessors, explaining that for Burke, “In the government of the nation, the people participated through their representatives—not delegates, but representatives, elected from the ancient corporate bodies of the nation, rather than from an amorphous mass of subjects.” In other words, “ancient corporate bodies” still play a role in the present-day political system since their contributions make up essential elements of our current system of law. A rapid abandonment of such contributions would result in unforeseen consequences.

This kind of Burkean thinking underlies (implicitly if not explicitly) the common law system, which relies on case law and precedent to help determine the outcome of current cases: “A constitutional order with a strong dose of common-law judicial definition and a proclaimed fidelity to precedent pushes in a Burkean direction.” This theory of constitutional interpretation, implicit in the common law, “found its most famous expression in Burke’s great work.” Rather than

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44 Id. at 91.
45 Id.
46 Id.
48 Id.
determine how best to promote its own happiness, a given
generation must be humble and respect the limits of
rationality. Although “judgments about morality, fairness, and
justice” are permissible, they are only permissible “within the
narrow confines left open by tradition.”

Strauss, in turn, cites Calabresi, who writes that “in our
constitutional culture there is actually a well-established
Burkean practice and tradition of venerating the text and first
principles of the Constitution and of appealing to it to trump
both contrary case law and contrary practices and traditions.”

Similarly—and still in the Burkean vein—defenders of
stare decisis argue that overruling past decisions, even if they
currently seem incorrect in the eyes of the judges, may prove a
worse option, given that overturning precedent requires a sort
of epistemological arrogance on the part of current judges.
Nelson explains that “this was particularly true when a long
line of decisions had all reached the same conclusion. If a series
of judges had all deemed something to be a ‘correct’ statement
of the unwritten law, a later judge who doubted the statement
ought to be modest enough to question his own position.”

Thus, both as a form of respect for tradition that Burke
stressed, as well as for the actual information contained in
precedent, prior decisions ought to be followed.

51 Id. Some contemporary authors, such as David Brooks, have written about
the limits of human rationality. See, e.g., David Brooks, The Social Animal, N.Y. Times,
Sept. 12, 2008, at A23. But Brooks and others in the Burkean vein take this in a
different direction than I do. Brooks argues that, because humans’ rationality is
limited, we should be skeptical of programs that seek to impose broad-based change:
the agenda of those who seek reform, he writes, are based on purportedly optimal,
rational models; because humans are not perfectly rational, the reform is likely to fall
short of its stated goals. See, e.g., David Brooks, The Big Test, N.Y. Times, Feb. 24,
2009, at A25. Thus, Brooks relies on social psychology to argue in favor of Burkean
traditionalism. See id. (acknowledging that “Burke has a point” and explaining that
broad-scale agendas of change “set off my Burkean alarm bells”). Conversely, (one piece
of) my argument is that Burkeanism itself could be seen as reflection of the status quo
bias, endowment effect, and so forth. Brooks cites deviations from the rational actor
model as a reason to be wary of large-scale efforts to address social problems. My
argument is the opposite: we should be willing to entertain large-scale change (such as
reimagining the role of precedent in our legal system)—but we should do so in a way
that acknowledges how people really act, not an idealized vision of how they might
act.

52 Strauss, supra note 50, at 973.

53 Steven G. Calabresi, The Tradition of the Written Constitution: Text,
Precedent, and Burke, 57 Ala. L. Rev. 635, 637 (2006).

54 See Caleb Nelson, Stare Decisis and Demonstrably Erroneous Precedent, 87

55 Id.
B. Stability, Predictability, Efficiency

The Burkean position, that precedent should be followed because it was likely to be correct, undergirded the view, dominant in the nineteenth century, that the common law is the repository of the collected rationality of the Anglo-American people. Edward Rubin characterizes this as “Langdell’s mythology,” but one that has persisted for quite some time. However, as Rubin points out, for over a century, it had been clear that the common law was not a “natural” institution that reflected the right answers to all legal questions. Instead, it arose out of an effort by King Henry II “to suppress dissension by displacing local law in England with a system of royal justice that would be common to the entire realm.” Under this conception, reliance on precedent is desirable for instrumental reasons: it makes the law uniform, predictable, and stable.

In a civil law system, courts are generally not bound by prior decisions; they are always free to change course. In the common law, however, stare decisis binds future courts to reach the same conclusion as prior courts, furthering the predictability of law. Maltz gives a sharp example of the role of stare decisis in fostering predictability:

As an illustration of the point, consider the action of the Michigan Supreme Court in Parker v. Port Huron Hospital. In Parker the court abrogated the doctrine of charitable immunity, which had prevailed in the state since the decision in Downes v. Harper Hospital. Challenging the decision to overrule Downes, one might well

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57 Id. at 623-26.
58 Id. at 616-31.
59 Id. at 627.
61 Earl Maltz, The Nature of Precedent, 66 N.C. L. REV. 367, 368-69 (1988). I should note that my argument has some application in civil law systems as well. The doctrine of jurisprudence constante, under which a particular rule of law is to be given weight if many courts have reached that same decision, is the civil law analogue to the common law’s stare decisis. One distinction between the doctrines is that jurisprudence constante requires a large number of courts to have reached the same conclusion, while a single case can have precedential effect in a common law system. See, e.g., Willis-Knighton Med. Ctr. v. Caddo-Shreveport Sales & Use Tax Comm’n., 903 So.2d 1071, 1088 n.17 (La. 2005). The concerns I highlight below, such as cascades, status quo bias, and so on, apply even in the civil law context. The problem may be mitigated because jurisprudence constante has persuasive, rather than binding, effect, see, e.g., Doerr v. Mobil Oil Corp., 774 So. 2d 119, 128 (La. 2000), but it would be present nonetheless.
conclude that charitable institutions planned their activities and budgets with the assumption that they would be immune from tort liability. Based on the same assumptions, these institutions may have failed to obtain liability insurance. Thus, the argument would conclude, **Parker** was wrongly decided because it defeated the justified expectations of the institutions relying on the **Downes** rule.\(^{62}\)

By this argument, stare decisis enables individuals to predict consequences and act accordingly. This also prompts stability in the law, since judges cannot make arbitrary decisions. This could be particularly true in property law: “if titles had passed in reliance on [prior rules] or if people had otherwise conducted transactions in accordance with them—the resulting reliance interests could provide a reason to adhere to decisions even if they were now deemed erroneous.”\(^{63}\)

In such cases, maintaining a commitment to past decisions in order to ensure and protect reliance interests remains an important feature of the argument in favor of the advantages of stare decisis, even against critics’ claims that an “important value is getting the right answer to critical questions of constitutional meaning.”\(^{64}\) The Supreme Court has endorsed such a view, commenting that “[c]onsiderations in favor of **stare decisis** are at their acme in cases involving property and contract rights, where reliance interests are involved.”\(^{65}\)

The instrumentalist view finds perhaps its most famous expression in the words of Justice Brandeis: “**Stare decisis** is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than that it be settled right.”\(^{66}\) Stare decisis prevents the disruption that would occur if judges were constantly seeking the “correct” rule.

Relying on precedent also helps ensure efficiency in the common law system. Cardozo explains that by relying on precedent, current judges expedite the decision-making process. Through stare decisis, “[a] stock of judicial conceptions and formulas is developed, and we take them, so to speak,

\(^{62}\) Id. (citations omitted). Maltz goes on to note, however, that the new rule was made prospective in application, so charities that had relied on the old rule would not be affected. Id. at 369.

\(^{63}\) Nelson, *supra* note 54, at 20.


Thus, judges can draw on this bank, avoid having to rethink each legal question, and consider more cases than would be otherwise possible.\(^{67}\) “[T]he labor of judges would be increased almost to the breaking point if every past decision could be reopened in every case, and one could not lay one’s own course of bricks on the secure foundation of the courses laid by others who had gone before him.”\(^{68}\) This argument has found purchase even at the Supreme Court.\(^{69}\)

Some critics argue that relying on precedent without recognizing that past decisions might have been incorrect is misguided. However, supporters of stare decisis point out that the benefits of maintaining past decisions far outweigh the consequences. In fact, while Nelson recognizes there might be instances where past precedent is undoubtedly incorrect, falling beyond even the wide range of possible outcomes associated with each case, he suggests that these instances might be the exception and in general, upholding stare decisis proves more valuable than not.\(^{70}\)

There is another component to the argument that stare decisis promotes efficiency. Some scholars argue, essentially following Posner, that the common law system is and has been geared toward economic efficiency. In their classic book on tort law, Landes and Posner write that “the common law of torts is best explained as if the judges who created the law . . . were trying to promote efficient resource allocation.”\(^{71}\) Posner does not cabin this theory to tort law; he believes that the common law is best explained as a system of wealth-maximizing rules.\(^{72}\) “The gist of that contention is that in a common law system there are incentives for repeat players to litigate inefficient rules but not to litigate efficient rules; [however judges decide a case,] this mechanism will inevitably lead to an increase in the stock of efficient legal rules.”\(^{73}\)

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\(^{67}\) Benjamin N. Cardozo, The Nature of the Judicial Process 47-48 (1921).


\(^{69}\) Cardozo, supra note 67, at 149.


\(^{71}\) Id.


theory has its roots in Lord Mansfield’s proclamation that the
common law “works itself pure,”75 the hypothesis that bad rules
will get weeded out over time.
Thus, whether the focus is on the time that judges save
or the maximization of social wealth, scholars for centuries
have argued that reliance on precedent furthers efficiency.76

C. Judicial Legitimacy

Courts follow precedent because it is correct or in the
interest of stability. But they also do so for a third reason:
because it furthers judicial legitimacy: “One of the most widely
shared values in the American political system is that
principles governing society should be ‘rules of law and not
merely the opinions of a small group of men who temporarily
occupy high office.’ The doctrine of stare decisis reinforces this
value . . . . ”77 Maltz points out that stare decisis (1) simply
makes judicial decisions look better, because the instant
decision is based on pre-existing law and not impulsive
preferences; and (2) implies a judicial role of “law-finding” and
not “law-making,” a value that does in fact limit judicial
discretion.78

Along these lines, Nelson notes, “According to many
commentators, frequent overruling jeopardizes public
acceptance of the courts’ decisions.”79 The joint opinion of
Justices Souter, Kennedy, and O’Connor in Planned
Parenthood v. Casey states, “[t]he Court’s power lies . . . in its
legitimacy.”80 Nelson explains that for these Justices it was
important to adhere to the core holding of Roe v. Wade so that
the country would not lose “confidence in the Judiciary.”81 In
this respect, stare decisis helps maintain the legitimacy of the
court. In the absence of stare decisis, the public might lose faith

75 Omychund v. Barker, (1744) 26 Eng. Rep. 15, 23 (Ch.).
76 Most behavioral critiques of the common law tend to focus on this
efficiency argument. For example, Hanson and Hart have argued persuasively that the
famous “BPL” formula developed by Judge Learned Hand, often cited as an example of
the efficiency of the common law of negligence, does not in fact yield the efficient
outcome in that case. See Jon D. Hanson and Melissa Hart, Law and Economics, in A
COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 311, 311-31 (Dennis Patterson
77 Maltz, supra note 61, at 371 (citation omitted).
78 Id. at 371-72.
79 Nelson, supra note 54, at 68.
81 Nelson, supra note 54, at 68 (citing Casey, 505 U.S. at 865, 867).
in the courts and therefore doubt the strength of the rule of law.

D. Conclusion

In short, stare decisis is defended for any or all of the preceding reasons. In the next Part, I catalogue common cognitive and psychological phenomena that undercut these arguments for stare decisis.

III. COGNITIVE BIASES THAT UNDERCUT ARGUMENTS FOR STARE DECISIS

If precedent represents a weak or impoverished learning device, then a common law system of adjudication seems unlikely to produce reliable results.82

As described in the previous Part, there are many reasons a system of stare decisis is desirable. These goals might be worth pursuing and might even be correct on their own terms. Nevertheless, the behavioral literature of recent years gives us serious reason to question the epistemic basis of those arguments. In turn, we should be skeptical of using stare decisis as a decisional guidepost. In this Part, I survey that behavioral literature.

Three preliminary points are in order: First, the following discussion is not meant to be exhaustive. There may be other behavioral phenomena that support my thesis; I only discuss those that are most relevant to my argument and relatively well known. Second, I do not discuss the phenomena in much depth. I summarize the key findings of the literature to the extent necessary to develop the doctrinal application of the literature. The interested reader can find citations to the underlying papers, studies, and experiments in the footnotes. Finally, much of the discussion tracks that set forth by Hanson and Yosifon in The Situational Character, which provides some

82 Eric Talley, Precedential Cascades: A Critical Appraisal, 73 S. CAL. L. REV. 87, 91 (1999). Talley ultimately concludes that precedent cannot be fully explained by cascades. Id. at 92. But crucially, he reaches this conclusion because his analysis focuses exclusively on cascades and not other cognitive biases. See id. Unlike Talley's paper, my analysis surveys a variety of cognitive and behavioral phenomena. The position I advance is not that precedent represents an information cascade, but that a broad range of phenomena (including cascades) suggest that precedent may not be advancing the goals we think it advances for the reasons we think it is advancing them. I respond more fully to Talley near the end of this Article. See infra notes 376-382 and accompanying text.
more detail on the phenomena I discuss as well as a broader survey of such phenomena.\textsuperscript{83}

At the end of this Part, I make a bold claim: the behavioral evidence gives us very strong reason to believe that the common law system (1) reflects cognitive biases; (2) magnifies cognitive biases; or (3) does both. I use “common law” loosely here. The critique applies to typical common law subjects, like contracts or torts, but also to statutory and even constitutional interpretation. It applies to federal courts and state courts, trial courts and appellate courts. It applies to the Supreme Court of the United States and it applies to district courts. It applies to instances where courts rely on prior court decisions as well as instances where they rely on earlier statutes or other sources. It even applies to legal policymaking in general, that is, not just to court decisions. In short, the critique applies very broadly.

In a slightly different context, Adrian Vermeule writes, “The key point is not that judges are likely to get things wrong; it is that when they do get things wrong, they are likely to err in systematic rather than random ways.”\textsuperscript{84} Work from several academic disciplines shows that we humans possess a series of correlated biases that make us more likely to favor existing conditions, overestimate the costs of change, and underestimate the benefits of new social arrangements. If these phenomena motivate us, consciously or not, to overvalue what we already possess, then a legal system designed to rely almost exclusively on past decisions probably places too much emphasis on the past. The presence of correlated biases should be of great concern to legal scholars and policymakers.

\textit{A. Choice Biases}

Hanson and Yosifon describe choice biases as those which “most clearly influence (and challenge economists’ typical assumptions regarding) people’s choices.”\textsuperscript{85} Recall that, according to the dominant view, stare decisis is defended because it leads to correct adjudication, stability, efficiency, and legitimacy. If lawyers’ and judges’ choices are shaped by these heuristics and biases, then decisions that we think foster these desirable goals may instead be reflecting the fact that we

\begin{itemize}
\item \textsuperscript{83} Hanson & Yosifon, \textit{The Situational Character}, supra note 20.
\item \textsuperscript{84} Vermeule, \textit{Common Law Constitutionalism}, supra note 23, at 1501.
\item \textsuperscript{85} Hanson & Yosifon, \textit{The Situational Character}, supra note 20, at 39.
\end{itemize}
are “cognitive misers” trying to avoid “the intolerable labor of thought.”

1. Cascades

Stare decisis typically requires subsequent courts to follow the decisions of prior courts. The subsequent court, in its written decision, typically explains why it was correct that it follow the prior decision. But what if the later court’s reasoning was subconsciously skewed? What if the later court had reason to know the prior decision was probably inapplicable—but followed it anyway? As described below, the phenomenon known as “cascades” suggests that might be exactly what happens: subsequent decision-makers will follow a decision that was made at some earlier time, merely because it was popular—not because doing so is “correct” or “preferable” in any objective sense.

Scholars generally distinguish between three different types of cascades: information cascades, reputational cascades, and availability cascades. As Kuran and Sunstein write, an informational cascade “occurs when people with incomplete personal information on a particular matter base their own beliefs on the apparent beliefs of others.” A reputational cascade is a similar case, in which “people take to speaking and acting as if they share, or at least do not reject, what they view as the dominant belief.” The combination of the two—when informational and reputational cascades “exhibit interactions and even feed on one another”—is known as an availability cascade.

The phenomenon of cascades—particularly information cascades—has relevance in law.

A strictly informational cascade occurs when people start attaching credibility to a proposition P (e.g., a certain abandoned waste dump is dangerous) merely because other people seem to accept P. To recast an earlier illustration, suppose that Ames signals that he believes P. Barr, who would otherwise have major reservations,
believes P because Ames appears to do so. Cotton, who would have
dismissed the proposition as silly, begins taking it seriously upon
discovering that not just Ames but both he and Barr are believers.
Noticing that Ames, Barr, and Cotton all seem alarmed, Douglas
then accepts P without further thought. When Entin learns that all
of his friends believe P, he joins the pack of believers on the grounds
that their shared understanding cannot be wrong.92

The problem, of course, is that everyone believed P merely
because Ames did, even if, in some cases, they had information
that would have led them to conclude otherwise!

In a recent study, Salganik and his co-authors describe
the results of a music downloads study.93 Participants in the
study had the opportunity to download one of a range of songs.
However, the authors introduced an element of social influence:
participants could see what songs were being downloaded by
others in a sort of “most popular songs” list. (The list, of course,
could be manipulated.) In general, the best songs never did
very badly, and the worst songs did not do particularly well.
However, “almost any other result is possible.”94 When songs
were on the list of popular songs, participants downloaded
those songs. In other words, the mere signal of a song’s
popularity increased the frequency of downloads—as
participants received a “relatively weak” information signal.95
The increased downloads created a sort of feedback loop, and
those songs moved up on the list of popular songs. In making
these seemingly independent decisions, participants were
susceptible to significant social influence and demonstrated an
information cascade.

It is important to note that information cascades are not
necessarily irrational. As Vermeule writes, an information
cascade occurs when “individuals rationally allow[ed] the
presumed information of others to swamp their private
judgments.”96 If you have better information than I do, then it is

92 Id. at 721. The authors explain that reputational and availability cascades
involve some element of social pressure. I do not dwell on those here, not because they
are not relevant but, for simplicity’s sake, I assume that judges face no social or
reputational pressures. Of course, this assumption may not be correct—but to the
extent that the assumption does not hold, my argument is even stronger.
93 Matthew J. Salganik et al., Experimental Study of Inequality and
94 Id. at 855.
95 Id. at 854-55.
96 Adrian Vermeule, Many-Minds Arguments in Legal Theory, 1 J. Legal
1087017) [hereinafter Vermeule, Many-Minds] (emphasis added).
quite rational for me to follow your decisions. The problem arises when I assume you have better information and you don’t. As I describe in the next Part, certain phenomena may alert us to the presence of a cascade.

2. Status Quo Bias

Information cascades are an external influence on individuals’ decision-making; the external cues of popular songs influence private choices about what to download. Status quo bias, on the other hand, is an internal influence on choice. It operates regardless of what is happening around us.

Kahneman and his co-authors discuss status quo bias in their article on “anomalies”—psychological phenomena that are difficult to fit into the rational actor model, because “implausible assumptions are necessary to explain it within the paradigm.” Status quo bias is such an anomaly. In one experiment, individuals were asked to choose between several alternatives. In the “neutral” setting, they were simply asked to make a choice. In the “status quo” setting, one was the current arrangement, and they were asked to stick with the status quo option or choose an alternative. “Many different scenarios were investigated, all using the same basic experimental design. . . . The[] results implied that an alternative became significantly more popular when it was designated as the status quo. Also, the advantage of the status quo increases with the number of alternatives.” In another study, consumers were asked to choose among utility providers. Some respondents currently had very reliable utility service. Approximately sixty percent of those respondents expressed a “preference” for high-reliability service. Other respondents currently had unreliable utility service. Approximately sixty percent of those respondents expressed a preference for low-reliability service. Among both groups, only about five percent were willing to switch to the other option. The remarkable point is that even those with unreliable service

98 Id. at 198.
99 See id.
100 Id.
said they preferred it! The devil we know truly is more comforting—even when we know it is suboptimal.

Kay, Jimenez, and Jost explain our preference for the actual and anticipated status quo through the twin examples of sour grapes and sweet lemons. They write that humans have a large capacity for rationalization, even in suboptimal situations. “It has been argued that people possess a ‘psychological immune system’ that allows them to adjust to suboptimal outcomes by enhancing the subjective value of the status quo while devaluing alternatives to it.” 101 The sour grapes/sweet lemons analogy helps explain how humans rationalize situations by bringing “preferences into line with expectations.” 102 In the famous fable, the grapes are initially attractive. However, once the grapes become unattainable, they “become” sour. Of course, the character of the grapes has not changed at all; we merely rationalize the fact that we know we cannot get the grapes by making ourselves believe the grapes are sour. More interesting, however, is the “sweet lemons” phenomenon. In this situation, an initially less favored outcome (the lemon) becomes more favorable as the likelihood of such an outcome becomes greater—the lemons become sweeter if they are the more attainable. 103 (This begins to cross over into system justification theory, which I discuss in Part III.B.1, infra.)

Rationalization of the anticipated status quo demonstrates humans’ strong tendency to adapt to, and “prefer” the status quo. We justify events that are likely to happen, even those that initially seem unfavorable, just as we justify the already existing status quo. In other words, if we already have lemons, we are likely to justify our possession of lemons by believing they are sweet rather than try to get grapes which are more unattainable, and therefore we believe them to be sour. In Kay et al.’s study, survey respondents (prior to the 2000 election) were told that George W. Bush’s election was very likely based on certain polls. In light of this information, Republicans and Democrats increased their favorability rating of Governor Bush. 104 The same result, in the

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102 Id.
103 Id. at 1309-10.
104 See id. at 1305-06.
opposite direction, occurred when respondents were told that polls showed Vice President Gore likely to win.\textsuperscript{105} In short, we “accommodate, internalize, and even rationalize key features” of the status quo.\textsuperscript{106} When given a menu of options, we tend to choose the status quo, and when a given arrangement is about to become the status quo, we are remarkably adept at coming up with reasons why it is sweet and all others are sour.

3. Endowment Effect

One reason we may prefer the status quo is because we over-value it relative to other options. As Russell Korobkin explains, “The much studied ‘endowment effect’ stands for the principle that people tend to value goods more when they own them than when they do not.”\textsuperscript{107} Jones and Brosnan define the endowment effect as “a psychological phenomenon that appears to underlie some seemingly irrational pricing of property and to thereby impede efficient exchange.”\textsuperscript{108} The endowment effect challenges the Coase Theorem, because the party holding a certain entitlement has an above-market willingness to accept price. When the other party is only willing to pay the market price, the entitlement will not change hands.\textsuperscript{109} This has legal implications because the Coase Theorem suggests that, among other things, (when transaction costs are low) parties will bargain around injunctions and other legal entitlements regardless of the initial allocation of those entitlements. However, given the endowment effect, the efficient outcome is not likely to occur.\textsuperscript{110}

In Knetsch’s oft-cited study, one group of students was offered a choice between a coffee mug and a chocolate bar as compensation for participating in the experiment. The second

\textsuperscript{105} See id.
\textsuperscript{107} Korobkin, supra note 25, at 1228.
\textsuperscript{109} Korobkin, supra note 25 at 1231.
group was given a coffee mug initially, and then given the opportunity to trade it for a chocolate bar at the end of the experiment. The third group was given a chocolate bar at the beginning of the experiment, and then at the end was given the opportunity to trade it for a coffee mug. The results of the experiment showed that under the choice condition given to the first group, fifty-six percent of the students selected the mug. However, each of the other two groups exhibited a strong preference for what they already had: ninety percent of those given the mug refused to trade it for a chocolate bar while ninety percent of those given the chocolate bar refused to trade it for the mug. Each group “preferred” its initial endowment, even though, given a choice, preferences were about fifty-fifty.\footnote{111}

It is worth noting that, for purposes of my analysis, it is not especially important \textit{why} the endowment effect, or any of these phenomena, actually occur. Jones and Brosnan attempt to explore this question, and posit that the so-called “irrational” psychological phenomena may include some number “that once (and indeed long) were substantively rational, in the traditional economic sense,”\footnote{112} but no longer are. However, this is not relevant to the first-level analysis. If humans exhibit certain tendencies that make them over-reliant on precedent, loosely defined, that finding has important implications for the law. \textit{Why} the endowment effect occurs is relevant to the second-level analysis, the “So what?” question. If we are concerned about these biases and want to use procedural or other methods to debias lawyers and judges, then it is helpful to know how and why these phenomena occur. However, their origins are not necessarily relevant to my overall argument that these phenomena undercut arguments for stare decisis.

4. Framing Effect

Earlier, I noted that the desirability of a policy option increases if it is described as the status quo. This is a version of the framing effect. Gonzalez et al. explain that

\begin{quote}
the “framing effect” is observed when a decision maker’s risk tolerance (as implied by their choices) is dependent upon how a set of options is described. Specifically, people’s choices when faced with consequentially identical decision problems framed positively (in
\end{quote}
As a result, individuals prefer sure gains to risky gains and prefer risky losses to sure losses.\textsuperscript{114}

Kahneman and Tversky, who identified and named the phenomenon, describe the framing effect as “both pervasive and robust.”\textsuperscript{115} Moreover, it is “as common among sophisticated respondents as among naive ones.”\textsuperscript{116} This point is particularly relevant to the law. One easy way to dismiss the discussion of these phenomena is to posit that they manifest themselves in trivial settings like controlled studies involving chocolate bars. However, on closer inspection, that claim does not hold water. Kahneman and Tversky’s studies show that the framing effect affects sophisticated respondents. Moreover, as discussed above, people demonstrate a strong status quo bias even when they believe their responses will affect policy.\textsuperscript{117} The endowment effect is a barrier to post-judgment bargaining in real-life lawsuits, when individuals presumably have important interests at stake.\textsuperscript{118} Respondents report support for an undesirable status quo even when presented with the important—and divisive—issue of a presidential election. In sum, the facile response, “Sure, but that wouldn’t happen in real life when judges are faced with serious issues,” is not compelling. Indeed, as I show in Part IV.A.2, heuristic judgments are reflected even at the United States Supreme Court.

5. Path Dependence

Path dependence is another example of how individuals demonstrate an undue deference toward existing arrangements. Pierson explains that our current perception of political and economic outcomes is informed by the timing in which the initial political or economic decision was made.

\textsuperscript{113} Cleotilde Gonzalez et al., The Framing Effect and Risky Decisions, 26 J. ECON. PSYCHOL. 1, 2 (2005).
\textsuperscript{114} Id. at 13.
\textsuperscript{116} Id. at 343. The preceding two sentences track Hanson and Yosifon’s description of the framing effect. See Hanson & Yosifon, The Situational Character, supra note 20, at 42-43.
\textsuperscript{117} See supra notes 99-100 and accompanying text.
\textsuperscript{118} Farnsworth, supra note 110, at 413.
Therefore, a seemingly minor decision gains significance as it is propagated over time and more people become accustomed to the consequences of that decision. Liebowitz and Margolis provide an example of path dependency using the concept of videotaping formats, Beta and VHS. They explain that an initial decision by consumers to use VHS, without previous knowledge as to which format provides better quality, might have much greater implications in the future if, based on this arbitrary decision, everyone continues to buy VHS for compatibility purposes.

Liebowitz and Margolis define three different degrees of resulting path dependency. First degree path dependency explains that these initial decisions are made at random and thus efficiency models cannot predict which format will be chosen. With first degree path dependency, there is no inefficient outcome regardless of which option the public chooses, assuming that Beta and VHS provide similar quality. If over time it becomes apparent that Beta is the better option, then second degree path dependency occurs. In this scenario, choosing arbitrarily was rational given the initial conditions of limited knowledge as to which option was better. However, in retrospect (once we know that Beta is superior), the public realizes that the wrong decision was made initially. Third degree path dependency takes this one step further, assuming conditions where Beta was known to be superior from the start. If a small initial majority of consumers were to choose VHS, customers who prefer Beta—but have not yet made a decision—might choose VHS, unaware that others might also prefer Beta. If the present-day benefits of switching from VHS to Beta outweigh the costs, yet consumers remain hesitant to switch because they are unwilling to leave their current system, third degree path dependency occurs again.

Pierson explains that path dependence is significant because individuals become accustomed to current conditions, regardless of why and when they occurred. Thus, costs of switching increase over time, and the originally-arbitrary decision becomes lasting and substantial. Pierson relates this

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121 Liebowitz & Margolis, supra note 120, at 208-09.
122 Pierson, supra note 119, at 252.
concept to increasing returns to scale, stating, “in an increasing returns process, the probability of further steps along the same path increases with each move down the path . . . . To put it a different way, the costs of exit—of switching to some previously plausible alternative—rise.” He then explains that “formal, change-resistant institutions” are especially susceptible to this process, since the cost and ambiguity associated with exit remain high. Pierson concludes that understanding path dependency provides “an important caution against a too easy conclusion of the inevitability, ‘naturalness,’ or functionality of observed outcomes,” cautioning us to consider that current institutions might not have been derived from an understanding of efficient conditions, but instead created based on conditions that are not only ancient but also initially arbitrary. As Mark Roe points out, path dependence means that “survival does not imply present-day superiority to untried alternatives.”

In her article on path dependence and stare decisis, Oona Hathaway distinguishes between increasing returns path dependence, evolutionary path dependence, and sequencing path dependence. The first category has its roots in the economics literature. Once a given decision is made, it is less costly to continue down that same path than to change to a different path. In this context, path dependence arises out of increasing returns. Evolutionary path dependence has its origins in the biological literature, in which the current genetic makeup of a species is constrained by its past evolutionary changes. Sequencing path dependence refers to the process by which the order in which choices are made affects the outcomes of those choices. In other words, if ten people need to make a

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123 Id. at 253.
124 Id.
126 Hathaway, supra note 68, at 605.
127 Id. at 606-07.
128 Id. at 607. The “evolutionary” reference suggests a question that I do not address in this Article: might stare decisis be problematic in certain cases but nonetheless “adaptive” and therefore optimal in the long run? Although this may be the case, I would argue otherwise. My criticism is not of the substantive results produced by a system based on precedent but the reasoning process by which we arrive at those decisions. Changing the time horizon (isolated case studies versus long term) does not change that basic point.
decision seriatim, each person’s individual decision could be affected by where he chooses in the lineup.\textsuperscript{129}

6. Sticky Defaults

Relatedly, individuals are generally hesitant to deviate from current conditions because of the ease with which default rules get entrenched. \textit{On the Stickiness of Default Rules}, by Ben-Shahar and Pottow, explores the factors prompting parties to continue using undesirable (but waivable) default rules in contract law, even when opting out of a legal default rule did not impose high costs or ambiguous outcomes on the parties.\textsuperscript{130} The first reason they explain for this irrational phenomenon is that “in the presence of a familiar and commonly utilized background provision . . . a transactor might fear that proposing an opt-out from the default will dissuade his potential counterparty from entering into the agreement.”\textsuperscript{131} The counterparty may view any opt-out from the default as a “trick,” used to cover up an unknown problem.\textsuperscript{132} Therefore, regardless of the practicality and efficiency of opting out of a default rule, a party might stick with the default rule since it attracts less suspicion and might hinder forming an agreement. This becomes especially apparent in areas where “it is uncommon for other market participants to negotiate a tailored provision, that is, where the background rules and templates are well entrenched and commonly employed.”\textsuperscript{133}

Ben-Shahar and Pottow further explain that the default rules might work in a similar manner to the concepts underlying the endowment effect. If a legal default is viewed as an entitlement, and added value is placed on a legal default because an individual already possesses or understands that default, then he will be less likely to opt out of the default. Based on Korobkin’s experiment investigating the endowment effect, Ben-Shahar and Pottow conclude that the “findings do, indeed, lend support to the conclusion that human beings are

\textsuperscript{129} Id. at 607-08. What Hathaway calls “sequencing path dependence” is similar to what I refer to in Part III.A.1 as an information cascade. See id. at 608 n.20 (describing and then distinguishing the two).

\textsuperscript{130} Ben-Shahar & Pottow, supra note 24, at 651.

\textsuperscript{131} Id. at 652.

\textsuperscript{132} Id.

\textsuperscript{133} Id. at 653.
cognitively disposed to prefer a default legal rule in contractual negotiations, irrespective of the content of that legal rule.\footnote{134}

Also stemming from Korobkin’s experiments on the endowment effect, Ben-Shahar and Pottow find that individuals prefer legal default rules because choosing an opt-out option might leave individuals with a greater feeling of regret.\footnote{135} Korobkin finds that individuals prefer options in which they do not have to take action to change the current situation. Even if individuals are not happy with a current situation, the perception that they will be worse off after changing the situation (whether or not that perception is correct) provides a powerful disincentive to change, since individuals might then regret their action.\footnote{136} In this sense, regret is worse than accepting the current sub-optimal situation. Thus, Ben-Shahar and Pottow conclude “the attractive role of inaction in the service of ‘regret avoidance’ by decisionmakers”\footnote{137} provides a powerful motive to stick with commonly-known default rules.

B. Attitudes and Motives

The rational actor model typically assumes that individuals have certain preferences, they think about those preferences, and then choose a certain course of action by exercising their will.\footnote{138} The choice biases discussed above demonstrate that we do not “think” the way we think we think. The attitudes and motives discussed here demonstrate that we do not “prefer” the way we think we prefer. In other words, our reasoning is, among other things, motivated to justify existing social arrangements, to create coherent narratives for observed phenomena, and to simplify ambiguities. I discuss these in more detail below.

1. System Justification Theory

John Jost and his co-authors have developed the idea of system justification theory to explain why individuals support and “prefer” the existing system, even when doing so appears
to do more harm than good. Jost, Banaji and Nosek define the theory of system justification as “the process by which existing social arrangements are legitimized, even at the expense of [one’s] personal and group interest.” In several of Jost’s articles on the subject, he and his co-authors explain how system justification theory prompts individuals to value the system they currently have, especially when the system appears unlikely to change. System justification theory goes further than this, however, in that it motivates people not only to accept the current system, but to justify it. Jost and Hunyady explain, “System justification theory holds that people are motivated to justify and rationalize the way things are, so that existing social, economic, and political arrangements tend to be perceived as fair and legitimate.” In other words, people not only accept the status quo—they come up with reasons why it is right that the world is as it is.

Jost and his colleagues give possible explanations as to why individuals practice system justification. For example, individuals may fear broad-based social change, preferring systems they know and understand. “For many people, the devil they know seems less threatening and more legitimate than the devil they don’t.” In cases where the system seems unlikely to change, individuals rationalize the system in order to convince themselves the system is fair, increasing “satisfaction with one’s situation.”

While system justification theory may lead individuals to self-report a relatively high level of satisfaction with the system, Jost explains that such reasoning actually hampers systems from evolving in a more fair and inclusive direction. For example, if individuals rationalize the status quo, they are unlikely to change it and may continue to justify an often unfair system without exploring new possibilities. Jost also describes the legal implications of system justification theories. For example, victims of abuse or discrimination might be

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139 John Jost et al., supra note 106, at 883.
140 See, e.g., id. at 887.
143 Jost & Hunyady, supra note 141, at 262.
144 Id.
145 Id. at 261.
unlikely to bring attention to their cause if doing so would threaten the status quo. More generally, Jost explains that the system justification theory “identifies important obstacles to social change in general, as well as to change in law and legal scholarship. Law, lawyers, and legal scholars need to take seriously the research on system justification motives and processes.”

In a recent article, Blasi and Jost point out that the Supreme Court could point to only two instances in which it directly overturned an earlier precedent. They hypothesize that this could be in part because “cognitive dissonance, implicit biases, and system justification motives affect judges, just like the rest of us.” A broader version of this point is precisely the claim I make, and develop, in this Article.

2. Motive to Simplify

The motive to simplify and the motive to cohere provide another set of motivational factors prompting individuals to fall subject to a plethora of cognitive biases. Kunda explains that “we prefer those hypotheses that have greater simplicity, that is, require fewer additional hypotheses or assumptions to

\[146\] Blasi & Jost, supra note 142, at 1120.

\[147\] Id. at 1165. Of course, the Supreme Court has overruled itself on more than these two cases (Brown overruling Plessy and Lawrence overruling Bowers). However, the point remains; the Court is generally loath to overrule prior cases. See, e.g., Indiana v. Edwards, 128 S. Ct. 2379, 2388 (2008) (“Indiana has also asked us to overrule Farretta. We decline to do so.”); Granholm v. Heald, 544 U.S. 460, 488 (2005) (“Recognizing that Bacchus is fatal to their position, the States suggest it should be overruled or limited to its facts. As the foregoing analysis makes clear, we decline their invitation.”); Thornton v. United States, 541 U.S. 615, 624 n.4 (2004) (“Under these circumstances, it would be imprudent to overrule, for all intents and purposes, our established constitutional precedent, . . . and we decline to do so at this time.”). Moreover, the mere fact that no precedent supports a given position is itself a sort of argumentative “trump.” See infra Part IV.A.2.

It should also be noted that the Court only rarely grants certiorari to determine whether a case should be overruled. A simple WestLaw search (cert! /p grant! /50 “should be overruled” “should overrule”) returned only a handful of such instances in the past forty years. See, e.g., Pearson v. Callahan, 128 S. Ct. 1702, 1702-03 (2008) (“In addition to the questions presented by the petition, the parties are directed to brief and argue the following question: ‘Whether the Court’s decision in Saucier v. Katz should be overruled?’” (citation omitted)); Exxon Corp. v. Central Gulf Lines, Inc., 500 U.S. 603, 606 (1991) (“We granted certiorari to resolve a conflict among the Circuits as to the scope of the Minturn decision and to consider whether Minturn should be overruled.”); Payne v. Tennessee, 498 U.S. 1076, 1076 (1991) (“In addition to the questions presented by the petition, the parties are requested to brief and argue whether Booth v. Maryland and South Carolina v. Gathers should be overruled.” (citations omitted)).

\[148\] Blasi & Jost, supra note 142, at 1166.
account for the full range of evidence.”

Hanson and Yosifon further note that we prefer simple social theories and explanations to more complicated versions because our minds “operate under scarce capacity, cognitively, temporally, and conceptually.” This motive to simplify, however, is often at odds with other motivations, such as the motive to be accurate, which requires more complex thought and explanation. This becomes problematic for individuals since “this conflict between the motive for simplicity and the motive for accuracy may spill over and cause discord for our motive of self-affirmation.”

3. Motive to Cohere

The motive to cohere explains why we are not comfortable with conflicting sets of motives, such as the combination of the motive to simplify with the motive to be accurate. “Because we value coherence, the desire to see it in ourselves dovetails with our motive for self-affirmation.” Thagard explains that individuals strive to make sense of themselves and the outside world, and attempt to do so by “fitting something puzzling into a coherent pattern of mental representations that include concepts, beliefs, goals and actions.” He further explains that “coherence can be understood in terms of maximal satisfaction of multiple constraints,” working together to form the most coherent story possible given the information available. Hanson and Yosifon explain that on an individual level, we seek to make our current situation cohere with our personal desires. In order to make our current situation more desirable, we compensate for a situation we dislike by physically gaining something (for example a monetary compensation), or else we alter our beliefs about that situation. Think here of the young associate who hates his BigLaw job but justifies keeping the job on the basis of his large paycheck.

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150 Hanson & Yosifon, The Situational Character, supra note 20, at 106.
151 Id.
152 Id.
153 Id. at 107.
155 Id. at 17.
156 Hanson & Yosifon, The Situational Character, supra note 20, at 108.
157 Id.
On a group level, we seek coherence between our beliefs and the group’s beliefs, but this motive often stems from pluralistic ignorance. For example, in the “Princeton drinking study,” Prentice and Miller found that college student respondents mis-estimated their peers’ attitudes toward alcohol consumption.\(^{158}\) Then, in turn, they overestimated the gap between their peers’ drinking and their own; they assumed their peers were drinking more than they actually were.\(^{159}\) This is problematic when pluralistic ignorance influences behavior, prompting individuals to alter their perceptions (which might initially be correct) to fit what they misperceive are the perceptions of others in order to promote group coherence. Unfortunately, “[t]he problem of pluralistic ignorance and the motive for group coherence distorts many social norms and would seem to have significant implications for policy and law,”\(^{160}\) as many decisions in these areas are made based on inaccurate assumptions.

C. **Stare Decisis is Cognitive Error**

Stare decisis—reasoning from precedent—requires adhering to a prior decision because it is the prior decision, not necessarily because it is correct. Frederick Schauer has explained that reasoning from precedent is commonplace in all forms of argument, not just legal argument.\(^{161}\) When a younger child argues that he should be allowed to do something because his older sister was allowed to do so when she was the same age, the child is arguing based on precedent.\(^{162}\) He is essentially saying, “You should follow the same rule in this case that you followed in the prior case.”\(^{163}\) The youngster expects the prior rule to apply in his case, regardless of whether the rule was correct then or is correct now.

However, taken together, the phenomena outlined above pose serious challenges to this mode of reasoning. First, the way we humans make choices strongly suggests that we are inclined to choose existing arrangements, not because they are

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\(^{159}\) See id.

\(^{160}\) Hanson & Yosifon, *The Situational Character*, supra note 20, at 115.

\(^{161}\) Schauer, *Precedent*, supra note 7, at 572.

\(^{162}\) See id.

\(^{163}\) See id.
preferable but merely because they exist. Second, our brains are hard-wired in such a way that even the act of reasoning—something that is at the heart of every judicial opinion—is skewed toward viewing the existing set of legal rules as just, right, and natural.

In general, we (lawyers, judges, and citizens) are likely to overvalue existing legal entitlements because of the endowment effect. The Coase Theorem, which predicts that individuals will bargain around inefficient injunctions, turns out not to work in practice as it should in theory, in part because parties overvalue the injunction once it is in place.\textsuperscript{164} Similarly, path dependence, the stickiness of default rules, and status quo bias suggest a cognitive predilection in favor of the way things are and have been. Thus, even judges with a good-faith interest in being alert to the possibility of inefficient or otherwise undesirable precedents may fail to see that they are perpetuating, rather than mitigating, the rules’ effects.

This is illustrated by the phenomenon of information cascades. Eric Posner and Cass Sunstein have made a version of my argument in their 2006 article, \textit{The Law of Other States}.\textsuperscript{165} There, Posner and Sunstein develop a framework for analyzing when courts in one jurisdiction ought to treat as persuasive authority a rule laid down in a similar case in a foreign jurisdiction.\textsuperscript{166} They note that the Condorcet Jury Theorem typically suggests that if many other relevant decision-makers have reached a particular result, then this particular decision-maker has reason to believe, with a relatively high probability, that the outcome is the correct one.\textsuperscript{167} This rationale applies to courts’ decisions too; if several courts reach a particular outcome, we might be more confident in the correctness of their result. But this conclusion requires each iterative decision to be independent, a criterion that is violated when cascades are present.

Earlier, I noted that the information cascade phenomenon is not irrational—a given judge, presuming that those who came before him had good information, has a high


\textsuperscript{165} See Posner & Sunstein, supra note 21, at 160-64.

\textsuperscript{166} \textit{Id.} at 171-72.

\textsuperscript{167} \textit{Id.} at 131.
level of confidence that they are correct and rationally follows their lead.168 However, as Vermeule points out, “[a] strategy that is individually rational for judges at any given time—following custom or tradition or precedent—is harmful to all if followed by all, because it drains custom or tradition or precedent of any epistemic value.”169 At least to the Condorcetians and Burkeans, following tradition is more likely to lead to the correct answer. But if individuals are “withdrawing” from this bank of knowledge, but not contributing to it, then—by virtue of information cascades—we are all worse off.

Such is also the case with status quo bias and the endowment effect. Typically, we assume that judges will independently evaluate a case and make a decision based on the merits. If a particular legal rule is outmoded or otherwise unworkable, we hope that they will at least say so, even if they ultimately conclude that they are bound by the existing precedent. But status quo bias and the endowment effect suggest this will not happen. When given a pre-existing set of legal rules, judges will be hesitant to move away from the status quo (status quo bias) and will overvalue the intrinsic worth of the existing rules (endowment effect). Because they overvalue the benefits of the current rule, they will correspondingly overestimate the costs of changing that rule.170

This blends into the problem of sticky default rules. As Ben-Shahar and Pottow write in the context of contract law, parties tend to be unwilling to deviate from default rules for fear of being seen as manipulative or otherwise sneaky.171 Similarly, a judge who deviates from the given rule might be seen as being “up to something,” or—quelle horreur!—an activist. Even if judges don’t have a sinister motive, the “stickiness” of default rules, in part because of the status quo bias, endowment effect, and so on, suggests that the judge will not deviate. Prentice and Koehler write about the “normality bias”—that actors are seen as more blameworthy when they take unusual actions than when they stick to the tried and true.172 As a result, judges have a strong incentive not to deviate.

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168 See supra note 96 and accompanying text.
169 Vermeule, Many-Minds, supra note 96, at 22.
170 See supra notes 130-133 and accompanying text.
171 See, e.g., Russell Hardin, Collective Action 82-83 (1982).
from tradition, because they would be seen as more blameworthy if their novel rule proved unworkable. The problem is compounded by the fact that we humans prefer sub-optimal situations to the risk of “getting it wrong” and the subsequent regret that might accompany choosing the non-default option. Thus, even if judges did not have an ulterior motive, and even if they were not concerned about being “blamed” for deviating, they still might not depart from the pre-existing rule, because they misperceive the risk of change and the costs of regret.

Framing effects and path dependence further entrench this problem. Recall that the framing effect suggests that the answer to a particular question often depends on how it is framed. Of particular importance and relevance here, the framing effect is robust even among sophisticated respondents and even when respondents believe their answers will have an effect on policy choices. And then, of course, as particular rules develop over time, path dependence suggests that they will get entrenched. Pierson explains that path dependence is particularly likely to occur in the context of “formal, change-resistant institutions,” a description that certainly applies to the legal system.

A recent article by Lindquist and Cross underscores this point. The authors empirically tested the proposition that judges’ decisions reflect their policy preferences and are unconstrained by precedent. They found that precedent does in fact constrain judges’ decision-making—but only in cases that are not of first impression. In other words, once a decision is made in a case of first impression, that rule tends to stick. Stare decisis is defended on the ground that it controls judges’ caprice. But Lindquist and Cross’s study suggests that it simply entrenches a tremendous first mover advantage.

173 See supra Part III.A.4.
174 See Gonzalez et al., supra note 113, at 2; Kahneman & Tversky, supra note 116, at 343.
175 See supra Part III.A.5.
176 Pierson, supra note 119, at 252.
178 Id. at 1158-59.
179 Id. at 1205-06.
180 Id. at 1183-84. I explore how a decision made in a case of first impression “sticks” in my discussion of Sarbanes-Oxley, infra Part IV.A.1.
Most noteworthy is that these biases often operate in tandem. Consider a legal question to which a reasonable person might answer X or Y. First-order path dependence teaches that, if both outcomes are roughly equally reasonable, there is no way to predict what a given court will do. However, if just one court chooses Y, information cascades suggest that (at least under certain circumstances), more and more people will start choosing Y. Over time, it might become apparent that X was the better option. But second-order path dependence predicts that we will be unlikely to choose X. This prediction is reinforced by status quo bias and the stickiness of default rules: given a particular legal entitlement (“Y”), we will be highly reluctant to move away from it. We might even imagine that some judges, in good faith, evaluate X and Y and weight the benefits of the correct rule against the costs of change. However, the endowment effect suggests that even these well-intentioned judges will overestimate the benefit of sticking with Y and overestimate, as a result, the cost of moving to X.

Our choice biases also interact with our attitudes and motives. This is perhaps most vividly illustrated by the intersection of system justification theory and status quo bias: we start out predisposed to “preferring” the status quo, and once we get accustomed to the status quo, we imbue it with a sense of legitimacy. In this telling, we are even less likely to move from Y to X, because, in addition to the incorrect assessment of cost and benefit, we are subconsciously primed to believe that X—merely by virtue of being different—is unjust and unfair. Similarly, the motive to cohere and the motive to simplify predict that, when an array of fact patterns come up over time, judges are more likely to recast a given case in terms of pre-existing precedent (“Y”), because doing so is simpler and creates a coherent narrative.

If these cognitive biases have explanatory power, then we might find ourselves in quite a bit of trouble. Under the current system, lower courts are supposed to take precedent at face value until altered. Moreover, stare decisis applies not only to courts’ holdings but also their ratios decidendi—the reasons for their decisions. But if judges (being, as they are,

\[181\] See supra Part III.A.5.
\[182\] See supra Part III.A.5.
\[183\] See supra Part III.A.6.
human) are using cognitive shortcuts, and if these shortcuts are all skewing in the same direction, then we should be suspicious of judges’ decisions and their stated reasons for them.

About a decade ago, Eric Talley explored a partial version of my hypothesis: he analyzed whether legal doctrine could be explained as being the result of information cascades. In setting up this inquiry, he wrote,

> If common law precedent is in fact a type of [information] cascade, it would represent the strongest refutation yet of the common law efficiency hypothesis. Indeed, it would suggest that even if judges are predisposed towards efficiency, and even if they do not face a biased selection of cases, precedents might still frequently diverge from the most efficient legal rule. Moreover, a theory of precedential herding would force us to rethink the coherence of virtually any jurisprudential theory of precedent that conceives of the common law as a mechanism for judicial learning—be it economic or otherwise. If precedent represents a weak or impoverished learning device, then a common law system of adjudication seems unlikely to produce reliable results.¹⁸⁴

Thus far, the focus has been on courts’ use of stare decisis essentially as a heuristic, one that might be leading to suboptimal results, but in any event one whose epistemic basis has been called into question. But there is another sense in which adherence to precedent can be problematic. The psychological phenomena catalogued do not only suggest that stare decisis might be an unreliable guidepost for judicial decision-making. They also suggest that adherence to precedent may be serving as a “shield” for unjust or otherwise undesirable results. Consider that the normality bias suggests that decision-makers will be reluctant to deviate from the norm: even if precedent has entrenched a rule that is unfair to certain groups of people, a judge might feel that ruling against that group makes her complicit in this injustice. But stare decisis provides the necessary cover: “I’d like to help you, but I’m bound by precedent to rule against you.”¹⁸⁵

¹⁸⁴ Talley, supra note 82, at 91 (emphasis added). Talley ultimately concludes that precedent cannot be fully explained by cascades, though he suggests that a more complete story (that explains precedent in terms of biases beyond just cascades) might be correct. See id. at 121-24. I respond to this point at the end of the Article. See infra notes 376-382 and accompanying text.

¹⁸⁵ See, e.g., Westlake Vinyls v. Goodrich Corp., No. 5:03-CV-00240-R, 2007 WL 1959168, at *3-4 (W.D. Ky. June 29, 2007) (“This court shares its sister district courts’ ‘latent misgivings’ about the propriety of the rule announced in Goodyear, but like those courts, is bound to apply governing Sixth Circuit precedent.”); United States
Benforado have noted, the actor-observer bias tends to make us blame the person when another person does something “bad” (what a rotten judge!) but to blame the situation when we do something bad (how could I be expected to defy precedent?). And so our biases and attributional proclivities suggest not only that stare decisis might not be furthering the goals we think it is but also that the system itself may be providing “cover” to judges who render decisions they know may be perceived as unjust.

Well, that’s the payoff. The correlated cognitive, psychological, and situational phenomena I have outlined in this Part, operating in tandem, strongly undercut the typical arguments for stare decisis. We think that the received legal rules are desirable (why would we have come to these decisions if they were not?). But “survival does not imply present-day superiority to untried alternatives.” In the balance of this Article, I evaluate what implications this might have for law, respond to some criticisms of my argument, and imagine what a (jurisprudential) world might look like if stare decisis did not have the weight it does today.

IV. SOME PREDICTIONS AND IMPLICATIONS FOR LAW AND LEGAL THEORY

A. Predicting Bias

At this point, it is worth pausing and asking whether this theoretical argument has practical significance. Are there instances where reliance on stare decisis has produced “skewed” results? In one sense, the question is difficult to answer. For example, since Hadley v. Baxendale, a party who breaches a contract is only liable for reasonably foreseeable damages, not proximately caused damages. The practice of stare decisis has entrenched this rule in our system, and it may

v. Pantoja, No. CR-05-164-FVS, 2006 WL 151939, at *2 (E.D. Wash. Jan. 19, 2006) (noting that a recent Supreme Court case arguably supported the defendant’s position, but that the district court was bound by Ninth Circuit precedent); Barclay v. Spitzer, 371 F. Supp. 2d 273, 274-75 (E.D.N.Y. 2005) (noting, in the context of ineffective assistance of counsel, that the New York State rule “seems more useful” than the federal rule, but explaining that Second Circuit precedent binds it to use the latter).


186 Roe, supra note 125, at 644.

188 (1854) 9 Exch. 341, 342.
or may not be preferable to the alternatives. However, even among critics of Hadley's rule,\(^{189}\) it would be hard to find some unanimity as to why Hadley was wrong, and harder still to determine if information cascades and status quo bias entrenched the rule, as opposed to a good faith belief among generations of judges that such a rule was preferable.

However, it is possible to find at least circumstantial evidence of stare decisis producing results that are, if not skewed, at least somewhat suspect. Assume that a court at time \(t\) decides that, under certain circumstances, the correct legal rule is X. Assume further that at time \(t+n_1\), another court also holds X. Then, at \(t+n_2\), a third court holds X; at \(t+n_3\), a fourth court holds X. These courts might be reaching the same result because they believe the first rule was correct, or because doing so leads to stability, or to preserve judicial legitimacy. However, the entrenchment of the legal rule may also be due to heuristic judgments by the subsequent courts.

There are several factors that could suggest that a subsequent court is following the first court's holding because it is relying on stare decisis as a heuristic, rather than as a means to preserve certain ostensibly desirable goals. I predict that when the subsequent court's decision reflects a heuristic judgment, the decision is likely to have one or more of several characteristics:

1. The subsequent court relies on the first court, even though the first court's decision is not binding on it.
2. The subsequent court engages in relatively little legal analysis of the issue, whereas the first court engaged in extensive analysis.
3. When there is ambiguity in the law, the subsequent court resolves the ambiguity in such a way that supports the decision of the first court.
4. The subsequent court—when the number of cases following the first court is relatively high—justifies its decision with reference to the large number of courts that have already decided X.
5. The subsequent court relies relatively more on policy considerations or generalized principles of law, rather than more detailed textual or doctrinal analysis.

When a rule of law is unsettled or still developing, I predict that several of these factors would be present in the decisions of the various subsequent courts, providing strong circumstantial evidence that the subsequent courts are using stare decisis as a crutch, rather than as a mode of legal reasoning that supports desirable outcomes. Of course, the list of factors is not exhaustive and the phenomenon is not limited to unsettled law. For example, when the rule of law has been settled for a relatively long period of time, the subsequent court might emphasize the destabilizing or disruptive impact that a deviation from the received rule would have.

Although the list above is not intended to be exhaustive, the factors set out above are derived from the behavioral data catalogued in Part III. For example, in the music downloads study, songs were downloaded more often (the “subsequent court,” to use the construction above) when they were shown to be popular on a list of top downloads. If a similar phenomenon applied to judicial decision-making, I would predict that a certain rule of law would become more entrenched when it was shown to be the popular rule in other courts. Just as the Southern District of New York is not obligated to follow the rule of decision in the Eastern District of Pennsylvania, someone downloading music in Lowenstein’s study was not obligated to download the popular song. Following a trend when it is not obligatory provides strong circumstantial evidence of information cascades.

Along similar lines, system justification theory suggests that judicial decisions are entrenched because we want to believe that a legal system is fair and just. Subsequent courts might be inclined to follow earlier cases by telling the challenger that the status quo rule (made by the first court) is the fairer and more just rule. Similarly, our motives to simplify and cohere suggest that courts will be hostile to those who challenge the precedential rule, because change is potentially disruptive. Particularly in the face of ambiguity, these phenomena suggest that our reasoning is motivated to create simple and coherent narratives out of the facts before us, which in turn suggests that courts will resolve ambiguity in favor of the precedential rule. Risk aversion—and the tendency of

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190 See supra notes 93-95 and accompanying text.
191 See supra notes 93-95 and accompanying text.
courts (and others) to overestimate the costs of change—further escalates this problem.

According to the case law, lower courts are obligated to accept binding precedent at face value until altered. But the cognitive and situational phenomena canvassed above suggest that we humans will generally rely on “precedent”—that is, we will defer to, and overvalue, existing rules and arrangements—regardless of the doctrinal edicts that compel a judge to do so in a particular case. Courts will rely on precedent, even when they are not obligated to, as a cognitive shortcut, pushing the law in directions that might be incorrect or otherwise socially undesirable.

1. Testing the Prediction I: Section 304 of Sarbanes-Oxley

In 2002, Congress enacted the Sarbanes-Oxley Act in response to the corporate scandals of the day. Among other things, the law provided for so-called “clawbacks.” Under this provision, in section 304 of the law, a company would be able to recover certain compensation paid to its executives if malfeasance was later revealed. Specifically, the law provided that if an issuer filed a restatement because of misconduct resulting in “material noncompliance” with financial reporting requirements, then the company’s CEO and CFO would be required to reimburse the issuer for (1) bonuses and other compensation received in the twelve months following the first filing of financials subject to a restatement; and (2) any profits derived from the sale of the issuer’s securities during those twelve months.

However, section 304 did not specify who had the right to enforce the provision. Some sections explicitly gave a company’s shareholders the right to enforce the statutory provision in question, other sections explicitly reserved enforcement authority in the Securities and Exchange

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194 Id.
195 Id.
Commission.\textsuperscript{197} Section 304 did neither. It was a classic “gray area.” Predictably, in the years since SOX was enacted, section 304 has been the subject of many shareholder derivative suits. The shareholder plaintiffs have argued that section 304 creates an implied private right of action in their favor, and the companies have argued that it does not.\textsuperscript{198}

Eventually, the courts spoke on the question.\textsuperscript{199} The first case to squarely address this issue was 	extit{Neer v. Pelino}, a 2005 case from the Eastern District of Pennsylvania.\textsuperscript{200} Neer recognized that when a statute is unclear as to whether there is a private right of action, courts must conduct a four-step analysis, as the Supreme Court instructed in 	extit{Cort v. Ash}.\textsuperscript{201} Therefore, Neer analyzed the four “Cort factors” to determine whether there was a private right of action under section 304. The court examined the statutory text of section 304, the legislative history of Sarbanes-Oxley, and the relation of section 304 to other provisions in the statute.\textsuperscript{202} Neer ultimately concluded that there was no private right of action under section 304 and dismissed that count of plaintiffs’ complaint for failure to state a claim.\textsuperscript{203}

So far, so good. But statutory analysis, it turns out, has a lot in common with music downloads. Recall that in the study by Salganik et al., songs would get downloaded more often if the consumers were told that those songs were popular.\textsuperscript{204}

\begin{footnotesize}
\begin{enumerate}
\item[198] These were the litigants’ positions in all of the cases cited in this Part.
\item[199] My case study focuses on the district courts to address this question. As of this date, only one circuit court has squarely addressed the issue. See In re Digimarc Corp. Derivative Litig., 549 F.3d 1223, 1226 (9th Cir. 2008) (“[T]here is no private right of action under section 304.”). Another case addresses the issue, but does so briefly with little discussion. See Pirelli Armstrong Tire Corp. Retiree Med. Benefits Trust v. Raines, 534 F.3d 779, 793 (D.C. Cir. 2008) (holding that section 304 “does not create a private right of action”). I discuss the district court’s ruling in 	extit{Digimarc} in this Part. However, for my purposes, it is not particularly relevant that the Ninth Circuit has spoken to this issue. My overall thesis explores the development of this line of case law at the district courts and, for the three-plus years between Neer and the Ninth Circuit’s decision, Neer was the first district court case. In fact, Neer has not been cited and Digimarc has been cited only three times in a reported case in the ten months since Digimarc, suggesting that the issue is sufficiently resolved at this point as to not necessitate further litigation. This underscores how the phenomena catalogued here can be problematic for the development of the law, even when the pattern develops only among district courts.
\item[201] Id. at 652-53; see also Cort v. Ash, 422 U.S. 66 (1975).
\item[202] 389 F. Supp. at 653-57.
\item[203] Id. at 657-58.
\item[204] See supra notes 93-95 and accompanying text.
\end{enumerate}
\end{footnotesize}
Information cascades are well-documented in other contexts. What about in the law? The section 304 example shows federal district courts across the country essentially following the rule set forth in Neer, with little to no legal analysis of their own. Over time, the Neer rule has become reinforced in the case law, with subsequent courts referring to the large number of prior courts that have reached the same conclusion as Neer. The courts are following the leader, even though Neer is binding on none of these courts. Although the subsequent cases tend to recognize the statutory ambiguity, they uniformly resolve the ambiguity in a way that supports Neer. As a result, every subsequent case meets characteristics (1) and (3) above. I discuss the post-Neer cases below.

Neer’s analysis spanned seven pages in the official reporter. Since Neer, cases have resolved the issue in just a few paragraphs, or sometimes just a sentence or two. The next major case after Neer, In re BISYS Group, Inc. Derivative Action, disposed of the issue in just two paragraphs with no substantive legal analysis. Instead, the court summarily held:

[There is no private right of action under Section 304 of Sarbanes-Oxley, substantially for the reasons stated in Neer. The question whether creation of a private right of action under Section 304 might have been a good idea is for Congress, which alone is charged with making the close judgments and sometimes messy compromises inherent in the legislative process.]

Thus, BISYS reflects factors (2) and (5) above: relatively little legal analysis of the issue, and a reliance on policy justifications in lieu of textual or doctrinal analysis.

In In re Whitehall Jewellers, Inc. Shareholder Derivative Litigation, the court laid out the Cort factors and discussed the
issue more extensively than in BISYS. However, Whitehall also demonstrates the beginnings of an information cascade regarding section 304. First, the court wrote that it “is inclined to concur with its colleagues in Neer and Bisys Group that no private right of action is available under § 304 . . . .” Second, although the court laid out the applicable doctrinal analysis, at every juncture, it simply deferred to Neer or BISYS. Whitehall thus reflects at least factor (2), and to a lesser extent (4)—reference to the number of courts that have already reached a particular decision.

Kogan v. Robinson, about eight months after Neer, engaged in the most extensive analysis of any post-Neer case. However, even here, the legal analysis relies on Neer at every turn. Additionally, the court refers to the fact that “all other courts that have considered this issue[] . . . conclude[d] [that] Section 304 does not explicitly create a private remedy.” And when plaintiffs cited a Ninth Circuit case implying a right of action in favor of shareholders, the court declined to follow it, in part on policy grounds. Kogan noted that courts were more likely to imply rights of action in the past. Because implied rights of action are disfavored today, Kogan found the earlier Ninth Circuit case distinguishable. Thus, despite its relatively extensive analysis, Kogan reflects factors (4) and (5).

The result was the same in In re Digimarc Corp. Derivative Litigation. The court noted plaintiffs’ argument “that Section 304’s text, [SOX’s] statutory construction and legislative history, and the purpose underlying Section 304 all favor finding the existence of an implied private right of

210 Id. at *8.
211 See id. at *7-8 & n.13 (“this court, too, agrees with Neer,” “[t]he Neer court reached its conclusion,” “[t]he Neer court observed,” “[t]he Bisys Group court pointed out that”).
212 Id. at *7 (noting that no court has “recognized an implied private right of action”).
214 See id. at 1079 (citing Neer twice); id. (“[a]s stated in Neer”); id. at 1082 (citing Neer).
215 Id. at 1078.
216 Id. at 1080.
217 Id.
218 See id.
219 In re Digimarc Corp. Derivative Litig., No. 05-1324-HA (LEAD), 2006 WL 2345497 (D. Or. Aug. 11, 2006), aff’d in part and rev’d in part, 549 F.3d 1223 (9th Cir. 2008).
action.” The court responded with little legal analysis, writing instead, “Every court that has considered the issue directly has concluded that Section 304 contains no implied private right of action.” Digimarc reflects factors (2) and (4).

The court in In re Goodyear Tire & Rubber Co. Derivative Litigation disposed of the section 304 issue in just two paragraphs. Like its predecessors, the court relied on Neer: “The Court is persuaded by the well-reasoned decision in Neer v. Pelino.” Goodyear acknowledged that there was no binding precedent on the issue. Therefore, it concluded, “this Court is free to consider [Neer, Whitehall, Kogan, and Digimarc] as persuasive authority on which it bases its decision.” Of course, one might think that, “[i]n the absence of binding authority,” it is more important for a district court to analyze the legal claims anew, if only to provide a fuller presentation of the legal issues for appeal. The court’s failure to engage in such analysis underscores factor (1), and also reflects factors (2) and (4).

In Pedroli ex rel. Microtune Inc. v. Bartek, the court declined to imply a private right of action, pointing out that the plaintiff was “ignoring the predominant holdings across the country that the Act does not create a private cause of action under § 304 . . . .” The court disposed of the issue in just two paragraphs, concluding, “The court declines to address the issue in any more detail and believes that the cases cited conclusively mandate a dismissal of [the section 304] Count . . . .” Pedroli also demonstrates numbers (2) and (4).

In re Infosonics Corp. Derivative Litigation reflects factor (2) and especially (3). First, the court deferred to Neer and Kogan, addressing the issue in just two paragraphs.

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220 Id. at *2.
221 Id.
223 Id. at *7.
224 See id.
225 Id.
226 Id.
228 Id.
230 Id.
Second, it noted that Congress could have been explicit about creating a private right, just as it was in section 306.\footnote{Id.} Of course, it is just as true that if Congress wanted to foreclose a private right, it could have done so explicitly, just as it did in section 303.\footnote{Sarbanes-Oxley Act § 303, 15 U.S.C. § 7242 (2006).} The court thus resolved the statute’s ambiguity in favor of the earlier, non-binding cases.\footnote{In re Infosonics, 2007 WL 2572276, at *9.} This underscores factor (3).

The In re Diebold Derivative Litigation case disposed of the section 304 claim in just one paragraph, with no legal reasoning at all, writing:

Every court that has considered whether SOX § 304 provides a private right of action has answered that question in the negative [citing Neer, BISYS, Kogan, and Goodyear]. The court agrees, and finds that SOX § 304 does not create an implied private right of action.\footnote{In re Diebold Derivative Litig., Nos. 5:06CV0233, 5:06CV0418, 2008 WL 564824, at *2 (N.D. Ohio Feb. 29, 2008) (citations to Neer, BISYS, Kogan, and Goodyear omitted).}

Unsurprisingly, Diebold reflects factors (2) and (4) above. However, it is interesting to note that Diebold, decided in 2008, gave no special weight to Goodyear, decided in 2007 by the same court. In theory, horizontal stare decisis requires a court to adhere to its prior decisions.\footnote{See, e.g., Nash & Pardo, supra note 19, at 1750-51.} Therefore, Diebold could have disposed of the issue by writing, “Until and unless the Sixth Circuit instructs otherwise, this court is obligated to follow its prior decisions. Accordingly, there is no private right of action under section 304, as stated in Goodyear.” The fact that Diebold gives no special weight to Goodyear (mentioning it only at the end of a string-cite)\footnote{In re Diebold, 2008 WL 564834, at *2.} gives additional support for the conclusion that Diebold’s conclusion is based on a heuristic judgment, rather than bona fide legal analysis.

The court in In re iBasis, Inc. Derivative Litigation recognized the tension between sections 303, 304, and 306.\footnote{In re Diebold Derivative Litig., 532 F. Supp. 2d 214, 224 (D. Mass. 2007).} But that court also deferred to “all other courts that have had the occasion to address the issue directly” and “found that Congress did not create a private right of action for purposes of
enforcing section 304 of SOX.\textsuperscript{238} The court went on to cite \textit{Goodyear, Digimarc, Kogan, Whitehall, BISYS,} and \textit{Neer} and was “persuaded by . . . precedent from other courts that have \textit{directly and thoughtfully considered the issue.”}\textsuperscript{239}

The \textit{iBasis} decision is interesting on two levels. First, it reflects factors (2) and (4). However, it goes further. \textit{iBasis} not only cites the cases above but also credits the “direct[] and thoughtful[] consideration” those cases gave to “the issue” of whether SOX § 304 contains an implied private right of action.\textsuperscript{240} This reference is striking because, as discussed above, almost \textit{none} of the cited cases engage in “direct[] and thoughtful[] consideration”\textsuperscript{241} of the issue. Instead, most of the cases discuss the issue briefly, with little or no legal analysis, deferring almost categorically to \textit{Neer}.

At this point, it is worth reiterating Posner and Sunstein’s argument:

If two states have adopted a law, or if two state courts have made some innovation, a third may do so, not because of any kind of independent judgment, but because it is following its predecessors. And if three states have made the same decision, a cascade might be forming. The problem is that subsequent states might assume that decisions have been made independently, even though most have been following the crowd.\textsuperscript{242}

The cases discussed in the section 304 example demonstrate, to varying degrees, all of the features that I predict would be present when later courts are following an earlier court out of cognitive bias. The case study provides strong support for the hypothesis that, at least sometimes, courts defer to prior decisions because doing so is quick and easy—not because doing so leads to the best results.\textsuperscript{243}

\textsuperscript{238} Id.
\textsuperscript{239} Id. at 225 (emphasis added).
\textsuperscript{240} Id.
\textsuperscript{241} Id.
\textsuperscript{242} Posner & Sunstein, \textit{supra} note 165, at 32.
\textsuperscript{243} Two interesting questions arise. First, would every single case have come out the opposite way if \textit{Neer} had come out the other way? Second, if the first circuit court had held that there \textit{is} a private right of action, would \textit{district} courts in other circuits have followed it, or the “weight of authority” among the majority of district courts? The second is an open question. However, for reasons that are beyond the scope of this Article, the behavioral literature suggests that other courts might not have followed \textit{Neer} in my counterfactual, because of the strong situational pressures that drive corporate law to generally favor managers over shareholders, especially in derivative suits. See Chen & Hanson, \textit{supra} note 27, at 59-64.
2. Testing the Prediction II: The First and Fourth Amendments

In one sense, heuristic judgments should be less common at the Supreme Court. The court has the luxury of deciding which cases it will hear, so it can manage its resources in a way that other courts cannot. If heuristics are a way of dealing with scarce cognitive (judicial) resources, then we should expect to find such biases less prevalent when resources are greater. Similarly, Supreme Court Justices (and law clerks) may, aware of the importance of their work, be especially careful not to take shortcuts, cognitive or otherwise.

But at the same time, other considerations suggest that the Supreme Court might be more prone to biases and heuristics. First, the Court is final; it is bound by no other court, as reflected in Justice Jackson's famous quote, “We are not final because we are infallible, but we are infallible only because we are final.”24 A lower court might rationalize its reliance on precedent on the basis of the doctrinal rules that obligate it to reach a particular result. The Supreme Court, answerable (at least formally) to no institution but itself, might actually be more susceptible to bias because it is not bound by any sort of frequent check.

Second, as Richard Posner points out, at least in constitutional cases, the Supreme Court is not bound by any “law” at all. Posner writes,

> The Supreme Court, when it is deciding constitutional cases, is political in the sense of having and exercising discretionary power as capacious as a legislature's. It cannot abdicate that power, for there is nothing on which to draw to decide constitutional cases of any novelty other than discretionary judgment. To such cases the constitutional text and history, and the pronouncements in past opinions, do not speak clearly. Such cases occupy a broad open area where the conventional legal materials of decision run out and the Justices, deprived of those crutches, have to make a discretionary call.

Constitutional cases in the open area are aptly regarded as “political” because the Constitution is about politics and because cases in the open area are not susceptible of confident evaluation on the basis of professional legal norms. They can be decided only on

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the basis of a political judgment, and a political judgment cannot be called right or wrong by reference to legal norms. 245

My assertion here is not that the Supreme Court’s position of finality renders it incapable of making “bias-free” judgments. I am making a different point: although the Court’s position situates it different from the lower courts, it is still susceptible to heuristics and biases.

The evolution of three lines of Supreme Court precedent, in the context of the First and Fourth Amendments, demonstrates such judgments. In a recent series of articles, Anuj Desai explains how certain First and Fourth Amendment constitutional doctrines can only be properly understood with the statutory history of the United States Postal Service in mind. When early Post Office cases came to the Court, they were properly decided with reference to the statutes that Congress had enacted governing the Post Office. However, those cases implicated broader policy issues regarding free expression and privacy. Later, when constitutional questions implicating free expression and privacy arose, the Supreme Court followed its earlier Post Office decisions—even though those decisions were based on the unique institutional context of the Post Office and were not squarely on all fours with the constitutional cases. The Constitution makes no mention of a First Amendment “right to receive” ideas, 246 and it does not restrict government subsidies in connection with the mail. 247 And the Fourth Amendment does not specify that correspondence between persons is subject to a right to privacy. 248 Yet these (judge-made) doctrines exist today—and they all have their origins in Post Office policy.

Professor Desai outlines the process by which constitutional law can follow legislative choices thusly: “(1) Congress passes a statute; (2) the statutory provision gives an institution certain attributes; (3) over time, social practice embeds those attributes into the institution; and (4) the courts


248 Id. at 556-58.
then take those attributes and write them into constitutional law.\footnote{249}

Desai chronicles how this process manifested itself in connection with the Post Office. First, the legislature embedded certain republican principles (a right to privacy in the mails, a right to receive ideas) into the institution.\footnote{250} Over the years, these principles became ingrained into societal expectations about how the Post Office should operate. Eventually, the Supreme Court held that these principles were constitutionally required.\footnote{251} The Supreme Court effectively raised Post Office statutes to the level of Constitutional law.

This kind of evolution supports my thesis. The Supreme Court elevates Post Office policy to constitutional law, not because of some strong consensus that the Post Office statute from 1792 reflects our understanding of the Fourth Amendment, but because it is following precedent, trying to minimize doctrinal conflicts, and relying on case law even though it arose in a distinct context. The Court’s reliance on stare decisis is, at least in part, the reflection of heuristics and biases. Over the next several pages, I summarize two of Desai’s articles, showing how this evolution took place. I then explain in some more detail how this story supports my thesis.

This story starts in the 1770s, when revolution was brewing in the colonies. The existing British postal system had no notion of privacy of correspondence. Indeed, the British government regularly opened citizens’ mail in order to gather intelligence on “conspiracies.”\footnote{252} Though it was officially illegal to open mail without a warrant, warrants were issued secretly and could often contain hundreds of names.\footnote{253} As one historian stated, “secrecy made legality unimportant.”\footnote{254}

Not only was confidentiality of the mail compromised, those who controlled the postal networks could also control what was allowed through the networks. Postmasters would exploit their position to block competing newspaper publishers from using the postal service.\footnote{255} As tensions rose between the

\footnote{249} Id. at 557.  
\footnote{250} See id.  
\footnote{251} Id.  
\footnote{252} Id. at 561.  
\footnote{253} Id. at 560.  
\footnote{254} Id. at 561 (internal quotation marks omitted) (quoting KENNETH ELLIS, THE POST OFFICE IN THE EIGHTEENTH CENTURY: A STUDY IN ADMINISTRATIVE HISTORY 63 (1958)).  
\footnote{255} Desai, Transformation, supra note 246, at 679.
British and the colonists, the nature of this blocking became political.\textsuperscript{256}

This regular opening of private correspondence posed a special problem for American rebels, who had to ensure privacy of correspondence to carry on their plans for the Revolution. Further, their inability to use the postal service to distribute their newspapers discouraged the American rebels from communicating their ideas to a larger audience. In response, they adopted an alternate mail system, the “constitutional post,” established by William Goddard, a Philadelphia newspaperman.\textsuperscript{257} Goddard realized the importance of the postal network for securely transmitting private information as well as for transmitting news and ideas to the populace. In his proposal to establish the “constitutional post,” he wrote, “It is not only our letters that are liable to be stopped and opened by a ministerial mandate, and their contents construed into treasonable conspiracies, but our newspapers, those necessary and important alarms in time of publick danger, may be rendered of little consequence for want of circulation.”\textsuperscript{258} His goals coincided with those of the American revolutionaries—freedom to express ideas without fear of being accused of treason.\textsuperscript{259}

In 1782, the Continental Congress passed a postal ordinance that codified this desire for freedom of correspondence.\textsuperscript{260} The ordinance prohibited postal officials from opening the mail without “an express warrant.”\textsuperscript{261} The ordinance also called for “moderate rates” for the mailing of newspapers.\textsuperscript{262} After the ratification of the Constitution, Congress passed the Post Office Act of 1792.\textsuperscript{263} The Act contained a similar provision for privacy of correspondence, which passed without controversy or even much discussion.\textsuperscript{264} However, debate arose around two issues involving newspapers. One issue revolved around whether to allow all newspapers to be circulated or whether to selectively admit

\textsuperscript{256} Id. at 680.
\textsuperscript{257} Desai, Wiretapping, supra note 247, at 564 (internal quotation marks omitted).
\textsuperscript{258} Id. (internal quotation marks omitted).
\textsuperscript{259} Id. at 564.
\textsuperscript{260} Id. at 565.
\textsuperscript{261} Id. (internal quotation marks omitted).
\textsuperscript{262} Desai, Transformation, supra note 246, at 684 (internal quotation marks omitted).
\textsuperscript{263} Id. at 690.
\textsuperscript{264} Desai, Wiretapping, supra note 247, at 566-67.
The second issue was what rate should be charged for mailing newspapers. Eventually, Congress voted against selective admission, based on fears that the policy would be used by the postmasters to discriminate against publications they disagreed with. As for rates, the legislature decided on reduced rates for newspaper subscribers, mostly subsidized by letter writers. This newspaper subsidy was based on the idea that in a republic, it was the government’s responsibility to ensure citizens have access to information about public affairs. The passage of this Act set in motion important policies that would shape the Post Office as an institution, and eventually shape constitutional law.

Another consequence of the 1792 Post Office Act was the formation of a functional monopoly of the Post Office. This happened because Congress chose to retain the power to designate postal routes. This power gave representatives a chance to bring back tangible benefits to their district in the form of a Post Office and mail service—what we might today call congressional “pork.” Naturally, this led to the rapid proliferation of postal routes, even to areas with very small populations. This ubiquity of mail routes made the Post Office the most effective conveyor of information across long distances, leading to a “practical dependence of the public upon the [Post] Office,” as Justice Holmes would later state. This effective monopoly had later implications for constitutional law.

Desai emphasizes that privacy of correspondence and subsidized rates for newspapers both developed independently of the Constitution. These republican principles had already been written into the 1782 Postal Ordinance, and the Constitution was ratified in 1789. Thus, the principles of privacy of correspondence and newspaper subsidies pre-dated the Constitution.

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265 Desai, Transformation, supra note 246, at 691-92.
266 Id. at 692-95.
267 Id. at 692.
268 Id. at 694.
269 Id. at 695.
270 Id. at 693.
271 Id. at 700-03.
272 Id. at 701-03.
273 Id. at 694 (internal quotation marks omitted).
274 Id.
275 Desai, Wiretapping, supra note 247, at 568.
How then did this minor postal act find its way into constitutional law? Tracking Desai, I address each principle separately—the Fourth Amendment principle of privacy of correspondence, First Amendment restrictions on government subsidies, and the First Amendment “right to receive” ideas.

Privacy of correspondence was first addressed in *Ex Parte Jackson.* Though the case is primarily seen today through the lens of its First Amendment implications, Desai points out that this is the first case in which the Court acknowledged a right to privacy of correspondence. The fact pattern of the case had nothing to do with the opening of sealed letters—the petitioner, Orlando Jackson, had been convicted for mailing information about a lottery. The case mainly revolved around whether the government had the right to prevent certain materials deemed “unmailable” from being mailed. The Court eventually upheld the statute and Jackson’s conviction. However, the majority added in dictum that it could not enforce the statute by opening sealed letters.

It is this dictum that first addresses the issue of privacy of correspondence: “[A] distinction is to be made . . . between what is intended to be kept free from inspection, such as letters, and sealed packages subject to letter postage; and what is open to inspection, such as newspapers, magazines, pamphlets, and other printed matter, purposely left in a condition to be examined.” The Court further stated, “The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.” Desai claims that the Court “effectively characterized a letter passing through the mail system as the sender’s ‘papers’ for Fourth Amendment purposes.” The principle of privacy of mail

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278 *Id.* at 570.
279 *Id.*
correspondence was thus constitutionalized. “Justice Field saw in the Fourth Amendment not what the constitutional drafters had put there, but instead what postal policymakers had incorporated into the structure of the Post Office.”285 This judicial interpretation based on the Post Office is an example of path dependence and risk aversion—the traditions of an institution becoming reinforced over time because people prefer the less risky path of status quo. This principle of privacy of correspondence as applied to mail was simply announced as a self-evident truth, even though no mention of it had appeared in the Constitution, and even though the notion itself was new in the 18th century.

*Milwaukee Leader*286 and *Hannegan v. Esquire*287 provide examples of how the Supreme Court made postal subsidies for newspapers a matter of constitutional law.288 The *Milwaukee Leader* case involved a Socialist newspaper that was denied subsidized mailing rates, because it was deemed “nonmailable.”289 The Court held that the newspaper could be denied the subsidized rate.290 In his dissent, Justice Brandeis characterized the denial of the subsidy as akin to a “penalty” or “fine.”291 He further stated that such discrimination was “effective censorship.”292 Desai points out that Brandeis’s reasoning was closely entwined with particular attributes about the Post Office itself.293 Specifically, the monopoly that the Post Office held over long distance communication, and the subsidies provided to other publications, would likely cause the newspaper to lose money and fold.294 Brandeis’s reasoning is dependent on this institutional context—and tends to reflect the operation of some of the cognitive biases described above. For example, it is not necessarily the case that denying a subsidy to this newspaper is effective censorship; it might be

285 Id. at 577.
287 327 U.S. 146 (1946).
288 Id. at 709 (internal quotation marks omitted).
289 Milwaukee Leader, 255 U.S. at 416; Desai, Transformation, supra note 246, at 709-10.
290 Milwaukee Leader, 255 U.S. at 424 n.7, 434-35 (Brandeis, J., dissenting); Desai, Transformation, supra note 246, at 711.
291 Id. at 712-13.
distributed through means other than the Post Office. Brandeis’s reliance on the institutional characteristics to make a broader point, unrelated to the institution, reflect a motive to simplify.

_Hannegan v. Esquire_ focused on a similar question: whether the Postmaster General had the power to determine what was eligible for subsidized second-class mailing rates. In this case, the Postmaster had determined that _Esquire_ magazine was not entitled to second class rates because it was deemed sexually explicit. This time, the Court ruled that the Postmaster did not have the power to decide which publications were eligible for subsidized mailings. The Court stated that to give the Postmaster that power would amount to censorship, and to give a government official the power to decide “[w]hat is good literature, what has educational value, what is refined public information, [or] what is good art . . . smacks of an ideology foreign to our system.” Desai points out that such an assertion, taken out of the context of the Post Office, is simply wrong. For example, public university professors and public school teachers are hired specifically for the purpose of deciding what is good literature or has educational value. Again, the Court relies on the institutional context of the Post Office to explain its reasoning, even though its conclusions are not related to the Post Office.

It is interesting to think about what the court might decide if Congress had decided not to subsidize newspapers, or to charge newspapers according to the distance the paper traveled. Would the issue then become one of whether subscribers living too far away are being denied their free speech rights? The point, of course, is not that these decisions were substantively incorrect; instead, it is that this reasoning reveals a tendency to use existing non-binding rules to justify subsequent decisions. The notion that newspapers had a right to subsidized postage was not mentioned in the Constitution. Yet somewhere along the line it became a conventional truth.

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295 Id. at 715.
297 Esquire, 327 U.S. at 157-58; Desai, _Transformation_, supra note 246, at 715.
298 Esquire, 327 U.S. at 157-58; Desai, _Transformation_, supra note 246, at 716.
299 Desai, _Transformation_, supra note 246, at 716.
300 See id.
301 See id.
The Court even referred to “our traditions” of providing newspaper subsidies.\footnote{120} The Post Office’s monopoly over long distance communication makes its way into \textit{Lamont v. Postmaster General}.\footnote{120} By the 1920s, the Post Office’s monopoly over long distance communication was such an entrenched reality that the reasoning of the case was shaped around that fact.\footnote{120} Though the Court did not allude much to the Post Office, one can see their dependence on that specific institution by looking at how the Court dealt with the “right to receive” in a different case, \textit{Board of Education v. Pico}.\footnote{120} In that case, the attempt to apply the “right to receive” to books in a public school library did not succeed.\footnote{120} The analogy failed because most of the Justices felt the institutional differences between the Post Office and public schools were too great.\footnote{120} The notion that the Post Office constituted a monopoly played a large part in the development of the “right to receive” doctrine. According to then-Justice Rehnquist, if a person could not receive materials through the mail, it was the equivalent of a “complete denial of access to the ideas sought,”\footnote{120} because the Post Office constituted an effective monopoly. Desai points out that Rehnquist makes an overstatement—a person could indeed receive ideas through other avenues (something that is probably even more true today).\footnote{120} Rehnquist’s reasoning reveals a motive to simplify, a preference for the simpler of two explanations. The inability to receive materials in the mail only constituted a “complete denial” in the context of the monopolistic Post Office. For example, if the Post Office Act of 1792 had instead ceded power to the Executive to designate postal routes, and as a result our postal service had been much smaller, the “right to receive” may very well not have developed, at least in the context of receiving mail. Thus, the reasoning behind the “right to receive” cannot be divorced from its institutional underpinnings.

\footnote{120} Id. at 716.
\footnote{120} 381 U.S. 301 (1965); Desai, \textit{Transformation}, supra note 246, at 718.
\footnote{120} See Desai, \textit{Transformation}, supra note 246, at 718.
\footnote{120} 457 U.S. 853 (1982); Desai, \textit{Transformation}, supra note 246, at 723.
\footnote{120} Desai, \textit{Transformation}, supra note 246, at 723.
\footnote{120} Id.
\footnote{120} Id.
\footnote{120} Id. at 913 (Rehnquist, J., dissenting); see also Desai, \textit{Transformation}, supra note 246, at 722 (internal quotation marks omitted).
\footnote{120} Id.
So what is happening here? How do ideas that were novel in the eighteenth century, having nothing to do with constitutional law, become a matter of constitutional law in the twentieth? Let us return to the late eighteenth century, when the new American republicans had recently escaped the clutches of British rule. A framing effect may have affected their decision-making when it came to Post Office policy. Recall that a framing effect is observed when a decision maker’s choices are affected by the way those choices are described.\footnote{See supra notes 114-116 and accompanying text.}

Faced with a decision to either allow all newspapers to be published or only some newspapers to be published, the decision makers chose to allow all newspapers to be published. Each decision was viable—proponents of selective admission argued that newspapers overburdened the mail system, which was “by no means an idle concern.”\footnote{Id. at 691.} Those who supported universal admission argued that those in power could discriminate against those who were not, an idea borne out by the history of British blocking of newspapers.\footnote{Id. at 691-92.} When the issue was framed as “what the British did” versus “what the British didn’t do,” the decision makers were bound to choose the positively framed choice—“what the British didn’t do.”

This new idea, that all newspapers should be published regardless of content, was accepted as “tradition” by the twentieth century.\footnote{See supra notes 295-302 and accompanying text.} This may have been path dependence at work: our current perception of political and economic outcomes determined by the timing in which the earlier decision was made. So, over time, this initial decision to universally accept all newspapers (itself the result of a framing effect), became Post Office tradition.

Finally, once this idea had become entrenched Post Office tradition, a series of heuristics may have further entrenched it into constitutional law. Using the typology above, I argue that these cases reflect factor (1), because the Post Office cases were clearly not binding on the subsequent constitutional cases. To an extent, the cases also reflect factor (2), because the prior legal analysis regarding the Post Office effectively got “imported” into the constitutional cases. The motives to simplify and cohere are also at play. If the Court had started anew with the constitutional cases (not an
unreasonable proposition, since the cases were, after all, ones of first impression), arguably similar cases could have spawned multiple lines of doctrinal development. Adopting the Post Office line of doctrine in constitutional cases led to case law that was not only simpler (fewer lines of doctrine) but also more coherent (a single story to explain disparate phenomena). Over time, path dependence led us to apply these early precedents in cases that have nothing to do with their origin. For example, the Ninth Circuit has recently held that an individual has a privacy interest in the contents of a text message, but not the number to which he was sending the text message.\footnote{See Quon v. Arch Wireless Operating Co., 529 F.3d 892, 905 (9th Cir. 2008).} One has no such privacy interest because he has no such expectation in the to/from e-mail address in an e-mail message. And that is so because one has a privacy interest in his telephone conversation but not the numbers he has dialed. And that is so because—you see where this is going—you have a privacy interest in your letters, but not the address on the outside.\footnote{Id. at 904-05.}

The point is not that these decisions are incorrect or even that they would not have come about in the absence of the early Post Office cases. Desai repeatedly, and explicitly, says that our existing set of doctrinal rules could very well have come about even in the absence of the Post Office statutes and cases.\footnote{See, e.g., Desai, Transformation, supra note 246 at 702 (“Although I do argue that the Post Office’s characteristics were embedded into the fabric of constitutional doctrine, I am not arguing that we would not have these two doctrines today without their origins in postal policy.”).} This underscores my overall theme in this Article: the fact that stare decisis reflects cognitive bias, in theory or in practice, does not necessarily mean that the decisions reached are incorrect. It merely means that we should be particularly vigilant about our reliance on prior decisions.

3. Testing the Prediction III: The Global War on Terror

Over the course of this Article, I have used the terms “precedent” and “stare decisis” mostly interchangeably, though doctrinally, there is a slight difference between the two (which is not relevant here).\footnote{See supra note 34 and accompanying text.} However, the idea of precedent, loosely defined, affects decision-making in all sorts of contexts beyond the law. Although this Article takes aim at the doctrine of
precedent in the law as commonly understood, it has broader application as well. As Schauer points out,

Appeals to precedent do not reside exclusively in courts of law. Forms of argument that may be concentrated in the legal system are rarely isolated there, and the argument from precedent is a prime example of the nonexclusivity of what used to be called “legal reasoning.” . . . In countless instances, out of law as well as in, the fact that something was done before provides, by itself, a reason for doing it that way again.318

The implications of my argument are reflected in a series of decisions regarding the Global War on Terror (GWOT). Shortly after the terrorist attacks of September 11, 2001, the United States began detaining suspected terrorists at Guantanamo Bay, Cuba.319 Two related issues arose: first, the permissible legal limits of the interrogation techniques the federal government could use against the detainees, and second, what, if any, legal process the detainees would have access to, including rights to habeas corpus or similar procedures.320 It is no exaggeration to say that the GWOT is unprecedented in its nature and scope. This novel situation provides a good test of the arguments I have advanced in this Article.

In the first example, the government had to determine what interrogation techniques the military and intelligence officers could use on the detainees. By way of federal criminal law and international agreements, the United States was bound not to use “torture.”321 John Yoo, then at the Department of Justice, was given the unenviable task of defining what exactly constituted torture.

Yoo has since been reviled by many for his callous formulation of what constituted torture.322 Yoo explained that one of the elements of torture was “severe pain or suffering” and that, “to constitute torture[,] ‘severe pain’ must rise to . . .

318 Schauer, Precedent, supra note 7, at 572.
the level that would ordinarily be associated with a physical condition or injury sufficiently serious that it would result in death, organ failure, or serious impairment of body functions.” Far from reflecting Yoo’s heartlessness, however, the phrase reflects his susceptibility to the heuristics that affect all of us.

As Yoo pointed out in an interview a few years after he authored the now-infamous memo, the question he faced in defining “severe pain or suffering” was, “has Congress ever used this phrase anywhere before?” Yoo found that Congress had in fact defined the phrase, in a statute that Yoo “thought[] was about health care.” But there was more; the interviewer pressed Yoo on the issue:

Esquire [Magazine interviewer]: John, you’re a very engaging guy, I like you—I can’t picture you writing that phrase “organ failure or death.”

Yoo: It’s the phrase Congress used. The main criticism, which is certainly fair, is that statute is so different from this one, how can you borrow the language of one and include it in the other. On the other hand, that’s the closest you can get to any definition of that phrase at all. The section of the memo that analyzed the meaning of “severe pain or suffering” is relatively short, less than a page of single-spaced text. The analysis began by noting that simple “pain or suffering” would be insufficient to constitute torture; 18 U.S.C. § 2340 requires that such pain or suffering be “severe.” The statute, however, does not define “severe.” Yoo looked in two places to determine the definition of “severe . . . pain or suffering.” First, the memo laid out the dictionary definitions of severe. Second, the memo explained how the

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325 Id.
326 Id. (emphasis added).
327 Yoo, supra note 323, at 38-39.
328 Id. at 38 (emphasis added) (internal quotation marks omitted) (citing 18 U.S.C. § 2340 (2006)).
329 Id. (emphasis added) (internal quotation marks omitted).
330 Id. (internal quotation marks omitted).
phrase “severe pain” was used in another Congressional statute:

Congress’s use of the phrase “severe pain” elsewhere in the U. S. Code can shed more light on its meaning. See, e.g., West Va. Univ. Hosps., Inc. v. Casey, 499 U.S. 83, 100 (1991) ("[W]e construe [a statutory term] to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law.").

Yoo notes that in “statutes defining an emergency medical condition for the purpose of providing health benefits,” “severe pain” is treated “as an indicator of ailments that are likely to result in permanent and serious physical damage in the absence of immediate medical treatment. Such damage must rise to the level of death, organ failure, or the permanent, impairment of a significant body function.”

There are two points I want to make regarding Yoo’s analysis. First, as the case cited by Yoo itself notes, a statutory term is to be given a uniform definition across contexts only when doing so “fits . . . logically.” Arguably, using a definition relating emergency medical services in the torture context does not fit logically, and attempting to make it fit reflects the motives to cohere and simplify.

Second, and more to the point, Yoo’s conclusion reflects at least factors (1), (2), and (3) laid out at the beginning of this Part. Obviously, Yoo’s memo is not a judicial decision, but the same principles apply. The analysis reflects factor (1) because Yoo is relying on prior analysis that is not binding in the “instant case.” In other words, the language Yoo relies on is not from any case involving torture, or even criminal law. There may have been reasons for doing so, but the fact remains that what Yoo relied on was not on point.

Yoo’s memo also reflects factor (2), a relative lack of legal analysis. The background on § 2340 (and 2340A) and the discussion of the specific intent requirement are about twice as

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331 Id.
332 Id.
333 Id.
334 Id.
336 See Yoo, supra note 323, at 38 (“Although the[] [other] statutes address a substantially different subject from section 2340, they are nonetheless helpful for understanding what constitutes severe physical pain.”). Note, however, that Yoo does not explain why the other statutes are helpful; the sole reason appears to be that the other statute happens to use the phrase “severe pain.”
long as the section on “severe physical pain.”\textsuperscript{337} About half of the section on physical pain simply recites the dictionary definition of the word “severe,” and the only legal analysis on point is the discussion of the (arguably irrelevant) statutes.\textsuperscript{338}  

Finally, Yoo’s memo reflects factor (3), resolving ambiguity in favor of the extant law. It is not unreasonable to think that the “unprecedented” attacks of September 11th would result in (and might even require) a legal analysis that did not rely on pre-existing doctrines and pre-existing, but unrelated, legal categories.

These kinds of judgments, however, are precisely what my hypothesis would predict. Relying on “precedent” applies to all kinds of legal reasoning, not just judicial opinions. The motive to cohere and the motive to simplify are at work; the same standard is applied across contexts because doing so simplifies the realm of legal doctrine and brings coherence to an ambiguous area of torture law. The availability heuristic is also prominent: Yoo’s memo relies on the readily available formulation even though it did not, even by his own admission, bear directly on the issue at hand.

The GWOT provides another occasion to examine the Supreme Court’s use of arguments about precedent. First, the mere fact that something has not previously been done is an argumentative trump, even at the Supreme Court.\textsuperscript{339} This mode of reasoning applied even in cases raising questions about enemy combatants’ due process rights. In Rumsfeld v. Padilla, Chief Justice Rehnquist, writing for the Court, responded to Justice Stevens’s dissent by writing, “the dissent cannot cite a single case in which we have deviated from the longstanding rule we reaffirm today.”\textsuperscript{340} Justice Scalia, dissenting in Hamdan v. Rumsfeld, complained that the majority “cannot cite a single case in the history of Anglo-American law (before today) in which a jurisdiction-stripping provision was denied immediate effect in pending cases . . . .”\textsuperscript{341} In both cases, the absence of a case on point was a crucial, if

\textsuperscript{337} See id. at 34-39.
\textsuperscript{338} See id. at 38-39.
\textsuperscript{339} See, e.g., Jones v. Bock, 549 U.S. 199, 222 (2007) (“[R]espondents cite no case interpreting this provision” the way they do); Smith v. City of Jackson, Miss., 544 U.S. 228, 247 (2005) (Scalia, J., concurring) (Smith “cites no case for this proposition”); McKune v. Lile, 536 U.S. 24, 26 (2002) (“Respondent fails to cite a single case from this Court” supporting its position).
\textsuperscript{340} 542 U.S. 426, 449 (2004).
\textsuperscript{341} 548 U.S. 557, 659 (2007) (Scalia, J., dissenting).
not dispositive, argument, so important that the relevant words were italicized. Yet, just as with Yoo’s memos, one might think that the GWOT might require novel legal or analytical approach.

Yoo’s goal in writing the memo was to provide bright-line rules regarding torture. This may or may not be a worthwhile goal. But my point is a different one: even in a war that presented “unprecedented dangers,” a critical juncture of the issue presented—how much physical pain is so severe as to constitute torture—relies on quite ordinary, and to some extent cursory, legal analysis. Although the importance of the law and policy issues at stake prompted careful legal analysis, it was impossible to completely eliminate the effect of cognitive bias on the legal conclusions. This underscores my overall point. It’s not only difficult to overcome these cognitive biases: because the biases operate subconsciously, it is often impossible.

B. Truth or Stability?

Earlier, I quoted Adrian Vermeule and pointed out that “[t]he key point is not that judges are likely to get things wrong; it is that when they do get things wrong, they are likely to err in systematic rather than random ways.” Vermeule’s point applies to my analysis as well. The key point is not just that we humans have certain cognitive biases; it is that when our decisions are skewed, they are likely to be skewed in systematic rather than in random ways.

342 See “Torture Memo” Author John Yoo Responds to This Week’s Revelations, supra note 324.

343 George W. Bush, U.S. President, The President’s State of the Union Address (Jan. 29, 2002).

344 Thanks to Zachary Clopton and Frederick Schauer for (separately) highlighting this issue for me.

345 Vermeule, Common Law Constitutionalism, supra note 23, at 1501.

346 This is not to suggest that there are not countervailing cognitive biases. For example, some combination of optimism bias and overconfidence may lead individuals to shun existing arrangements in favor of their own, idiosyncratic views. See, e.g., Antonio E. Bernardo & Ivo Welch, On the Evolution of Overconfidence and Entrepreneurs 1-2 (Yale Int’l Ctr. for Fin., Working Paper No. 00-48, 2001), available at http://ssrn.com/papers=275516. Bernardo and Welch argue that the overconfident—those who, presumably, are less likely to exhibit the biases I describe in Part III.A—are more likely to be entrepreneurs and risk-takers. See generally id. There are two responses. First, the literature demonstrates far more “backward-looking” biases than “forward-looking” biases. Second, the people Bernardo and Welch identify are, by definition, the exception. My Article, on the other hand, is aimed at the characteristics that are reflected in most people’s behavior, most of the time.
Then the question is, “So what?” Maybe our expressed preferences—as humans, as citizens, as lawyers—are unduly weighted toward the past. Is this really problematic? Maybe the law is “wrong” as measured against some idealized notion of humans’ preferences (if such an ideal could even be extrapolated), but this may not pose any practical problems. If the law is not meant to embody some intrinsic truth, but instead is merely meant to be stable and predictable, then this problem seems illusory.

For example, if we are not concerned about the substantive content of the law, then it does not matter whether there is an implied private right of action under section 304 or not. So long as a rule is established, and relatively unlikely to change over time, then the law is at least stable and corporations and shareholders can act accordingly. For example, instead of repeatedly litigating the section 304 question, shareholders might focus on other causes of action and thus save resources. Moreover, acute awareness of the possibility of bias might require judges to constantly re-evaluate legal rules, putting the rules in a state of flux and making them unpredictable and unstable.

However, I argue that this problem is overblown. Even if law is merely meant to foster stability, and even if we are completely agnostic about the substantive content of the law, my analysis poses problems with the doctrine of stare decisis whether we are concerned about truth, stability, or both.

C. Problems in Both Cases, and Some Solutions

Imagine that you have a gun that, due to some mechanical error, always fires slightly (but somewhat

I should note (as may already be apparent to some readers!) that my analysis is not perfect. One hundred percent of the population is not biased toward the status quo; some people may buck the trend in the face of even the most forceful cascade. Just because most people will demonstrate some quality most of the time does not mean all people will do so all of the time. However, as Hanson and Yosifon write in *The Situation*,

[T]o best promote human understanding and well-being, legal theories must be anchored in a reality-based understanding of human thinking and behavior. Realism, we think, is critical. To be realists, on this telling, means to begin with real humans and to build models from there, rather than to begin with models and then view and interpret humans through them.

Hanson & Yosifon, *The Situation*, supra note 20, at 183. Even if there are exceptions, policymaking must generally be based on how most people will react to a given situation.
unpredictably) to the left of where it is aimed. Now imagine that the error is brought to your attention. What do you do? Broadly speaking, there are three options. First, you might decide that your gun’s aim is off enough that you buy a new gun, one that does not have this error. Second, you might decide that the slight unpredictability is not reason enough to buy a new gun, so you will just aim slightly to the right from now on and correct the gun’s bias. Finally, you might decide that you generally want to shoot to the left anyway, and that therefore you won’t change much at all. The gun’s “leftness” is a good thing to be aware of, but since it generally gets you where you want to wind up, it is not going to affect your actions.

This analogy tracks the argument made in this Article. The evidence put forth in Part III suggests that our court decisions will tend, for situational and psychological reasons, to be rooted in history, tradition, and precedent. The theory I infer predicts that we will choose these existing arrangements, not because they are the best of all possible worlds, but merely because they exist. In other words, our jurisprudential gun will always shoot slightly to the left. However, the evidence does not provide perfect predictive power. Precedent is sometimes disregarded and cases do get overruled. Thus, although our decisions are rooted in the past, it is not possible to predict with complete certainty how firm the roots are and when they will be broken.

And so, broadly speaking, there are three alternatives. I term these the strong case, the middle case, and the weaker case. In the strong case, stare decisis is fundamentally unworkable, so the only option is to buy a new gun. In the middle case, stare decisis is seen as a “thumb on the scale” for the cold hand of the past. Aware of this information, we might aim slightly to the right, by lessening but not eliminating our dependence on stare decisis. In the weaker case, the theory offers very little. It sheds some light on reasons why our jurisprudential gun aims to the left, but if we want a system that is resistant to change, then we may simply decide that the cognitive biases outlined above do not change the systemic calculus (and may, in fact, provide reasons why the current system is preferable). I discuss each of these possibilities in turn.
1. The Strong Case

The strongest form of the argument is that the legal system reflects cognitive shortcomings and nothing more, so we should scrap stare decisis and look to another way to adjudicate cases. Under the strong case, judges should not follow precedent other than as a last resort.

In the strongest form of the argument, our cognitive biases and heuristics make reliance on precedent unreliable. Therefore, courts should essentially engage in “de novo review” every time. A court would not be barred from following precedent—such a rule would be patently absurd—but there would be a strong presumption against doing so. On appellate review, a court would critically examine the lower court’s citation to precedent. The appellate court would be especially vigilant to monitor whether the district court was following precedent as a heuristic, for example, by evaluating the district court’s decision as measured against the five factors outlined in the previous part.\(^{347}\) Moreover, in the strongest form of the argument, not only would the practice of stare decisis reflect cognitive bias, but the doctrine itself could be seen as arising as a reflection of bias—and nothing more.

2. The Middle Case

The “middle ground” of this argument considers stare decisis (history, precedent, stability) as one set of factors among many to consider when deciding legal rules. Under this “middle ground,” precedent should generally be respected, but the burden of proof is on the one who wants to maintain the status quo.

The middle ground can be illustrated with an example: Consider a legal dispute and a given set of facts. Assume further that the correct answer to this legal question is X, another reasonable answer is Y, and an unreasonable answer is Z. Under the current system of stare decisis, if an appeals court concludes Z, that conclusion is binding on all lower courts.

\(^{347}\) For example, if the question of a private right of action had come up on appeal in *iBasis*, the reviewing court should have been wary of the decision below because there are strong grounds to think that the *iBasis* court relied on precedent—and non-binding precedent at that—as a heuristic. As it was, the *iBasis* appeal was voluntarily dismissed so the court never reached the merits. Judgment, *In re iBasis, Inc. Derivative Litig.*, No. 08-2055 (1st Cir. Feb. 20, 2009).
and on itself." Under the “middle ground” that I propose here, a subsequent court might reason as follows: An earlier court concluded Z. However, after reviewing the basis for that conclusion, we conclude that it was incorrect. Therefore, we conclude X. Under this regime, a court would have the flexibility to depart from precedent and review the rule anew. In other words, the subsequent court would review the earlier case out of a concern that it would follow the prior rule as a heuristic rather than because of the informational content contained in the rule.

However, once the subsequent court concluded X or Y, that rule would be binding on subsequent courts. In other words, so long as the precedential rule was reasonable, it would be binding; courts would only be free to revisit precedent if they were convinced the earlier rule was incorrect.

3. The Weaker Case

The weaker case is that all my theory offers is a “tweak.” Under the existing doctrine, for example, the Supreme Court will not overrule its earlier precedent unless it has become demonstrably erroneous and unworkable. Under the weakest version of the theory, this Article highlights one phenomenon that should go into the calculus when Justices are determining whether a given precedent is demonstrably erroneous or unworkable. At the lower court level, if judges could think of any plausible reason for sticking with the existing rule, then they should do it. Under the weakest version of my argument, lower courts will almost never be justified in deviating from the existing rule. The only possible exception might be in, for example, a SOX section 304 case in the District of Massachusetts or some other district that decided the private right of action question “late in the game,” so to speak. If, after an analysis like mine, a court was convinced to a high degree of probability that the existing rule was the result of a cascade, the court might be justified in deviating from the rule. Even under this conception, though, a

348 See, e.g., United States v. Humphrey, 2002 Fed.App. 0131P (6th Cir.), overruled on other grounds by United States v. Leachman, 2002 Fed.App. 0353P (6th Cir.) (explaining that a given Sixth Circuit panel is bound to follow precedential authority from another panel even if current panel is inclined to disagree with prior decision).

349 See Nelson, supra note 54, at 1-3.
lower court would probably never be justified in refusing to follow a higher court’s rule.

D. An Important Qualification

Imagine that I want to know if it will rain tomorrow. You come to me and say, “I believe it will rain tomorrow.” I take this piece of information and add it to the available data I have. Eventually, I use your information when I decide whether or not it will rain tomorrow (and presumably, your comment makes me somewhat more likely to think it will rain tomorrow).

But now imagine that I asked you how you know it will rain tomorrow, and you say, “It came to me in a dream.” You didn’t check the weather report, or look at your barometer, or collect any sort of data. Now, my faith in the epistemic basis of your claim is shaken, and your claim carries less weight than it otherwise would. However—and this is key—the fact that your information came to you in a dream does not bear at all on whether it will actually rain tomorrow. Maybe it will, for reasons related to your dream or not, but the sensible thing for me to do (ex ante) is to discount your assertion.

This analogy applies to my argument. It may be that stare decisis is desirable for a variety of reasons. However, the social psychological evidence suggests that we believe in stare decisis because it “came to us in a dream.” Of course I don’t mean that literally, but just as in the weather example above, the epistemic basis of our faith in stare decisis is called into question. The mere presence of cognitive bias can never tell us that our decision is wrong. Biases can only tell us that the reasons we think our decision was right are unreliable.

This qualification relates to the way I have referred to the psychological studies in this Article. If a coffee mug is “worth” five dollars, then we might say that it is irrational or otherwise “suboptimal” for a person to sell it for no less than ten dollars. In this instance, “suboptimal” would mean that the person made the wrong substantive decision: she should have sold the mug for five dollars but instead held out for ten to no avail.

I am not arguing that stare decisis is suboptimal in that sense. For example, Casey declined to overrule Roe, in part

350 Thanks to Adrian Vermeule for this example, which I adopt from his telling almost verbatim (to the best of my recollection).
because of considerations of stare decisis. One might read my argument to be that (1) stare decisis is rooted in cognitive bias; (2) bias leads to substantively suboptimal results; and therefore (3) *Casey* should have overruled *Roe*.

But that misreads my argument. My Article takes no position on whether *Casey* should have overruled *Roe* or any other substantive question. The behavioral phenomena I outlined earlier will never prove that a decision was wrong, or even that it was the product of bias. Indeed, some of the psychological literature argues that heuristics are not substantively suboptimal at all.\(^{351}\) My point is not that the decisions were suboptimal in every case where precedent was followed. My point is that the reasons for arriving at that decision are suspect.

Another point worth noting: I am arguing for a decreased reliance on precedent in our system, but not for judges to be oblivious to rulings in earlier, like cases. At its inception, the doctrine of stare decisis did most of its work in making the law “common”—that is, in making legal rules standard across the various English counties. Certainly, uniformity is a desirable goal for any legal system, and (at least to some extent) advocates defend stare decisis on similar grounds today, arguing that it makes the law more stable, predictable, and efficient.\(^{352}\)

Today, the “information sharing” function of stare decisis is significantly less important. With every published decision, and many unpublished decisions, available on Westlaw or Lexis within a matter of months (at most), search costs are dramatically lower. Judges are in a position to signal to each other in a way that they were not eight hundred or a thousand years ago.

Moreover, judges can and should learn from each other through this information-sharing. Even in the strongest case, procedurally rejecting stare decisis does not mean that judges are required to ignore other (correct) decisions. It does not even mean that judges should go out of their way to avoid the prior results. It merely means that stare decisis carries no normative weight, whereas in today’s jurisprudential system it is almost always dispositive.

\(^{351}\) See, e.g., Gerd Gigerenzer et al., Simple Heuristics That Make Us Smart (1999).

\(^{352}\) See supra Part II.B.
This leads to another point: even in the strongest case, even if the doctrine of stare decisis is eliminated altogether, judges will still rely on precedent. Suppose that my analysis is correct. (After all, that would be the only reason to decrease our reliance on precedent.) The phenomena catalogued in Part III suggest that, even in the absence of a formal mechanism by which judges are obliged to rely on prior decisions, they will do so anyway. In other words, even if the doctrine of stare decisis were to be eliminated in one fell swoop, my hypothesis implies that judges will still be relying on prior decisions in some manner. Thus, we would not completely lose the benefits that stare decisis provides.

E. Will the World Come to an End? (No.)

Stare decisis is defended on a variety of grounds. If the hypothesis I advocate takes hold, and prior judicial decisions have diminished sway—even in like cases—will the legal system fall apart at the seams? If stare decisis “controls the caprice of judges by requiring them to suppose that all similar future cases will be decided according to their instant decision,” a weaker role for precedent might encourage the caprice of judges. If stare decisis is “prudential and pragmatic,” a weaker role for precedent might lead to imprudent and impractical outcomes. If stare decisis enables efficiency, a weaker role for precedent might throw parties’ prospective planning into disarray and harm our country’s economic prospects.

I do not dwell on these possible objections to my argument because I find them to be a canard. First, as others have pointed out, the increasing number of unpublished dispositions at the court of appeals level and oral decisions at the district court level means that a large number of cases are taken out of the “stare decisis database,” so to speak. Second, as Nelson has thoroughly explained, a decreased reliance on stare decisis by no means suggests that chaos will reign. Third, it is unlikely that a decreased reliance on stare decisis will undermine efficiency goals, as it is unclear whether the current system furthers those goals in the first place. Fourth, stare

353 See supra Part II.
decisis may in some cases undermine, rather than further, judicial legitimacy.

First, courts frequently, and by some accounts increasingly, rely on unpublished dispositions (at the appeals level) or oral dispositions (at the trial level). Even though some of these decisions may be available via online databases, litigants are instructed not to cite them. Schmier and Schmier argue that the “abandonment” of stare decisis—through the use of unpublished dispositions—is detrimental to the democratic process. Whatever the merits of their argument, it is clear that if ninety-three percent of cases are decided without a published opinion, and where the practice has not had a tremendous destabilizing, delegitimizing, or efficiency-impeding effect on the law, a decreased reliance on stare decisis will probably not wreak havoc on the rule of law.

Second, and at a deeper level, a decreased reliance on stare decisis does not mean that courts should decide cases based on a whim. In his article, Stare Decisis and Demonstrably Erroneous Precedent, Caleb Nelson argues (for a variety of reasons unrelated to my Article) that stare decisis should not carry the almost-dispositive weight that it does under the current regime. But Nelson does not argue—and neither do I—that judges should be entirely free to make any decision they want in a given case. Instead, Nelson adapts the administrative law model of Chevron deference. Under Chevron, a reviewing court will defer to an agency’s interpretation of a statute so long as that interpretation is “permissible,” even if the court would have chosen a different interpretation in the first instance. A reviewing court is not bound by the agency’s interpretation if it is “impermissible.”

Nelson proposes that a similar framework apply to stare decisis. A lower court should be permitted to disagree with the stare decisis-given rule (to an extent that varies depending on which version of my theory is adopted), but its discretion would be limited, essentially by a reasonableness side

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356 See, e.g., Schmier & Schmier, supra note 354, at 233.
357 See id. at 233-34.
358 See generally id.
359 See generally Nelson, supra note 54.
361 See Nelson, supra note 54, at 5-8.
362 See Chevron, 467 U.S. at 842-45.
363 See id.
364 See Nelson, supra note 54, at 5-8.
constraint. Under such a system, erroneous or otherwise improper precedents would be more likely to be abandoned. The reviewing court should then uphold the lower court unless it is “impermissible,” i.e., if it has no reasonable basis in law or fact—or if it relied on stare decisis as a heuristic.

Nelson argues persuasively that a weaker version of stare decisis is likely to lead to a net benefit. Among other things, the weaker version of stare decisis will lead to more overruling of prior decisions and, presumably, the law becoming more “correct” as a result. But this benefit is not without cost; as courts engage in more overruling, the law could become more uncertain and potentially unstable. Yet it is not necessarily clear that the current system, with a stronger form of stare decisis, is free from such uncertainty. After all, when legal questions are clear, individuals would probably not litigate them; the mere fact of litigation often signals that we are in a gray area. In those cases, the law would not be substantially more uncertain under a weaker version of stare decisis. And when litigants do bring a question where the correct answer is clear (or well-established, or easy to ascertain) there is a very good chance that judges will adhere to that correct answer, under any system of stare decisis, strong or weak. As Nelson points out, even under a weaker regime, the law is more likely to move toward correct decisions, even if subsequent courts are as likely to be error-prone as their predecessors.

This kind of a system is not—if you will excuse the pun—unprecedented. Appellate courts routinely affirm lower court rulings with which they might, writing on a blank slate, decide differently. For example, courts will affirm an agency’s adjudication so long as it is supported by substantial evidence, even if the court would have reached a different conclusion. When there is an appeal following trial, all inferences are drawn in favor of the jury’s verdict; the jury’s verdict is affirmed so long as there is any evidence that supports it. Issues not properly preserved for appeal are routinely reviewed for “plain error,” meaning that a court’s conclusion is upheld unless there is no reasonable basis for the lower court’s ruling. In short, there are already a wide range of cases where an

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365 See id. at 54-78.
366 See id. at 54-60.
367 See id. at 59-60.
appeals court will uphold a decision it might disagree with, so long as it has some basis in law or fact.

Now imagine that a case presents certain facts. One judge might reach one conclusion, X, that is reasonable under the circumstances. Some time later, on similar facts, another judge might conclude Y. If the standard of review is plain error, an appeals court—the same appeals court—could very well permit both decisions to stand under the status quo. This is not much different from the result that would obtain under a system with a weaker reliance on precedent.

Third, it is highly unlikely that a system with decreased reliance on stare decisis will undermine efficiency goals (bracketing the question of whether economic efficiency should be the goal of a system of justice at all). For example, Stake wrote in a recent article that the demise of the fee tail estate demonstrates the efficiency of the common law: the fee tail, by holding that only first-born sons could inherit property, was inefficient; the common law ultimately abolished the fee tail, suggesting that the common law moves toward efficiency. However, as Hirsch points out in a persuasive reply, the common law is not a natural system that arose of its own accord; “it is also, through and through, a participatory system. Human participation cannot but leave its indelible stamp.” That stamp, he argues, includes phenomena such as the stickiness of legal rules, status quo bias, and the availability heuristic. In other words, these psychological phenomena undercut the common-law-as-efficiency hypothesis, even in a very limited context (fee tails and other perpetuities).

Along these lines, no less a titan in the law and economics field than Judge Richard Posner (and co-authors) looked at the Economic Loss Rule in tort law, the doctrine which holds one cannot sue for economic loss without physical injury under certain circumstances. The doctrine arose around the 1960s and 70s, and its application gained ground in various states over time. Yet after conducting a detailed empirical

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370 Id. at 430-31.

analysis, Posner and his co-authors conclude that the law did not converge on any given point, evolved inconsistently, and, under almost any interpretation, did not converge on efficiency. Of course, this does not mean that no legal rules ever converge on efficiency. It does, however, mean that any critique of my argument that suggests that my proposal will throw into whack an already-efficient system is, at best, incomplete, and at worst, flat wrong.

Fourth, although stare decisis is thought to further the legitimacy of the judicial system (by controlling the caprice of individual judges), it may in some cases have the opposite effect. As noted above, it is not uncommon for district courts to adhere to a rule while telling the parties that they disagree with that rule. In a typical court case, one party is on the losing side. The losing party may come to view the court as less legitimate for sticking to a rule that it acknowledges is incorrect or otherwise inapplicable.

Finally, it is worth noting that a critique against my Article’s premise contains the seeds of its own response. To put it another way: I assume at the outset of this Article that stare decisis has a constraining effect on judges and that effect pushes decisions toward the past. Reasoning from that premise, and on the basis of psychological evidence, I conclude that stare decisis should have a diminished role in our jurisprudential system.

However, some people argue that stare decisis already does very little work to constrain judges because (1) judges are simply enacting their own political preferences, (2) there is so much prior case law, encompassing so many sets of facts, that “precedent” can be used to justify virtually any position, or (3) both. I find this argument to be unpersuasive.

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overwhelming majority of cases are simply not politically charged, so that political preferences do not even enter the equation. Indeed, even at the Supreme Court, unanimity is not uncommon: of the seventy-five full opinions published in the 2007 term of the Supreme Court, nearly one-third of them had no dissenting opinion. If judges are already unconstrained by precedent, then the parade of horribles that will supposedly ensue should already be happening. The legal realists’ theories acknowledge, implicitly or explicitly, that the fact that legal decisions reflect political preferences does not, ipso facto, throw the law into flux because most decisions are not political. Similarly, I acknowledge explicitly that the fact that we should decrease reliance on stare decisis will not, ipso facto, throw the law into flux. Moreover, if anything, an obligation to follow precedent creates a tremendous first-mover advantage for the first court to address a given question. For example, it might be the case that the district judge in Neer came out against the shareholder plaintiffs because he harbored some animus against shareholders (or whatever). Because other courts have followed Neer almost blindly, that initial judge’s policy preferences have been enacted across the country. Stare decisis may not limit the role of policy preferences; it may simply change whose policy preferences get furthered—the first judge’s.

There is one final point I want to make. In his 1999 article, Talley concludes that precedent cannot be explained as an information cascade. First, he writes that cascades are unlikely to occur because of the possibility of appellate review. However, as Guthrie and George point out, the overwhelming majority of cases are affirmed on appeal, suggesting that appellate review is not as robust as Talley cases). In a recent article, Frederick Schauer concludes that recent criticism of the Roberts Court for not taking stare decisis seriously is overblown. Frederick Schauer, Has Precedent Ever Really Mattered in the Supreme Court?, 24 GA. ST. U. L. REV. 381, 400-01 (2007).

375 See, e.g., The Supreme Court—The Statistics, 122 HARV. L. REV. 516, 521 (2008) (noting that roughly one-third of Supreme Court opinions have no dissent and that Justices dissent relatively rarely). In 2007-2008, only twelve cases were decided by a five-to-four vote. Id. at 522.

376 Talley, supra note 82, at 92.

377 Id. at 112-13.
assumes. Second, he argues that cascades are unlikely because we know not only what courts did but also why they did it, by way of their written opinions. However, as the Sarbanes-Oxley example demonstrates, courts often dispose of a case with little or no written explanation, suggesting that the mere fact of a written opinion is not dispositive in determining if a cascade is at work. Third, Talley suggests that cascades are unlikely because judges are heterogeneous and have competing considerations. However, in this line of argument, Talley underestimates the strong institutional ethos (not to mention the cognitive and behavioral factors) that weigh strongly in favor of following precedent.

But Talley is right in this regard—it is difficult to identify a cascade and it is difficult to identify cognitive bias at work. However, I have tried to identify some factors that could help in making that determination. In conjunction, these factors give us at least more persuasive—even if not conclusive—evidence. For example, in the context of the unconscionability doctrine, Talley says that it is hard to identify a cascade. However, he focuses on only one factor (following the decision of a non-binding court). I have identified other factors. These are not infallible or exhaustive. They do, however, move us closer to knowing when bias is at work.

It is true that appellate review might halt or reverse a district court cascade. But if the Supreme Court hears very few cases (it does), and if the courts of appeal affirm the overwhelming majority of cases (they do), then a district court cascade such as the one I identified earlier bodes poorly for defenders of stare decisis.

V. CONCLUSION: A WAY OUT

For a very long time—varying a bit by whom you ask—the practice of stare decisis has been the cornerstone of Anglo-American jurisprudence. We are taught that present-day courts should follow the lead of their predecessors because (1) the

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379 Talley, supra note 82, at 107.
380 Id. at 110-11.
381 Id. at 115-18.
382 Id. at 116-17.
earlier courts are more likely to have reached the correct answer; (2) sticking with the status quo rule fosters stability, predictability, and efficiency; and (3) the practice furthers judicial legitimacy.

Yet as scores of studies from a variety of disciplines show, we are not rational actors coldly picking the best solution to a given legal problem. We take mental shortcuts and deviate from rationality in ways we aren’t even aware. We are primed to prefer existing social and political systems, and we place an undue weight on tradition and the status quo. If we see others making a given decision, we tend to follow that decision, believing that others know best even when our “private stock of reason” tells us otherwise. In short, our decisions are biased and the biases are correlated.

If our biases were random, we might take some comfort knowing that they might all cancel out. But they are not random. We are cognitively primed to subconsciously prefer precedent—and then, instead of correcting that bias, we built a legal system that requires courts to follow precedent. We would do well to look at this practice with a critical eye.

Hanson and Yosifon write that, in developing legal theory, we ought to begin with descriptions of real human actors and work from there.\textsuperscript{383} Similarly, the law would be more honest, more accurate—and, yes, more just—if we cast that same critical eye on judicial decision-making.

\textsuperscript{383} Hanson & Yosifon, The Situation, supra note 20, at 183.
The Puzzle of Judicial Education

THE CASE OF CHIEF JUSTICE WILLIAM DE GREY

Emily Kadens†

Reading judicial memoirs from the last three centuries, one gets the impression that the judge took the oath, stepped onto the bench, and proceeded to fill the judicial role as if born in the robe. Even those who admit to having had a learning curve remain coy about what they did to teach themselves how to be judges.1 When asked directly, however, judges readily admit to the difficulties of learning their jobs.2 As one said, “[B]ecoming a federal judge is like being thrown into the water

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1 See, e.g., Kathryn H. Vratil, Notes from the Bench, 42 U. KAN. L. REV. 1, 5-10 (1993) (discussing her experience upon joining the bench without going into significant detail about her self-education).

Recognizing the need for formal training, in the last fifty years both the federal and state judiciaries have created what are affectionately known as baby judge schools, short orientation programs primarily aimed at instructing trial-level judges in law and judicial administration.4

Fifty years is a very short time in the life of a problem that began at least as early as the sixteenth century, when the English started to turn to experienced lawyers with no judicial experience to staff their central common law courts.5 The United States inherited this system of selecting its judges from the general pool of lawyers, and thereby also inherited the dilemma of training those neophyte judges in their new roles.6 Interestingly, however, despite evidence of the omnipresence of judges' need for education and the likelihood that early modern judges were no more able to step seamlessly onto the bench than their modern counterparts, scholars and historians of the

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3 Carp & Wheeler, supra note 2, at 374 (internal quotation marks omitted); see also Alpert, Atkins & Ziller, supra note 2, at 330 (“It takes two or three years to get to where you finally feel sure of yourself.” (internal quotation marks omitted)); On Becoming a Judge, supra note 2, at 140 (“Every judge I’ve ever talked to said, ‘yes, there was a period in which I felt like a freshman.’”); Wasby, supra note 2, at 10 (“When I joined the court . . . I was left to stumble, bumble, and do injustice to other people. I was given no manual, no orientation, [and] no one came forward to help.” (alteration in original) (internal quotation marks omitted)).

4 “Baby Judges School” Jump Starts Learning Process, THIRD BRANCH, Aug. 2005, at 1, 10 (federal baby judges school); Larry Berkson & Lenore Haggard, The Education and Training of Judges in the United States, in MANAGING THE STATE COURTS 145-49 (Larry C. Berkson, Steven W. Hays & Susan J. Carbon eds., 1977) (detailing early history of state baby judges schools); Rex Bossert, A Week at Boot Camp for Judges: Rookie Jurists Get a Crash Course and Swap Court Tips at Baby Judge School, NAT'L L.J., Jul. 7, 1997, at A1 (federal baby judges school); Cook, supra note 2, at 263-66 (early history of federal baby judge seminars); see also Russell, supra note 2, at 17 (“Judicial education is a young science. It was only 25 years ago that the National Judicial College was founded by judges who recognized their need for professional judicial education.”).

5 The earliest English justiciars and justices, of course, had no judicial experience prior to taking the bench. However, as discussed below, between the fourteenth and sixteenth centuries judges were selected from among the serjeants-at-law, leading lawyers who served a sort of judicial apprenticeship before taking the bench. See discussion infra notes 29-31 and accompanying text.

6 See On Becoming a Judge, supra note 2, at 142 (“Federal judicial recruitment processes are almost tailor-made to pick people who don’t know an awful lot about what they’re supposed to do to become a judge. I think typically the judges are successful practitioners, which requires a certain degree of specialization, and they get on the federal bench anyway and they’re faced with all sorts of civil rights and constitutional law and criminal procedure questions about which they know relatively little.”).
jurisdiction have paid limited attention to the question of how an appointee learns to be a judge.\footnote{See supra notes 2, 4 (literature on modern judicial education).}

One reason for both the lack of scholarship and the need for judicial education may be the mystique of the judge, whom Blackstone called the “depositories of the law; the living oracles.”\footnote{1 WILLIAM BLACKSTONE, COMMENTS *69; see also JOHN P. DAWSON, THE ORACLES OF THE LAW, at xi (1968) (saying that Blackstone’s comment “could not have seemed at the time he wrote to be greatly exaggerated. The predominant role of English judges in the creation and development of English law had been written for all to see. To us in this country, some 200 years later, the influence of judges has if anything increased.”)}. In civil law countries, the judiciary has long been viewed as a career, an honorable one, perhaps, but just one amongst many choices a young lawyer could make. The law student or law school graduate selects the judicial track, receives focused training, and progresses up the hierarchy of courts as his or her abilities, interests, and experience warrant.\footnote{The key elements across civil law system are that judges are formally trained and that there are separate hierarchies for judges and lawyers. Systems vary in how they recruit and train their judges. For the variations in some European judicial training systems see JOHN BELL, JUDICIARIES WITHIN EUROPE 52-58 (France); id. at 113-18, 120-24 (Germany); id. at 189-95 (Spain); id. at 244-46, 248-51 (Sweden); id. at 312-13, 319-20 (England) (2007).} In such a system, the fact of judicial education is openly acknowledged. In common law countries, by contrast, a judgeship long ago became a reward for a successful career as a practitioner. It was not a career the young lawyer prepared for; it was, and remains, the plum he hoped he might earn by service in another branch of the law.\footnote{DANIEL DUMAN, THE JUDICIAL BENCH IN ENGLAND, 1727-1875: THE RESHAPING OF A PROFESSIONAL ELITE 72-99 (1982); DAVID LEMMINGS, PROFESSORS OF THE LAW: BARRISTERS AND ENGLISH LEGAL CULTURE IN THE EIGHTEENTH CENTURY 275-81 (2000) (reviewing pre-judicial career paths of English judges); WILFRID R. PRIEST, THE RISE OF THE BARRISTERS: A SOCIAL HISTORY OF THE ENGLISH BAR, 1590-1640, at 135 (1986) (“The highest prize within the legal profession itself was a judge’s place in one of the superior courts of Westminster Hall . . . .”).} This method of appointing top lawyers to the bench encourages a mentality that “the better the advocate, the better the judge is likely to be,”\footnote{Howard, supra note 2, at 127 (paraphrasing Charles Evans Hughes, Jr.).} and discourages admitting, as Chief Justice Warren Burger did in an interview, that “not every person appointed is immediately qualified to step right in and perform the function.”\footnote{Interview with Chief Justice Warren E. Burger, U.S. NEWS & WORLD REP., Aug. 21, 1972, at 42.} The mystique of common law judges presumed to have “learn[ed] their roles en route to office” also has consequences
for scholarship." If the myth were true, then a study of judicial education would be uninteresting, if it were even conceived of at all. And because the perpetuation of the myth is incompatible with judges discussing their methods of self-training, evidence can be hard to come by. Thus it is hardly surprising that so little has been written about the specific steps new judges have taken to acquire the knowledge necessary to serve on the court to which they have been raised.

But the myth is not true, and it has not been true for at least two centuries, as this study of the education of judges in eighteenth-century England, and specifically that of William de Grey (1719-1781), who served as Chief Justice of the Court of Common Pleas from 1771 to 1780, will try to demonstrate. This Article draws on an unusual and heretofore unexplored collection of archival material in Norwich, England and in Lincoln’s Inn, London to shed some light on the way one important and well-regarded judge addressed his knowledge gap. Although a work of legal history, it borrows from the discoveries of modern studies of judicial education to help give meaning to the historical evidence. And although as a work of history it claims to offer no lessons for the present, the story of how de Grey and his brethren learned their jobs does suggest the universality within the common law world of both the problem of judicial training and its solution.

Current scholarship calls the process of learning to be a judge “socialization.” In these works, socialization is a broad

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13 Howard, supra note 2, at 127; see also Edson L. Haines, Judicial Education, in HANDBOOK FOR JUDGES: AN ANTHOLOGY OF INSPIRATIONAL AND EDUCATIONAL WRITINGS FOR MEMBERS OF THE JUDICIARY 230, 231 (Glenn R. Winters ed., 1975) (“Everyone seems content to operate on the assumption that the donning of judicial robes makes a man competent to perform all duties of office.” In fact, however, “[a] judge needs opportunity, time and assistance in the reduction of his ignorance. In many instances it will not be a case of re-tooling—it will be tooling up for the first time.”); Richard S. Arnold, Irving L. Goldberg Lecture, Southern Methodist University Dedman School of Law: The Federal Courts: Causes of Discontent, 56 SMU L. REV. 767, 771 (2003) (“You may find it a little disconcerting that people who are appointed to the bench need to go to school to learn how to do it. We hope that they know something before they are appointed . . . .”).

14 On Becoming a Judge, supra note 2, at 139 (“I think one of the reasons we have so little systematic and solid study of this is that it's difficult.”).

15 For contemporaries' views of de Grey, see 1 JAMES OLDHAM, THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY 128 (1992) [hereinafter OLDHAM, MANSFIELD MANUSCRIPTS]; 1 HORACE TWISS, THE PUBLIC AND PRIVATE LIFE OF LORD CHANCELLOR ELDON 113 (London, John Murray, 2d ed. 1844) (“One of the most considerable among the judges of that time was Lord Chief Justice De Grey. 'He was the object,' says Mr. Farrer, 'of Lord Eldon's highest commendation. He spoke of him as a most accomplished lawyer, and of most extraordinary power of memory.'”).
concept encompassing variously the pre-judicial career, acclimation to institutional norms, integration into the court organization, and acquisition of required knowledge. This Article focuses on only one piece of the socialization puzzle: that of education in the procedural and substantive law. To a much lesser extent it touches on evidence of the transition from advocate to judge and the familiarization with court administration. By judicial education is meant any attempt to learn the rules, procedures, or history of the court or to prepare legal reference tools for use while hearing or preparing to hear cases. It excludes the use of reports or of certain canonical works in the preparation of opinions in the ordinary course of the judge’s job. The citation to authorities was a normal part of the opinion process for all judges of the time, whether new or long-serving.

Furthermore, because most of the archival material concerns the books Chief Justice de Grey bought or used during his first two years on the bench, this Article concentrates on the book-learning aspect of judicial education. An important part of de Grey’s studies appears to have involved very basic practice manuals and textbooks. That de Grey used books ought to have been then, as now, unremarkable. Yet given the insignificant attention such elementary works have garnered, few legal historians might have guessed that a highly experienced barrister like de Grey would have turned to basic student manuals for his information. Such a finding introduces a caveat into the current assumption that these sorts of works played little role in the development of English law prior to the nineteenth century. In other words, the de Grey materials give entrée into two significant historical questions with modern resonance: how did judges learn their jobs and what kinds of texts shaped the development of the law?

Beyond the serendipity of the archival collections that permit an at least partial reconstruction of what de Grey did to teach himself how to be a judge, he is also an ideal exemplar because he took a well-blazed path to the bench. Called to the bar in 1742, he benefited early from patronage, became a king’s

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16 See, e.g., Alpert, Atkins & Ziller, supra note 2, at 325-36; Cook, supra note 2, at 254; On Becoming a Judge, supra note 2, at 140.

counsel in 1758, solicitor general to the queen in 1761, solicitor general in 1763, and finally attorney general in 1766.\textsuperscript{18} He was a loyal government man, who served ten years in Parliament and even turned down an offer of the Chancellorship.\textsuperscript{19} While attorney general, he maintained a lucrative private practice, becoming one of the first barristers to earn over £8000 in a year.\textsuperscript{20} Such a résumé made him as completely qualified for his judicial appointment as one could be at the time. If he needed to read textbooks to learn the law and procedure of his court, so would many other judges of the age.

After discussing in Part I the historical reasons for the creation of the myth of the pre-trained judge and, conversely, the reasons for a new judge’s lack of preparation, the Article turns in Part II to the usual methods of judicial education suggested by both the modern scholarship and the eighteenth-century evidence. Part III investigates the set of procedural books de Grey acquired soon after becoming a judge and asks what he might have learned from them. Part IV examines how, paralleling the practices of modern judges, he created his own bench book for use at trial.

\section*{I. Why Judges Needed an Education}

The common law judiciary has been built on the assumption that legal practice is the best preparation for being a judge.\textsuperscript{21} Given centuries of evidence that practitioners quite often do not “learn how to judge on the way to the bench,” this belief must have its roots in the distant past.\textsuperscript{22} This Part argues that the mystique of judicial preparedness arose from conditions unique to the medieval English legal community, while the need for education grew up in response to changes in the way law was practiced from the sixteenth century onward.

In his classic work on the history of judges, John Dawson points out a startling fact. In medieval and early

\textsuperscript{18} On de Grey’s early patronage positions, see LEMMINGS, supra note 10, at 162 and DUMAN, supra note 10, at 64-65.
\textsuperscript{20} DUMAN, supra note 10, at 107.
\textsuperscript{21} See On Becoming a Judge, supra note 2, at 139-41.
\textsuperscript{22} Id. at 139.
modern France, the royal courts were staffed by thousands of judges. By contrast, in England until the nineteenth century, “the permanent judges of the central courts of common law and Chancery, all taken together, rarely exceeded fifteen.” Those central common law courts—King’s Bench, Common Pleas, and Exchequer—sitting in Westminster and staffed, in de Grey’s time, by four judges apiece, dealt with the mass of litigation flowing in from all over England. On the one hand, therefore, only an extremely small number of judges had to be prepared to serve, and they could, in theory, be quickly socialized into courts with a long institutional memory, a small bar, and a coherent body of case law. On the other hand, a very few judges carried the weight of the nation’s legal system on their shoulders, and they needed to know what they were doing.

When seeking an answer to the question of the origin of the belief that legal practice prepared judges for the bench, a dominant factor seems to be the existence in the Middle Ages of a single, tightly-knit hierarchy with the judge at the top as a primus inter pares. Unlike the continental civil law judge today, who is often largely isolated from the bar, the medieval English judge spent his career immersed in it. He learned the law as a student in an inn of court. He joined the inn when he became a member of the bar and often progressed up the ranks of its leadership. Normally, he practiced as a serjeant-at-law, an elite group of senior barristers formed in the fourteenth century who for a time had precedence at the bar, a monopoly over pleading before the Court of Common Pleas, and a presumptive right to judicial appointments. As a serjeant, the future judge served a sort of judicial apprenticeship. He could dine and have his chambers at the Serjeants’ Inns alongside the judges, with whom he would discuss thorny legal issues

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23 DAWSON, supra note 8, at 2.
24 Id. at 3.
25 Id. at 2-3.
27 BELL, supra note 9, at 79-80.
28 PREST, supra note 10, at 135-36.
and imbibe the collegiality of the bench.\textsuperscript{30} When a judge could not go on assize, a serjeant would fill in, hearing cases with his circuit partner, a real judge, nearby.\textsuperscript{31} Thus, by the time a serjeant became a judge, he had acquired some experience of judging, knew the members of the court, and had for years watched them discuss and decide cases.

As a judge, he continued to participate in the same legal community in which he had spent his career as a practitioner. He retained a connection with his inn, and he mingled with the serjeants, whom he called his “brothers,” in the Serjeants’ Inns.\textsuperscript{32} As a leading member of this legal community, the judge was an important conduit for the body of orally-transmitted knowledge called the “common erudition” or the “\textit{communis opinio}” that all active members of the bar shared.\textsuperscript{33} The common erudition, worked out as much in the teaching exercises and the discussions in the Inns of Court as from the bench, created an oral tradition of “received learning.”\textsuperscript{34} Thus, an experienced practitioner would presumably have possessed much the same expertise as the judges just by having spent sufficient time in the same legal culture. Consequently, it is not difficult to imagine how a serjeant could be assumed to move from bar to bench without needing to re-equip his toolkit.

But by the sixteenth century, a number of changes had been set in motion that would end the hegemony of the \textit{communis opinio}, alter the practice of law, and turn judges into a different species of legal officer rather than merely the most esteemed lawyers among equals. First, the number and power of ordinary barristers increased dramatically in the sixteenth century. Where “[t]he medieval legal profession had been in

\begin{itemize}
\item \textsuperscript{31} Baker, Introduction, \textit{supra} note 29, at 166; Baker, Serjeants, \textit{supra} note 29, at 36.
\item \textsuperscript{32} 6 Baker, Oxford History, \textit{supra} note 26, at 411-12.
\item \textsuperscript{34} See 6 Baker, Oxford History, \textit{supra} note 26, at 471-72 (“[I]t was in the inns, rather than in Westminster Hall, that those principles were expounded and refined as a coherent body of law.”); Baker, Introduction, \textit{supra} note 29, at 198.
\end{itemize}
effect a guild, whose journeyman members practised their trade . . . under the oversight of a body of masters, the judges and serjeants at law,” the early modern bar was more of an open market, where men with ability or connections could rise in the profession without being constrained by the old hierarchy.  

From this group of upstarts there emerged in the sixteenth century a new leadership: the solicitor and attorney general and the king’s counsel.  

King’s counsel were royal law officers who, though remaining members of the bar, took cases on behalf of the King and could not appear against the Crown in their private practice without license.  

The new king’s counsel acquired a right of precedence in court, immediately jumping over other members of the bar, including most serjeants, in seniority.  

Being forever trapped beneath the king’s counsel lessened the desirability of becoming a serjeant, which in turn meant that the finest barristers were no longer to be found amongst their ranks.  

Consequently, king’s counsel became the preferred credential for judicial selection.  

By the mid-eighteenth century, although no single path to the bench had emerged, certain “avenues of advancement” were common, and these centered on indications of political loyalty and excellence at the bar.  

Future judges usually spent over two decades in practice before their elevation.  

Over half were king’s counsel, and many had their preeminence at the bar recognized by an appointment to serve as solicitor and/or attorney general.  

In addition, half—and over ninety percent of the chief justices of King’s Bench and Common Pleas—had spent time in Parliament.  

These men may have been excellent lawyers and in some instances skilled politicians, but they had not necessarily been trained to serve as judges on the courts to which they were appointed.

35 Prest, supra note 10, at 75.
36 See Baker, Introduction, supra note 29, at 158; Baker, Serjeants, supra note 29, at 108, 111-14, 116-17; Prest, supra note 10, at 75.
38 Id. at 164-65.
39 See Lemmings, supra note 10, at 174.
40 Id. at 262, tbl. 7.1, 264.
41 Duman, supra note 10, at 73.
42 Id. at 72.
43 Id. at 73-75.
44 Id. at 78, 87.
This lack of training posed a particularly pressing problem for the Court of Common Pleas because, with one exception, only serjeants could appear before that court. The sole exception was the attorney general, who was permitted “to address the court from within the bar as an officer, though not to take the place of a serjeant at the bar. . . .” But such appearances seem to have been rare and occurred only in the attorney general’s official capacity and not in his private practice. Yet, despite the serjeants’ monopoly over the Court, during the eighteenth century the most trod path to the chief justiceship of Common Pleas lay precisely through service as the attorney general. Almost by definition, this man had not been a serjeant, and while he may have appeared before the Court occasionally in his governmental role, he did not have the day-to-day expertise gained by long attendance at the Court’s bar. Indeed, given the status of Common Pleas in that era as second fiddle to King’s Bench, the new chief justice may not even have observed the Court very often while a student or young barrister. Furthermore, Common Pleas had remained a more traditionally procedural and black letter court than Chancery or King’s Bench, where the former attorney general was likely to have spent much of his time. The new chief may consequently have come to his job quite unfamiliar with the

45 BAKER, SERJEANTS, supra note 29, at 42.
46 Id. at 43 n.5.
47 Wilson’s Common Pleas Reports for the period 1753 to 1774 include only one explicit mention of the Attorney General appearing before the Court. Rex v. Serjeant Mead, (1754) 2 Wils. 17. Even in the famous case of King v. Wilkes, when the Common Pleas granted Wilkes’s petition for habeas corpus, Wilson only records serjeants arguing on behalf of the Crown. King v. Wilkes, (1763) 2 Wils. 151, 156. A search of the Court’s rule books would undoubtedly turn up more appearances, but the fact remains that the attorney general did not spend a great deal of his time before the Court.
48 DUMAN, supra note 10, at 84, 87.
49 None of the solicitors or attorneys general of the eighteenth century had been serjeants.
51 See BAKER, SERJEANTS, supra note 29, at 117; 12 HOLDSWORTH, supra note 30, at 452-53; LEMMINGS, supra note 10, at 183 (“[L]ists of leading counsel show that the attorney-general and solicitor-general, whose privileged positions allowed them to pick and choose among the most lucrative briefs, generally chose to concentrate their private practice in Chancery.”).
basic operation of the court over which he found himself presiding.

At the same time as the number of lawyers expanded and the path to the bench ceased to lead inexorably through an apprenticeship as a serjeant, the communis opinio also broke down.\(^\text{52}\) In the Middle Ages, the primary arena of interest to the legal community had been the back and forth between pleaders and judges aimed at the establishment of the pleadings in each case. “[M]uch of th[is] debate was tentative, extempore and inconclusive,” looking not so much for a ruling but rather for an indication of the tactical moves the pleader should make.\(^\text{53}\) But by the sixteenth century, the lawyers had begun to draft their pleadings in writing, working them out between the parties, and without the assistance of the judges.\(^\text{54}\) When the case did finally come before the court on a point of law, the lawyers wanted answers, not debate, and those answers were supposed to be supported by chapter and verse citation to the case law reported more and more in authoritative, printed works.\(^\text{55}\)

As a result, the position of the judge within the legal hierarchy changed. He was no longer the master who labored side-by-side with his journeymen. He now sat apart, tasked to rule on disputes brought before him, and confronted with the prospect that his words would be captured by reporters, published, and cited as the law in the future. If the observations of modern judges are any guide, this was a seismic shift. Judges today speak of the difficulty of learning “that there comes a time when he or she has to make a decision.”\(^\text{56}\) This is not a skill that a lawyer, even one who counsels clients rather than litigates, necessarily has to master.

The difficulty of moving from advocate to decision-maker can be glimpsed on de Grey’s court in the 1770s. The

\(^{52}\) See Ibbetson, supra note 33, at 34-35 (discussing the decline of the communis opinio during the sixteenth century and its disappearance by 1600); see also Baker, Introduction, supra note 29, at 198-99; Baker, Inns of Court, supra note 33, at 50-51; Richard J. Ross, The Memorial Culture of Early Modern English Lawyers: Memory as Keyword, Shelter, and Identity, 1560-1640, 10 YALE J. L. & HUMAN. 229, 267-68 (1998).

\(^{53}\) Baker, Introduction, supra note 29, at 197-98; see also 6 Baker, Oxford History, supra note 26, at 386-89.

\(^{54}\) See 6 Baker, Oxford History, supra note 26, at 338-39.

\(^{55}\) See Baker, Introduction, supra note 29, at 198.

\(^{56}\) On Becoming a Judge, supra note 2, at 142. (“The inability to make decisions is an occupational hazard to which an unusually large number of our trial judges are exposed to and exhibit.”).
most junior justice on the Court was George Nares, who had spent over a decade as a serjeant and a leader of the Common Pleas bar. He also did an active business in writing opinions of counsel advising on questions of law based on a set of facts presented by the client or solicitor. With regard to the substantive law and procedure, Nares probably had little to learn when he took the bench. He knew the case law of the Court better than any of his brethren, a fact he demonstrated frequently in his opinions, which were generally reported as consisting of little more than citing precedential cases, usually from Common Pleas and usually ones that had been decided while he was at the bar. Yet of all his colleagues, he also seems to have had the most trouble becoming accustomed to making up his mind and was unsurprisingly not considered a strong judge.

57 See BAKER, SERJEANTS, supra note 29, at 528; LEMMINGS, supra note 10, at 172. Nares was said to have been "bred an attorne, called to the bar." Bray Family Papers, Surrey History Centre, G52/8/10/1, s.v. George Nares (recollections by the solicitor, William Bray, of leading people of his time, in alphabetical order by last name of person, no page numbers).

58 See BAKER, LAW'S TWO BODIES, supra note 33, at 87-88. For a large collection of Nares's opinions, see Philadelphia Free Library, MS. LC.14.77.

59 E.g., Manuscript Reports, Lincoln's Inn Library, Hill MS. 15, fol. 32 (Parsons v. Lloyd, (1772) 2 W. Bl. 845; 3 Wils. 341) (citing cases); The Warden and the Commonalty of the Mystery of Grocers v. Backhouse, (1771) 3 Wils. 221, 227 (comment at the end of the first argument, citing precedent); Sanderson v. Baker, (1772) 3 Wils. 309, 317 (“I know of three actions of trespass against the sheriff in cases of this kind. Tyler versus Johnson, B.R. tried at Stafford in 1764 . . . ; I remember a similar case tried before Lord Chief Justice Wilmot, who was of opinion . . . ; I also remember a third action of the same kind . . . .”); Stevenson v. Hardie, (1773) 2 Bl. 872, 874; Manuscript Reports, Lincoln’s Inn Library, Hill MS. 11, fol. 66 (“J. Nares was of ye opin[in]ion and to prove that the cop[py]old does not derive und[er] ye L[ord] he cited these cases . . . all w[hi]ch he observed.”); see also Smedley v. Hill, (1776) 2 W. Bl. 1105, 1106 (Nares had tried the case and had made a ruling on evidence that was overturned en banc. Blackstone reported that Nares “with great candour admitted the determination to be wrong; and cited a case before Willes, C.J. . . . wherein such evidence was admitted.”).

60 Bray Family Papers, Surrey History Centre, G52/8/10/1, s.v. Nares. Samples of Nares's inability to make up his mind can be found in Cox v. Chubb, (1772) 2 W. Bl. 809, 810; Glead v. McKay, (1774) 2 W. Bl. 956, 957; Flureau v. Thornhill, (1776) 2 W. Bl. 1078, 1079. In Howell v. Hanforth, according to de Grey's bench notes, Nares said that he at first disagreed with the rule the majority put forth because the plaintiff had not followed the proper procedure but then let himself be persuaded to agree. William de Grey Bench Notes, Lincoln's Inn Library, Misc. MS. 183, fol. 21r. When presiding over a trial on circuit in 1776, Nares had to rule on the admissibility of evidence. Plaintiff had brought suit against a pastor for non-residence in his rectory and wanted to introduce evidence that the pastor had confessed himself to be the rector. Defendant objected that such parol evidence was inadmissible. Unable to decide, Nares "sent to consult Forster Serjeant (who went that Circuit with him as Judge) & by him was informed that ye same point had been determined lately on the Norfolk Circuit by Willes J. The plaintiff therefore was nonsuited." The following term, King's Bench set aside the nonsuit, finding that such parol evidence against the interest of
Beyond learning how to make a decision, the new judge also had to know the law and procedure of his court, and this could pose a problem because, by at least the seventeenth century, some leading members of the bar had begun to specialize. A man might have all or most of his practice in Chancery—a court of equity whose rules and procedures were quite different from those of the common law courts—or take primarily revenue cases in Exchequer, or do criminal work at the London criminal court, the Old Bailey, and King’s Bench.

Because Chancery was the court of choice for eighteenth-century legal “high-flyers,” many newly-appointed chief justices in de Grey’s time found that their “promotion to a chief justiceship . . . involved hasty revision of their old common law knowledge, and no little personal nervousness about their competence on the bench.” Philip Yorke, who had primarily practiced in Chancery after achieving some renown as a barrister, and who thereafter served as chief justice of King’s Bench from 1733 to 1737, worried that “he had forgotten his old practice in [King’s Bench] for many years and was extremely uneasy how he should acquit himself in his new office.” A similar concern about his lack of familiarity with the common law was expressed about the appointment of the Chancery practitioner, Dudley Ryder, to the chief justiceship of King’s Bench in 1754. De Grey faced this problem as well, for he had spent much of the approximately defendant was admissible. Manuscript Reports, Lincoln’s Inn Library, Misc. MS. 551, fols. 17b-18 (Beavan v. Williams, before Nares at Hereford Spring Assize, 1776).

61 See Prest, supra note 10, at 70-71.
62 See Lemmings, supra note 10, at 184 (“[E]quity cases . . . traditionally depended on natural law, reason, and ‘conscience’ rather than the issues of law or fact tried at common law.”).
63 Id. at 169, 171, 177-78, 181, 210-11.
64 Id. at 171.
66 Id. at 171 (internal quotation marks omitted). Interestingly, Yorke received the chief justiceship of King’s Bench rather than becoming Chancellor because the other candidate, “Charles Talbot, . . . was almost exclusively an equity lawyer, with little knowledge of the Common Law; and he would have found the duties of Chief Justice of the King’s Bench . . . both difficult and distasteful. He desired ardently to remain in the Court of Chancery.” 1 Philip C. Yorke, The Life and Correspondence of Philip Yorke, Earl of Hardwicke, Lord High Chancellor of Great Britain 117 (1913). At the time, Yorke, who also had a large Chancery practice, was attorney general and Talbot solicitor general. Id. at 116.
67 Lemmings, supra note 10, at 171 n.77.
twenty years prior to his appointment as a Chancery barrister.\textsuperscript{68}

Finally, the early modern English common law judge did not take the bench prepared to do his job because the scope of that job had widened considerably over the centuries to include matters that no individual practitioner would have mastered. In addition to his central tasks of hearing questions of law when sitting en banc at Westminster Hall and questions of fact when presiding individually over jury trials held during circuits (called assizes) twice a year in the country, the judge also heard both civil and criminal trials in London and Westminster throughout the year, served on admiralty and ecclesiastical appeals panels alongside civilian lawyers and churchmen, advised the House of Lords acting in its judicial capacity, advised the government on pardons in criminal cases, helped Parliament draw up legislation and advised it on petitions, and decided administrative appeals on tax matters.\textsuperscript{69}

\textsuperscript{68} Id. at 353 (listing de Grey as one of the leaders of the Chancery bar in 1770). In de Grey’s papers are several sets of accounts of fees received from 1764-1770. The accounts separate out the source of the fees, for example, briefs in King’s Bench, or Chancery, or Exchequer. De Grey only listed Common Pleas once in that time. The 1764 account has an entry: “King’s Bench & Common Pleas……115:7—.” This appears to be his fees for being on brief in arguments before these two courts. (In later accounts this is made more explicit.) By way of comparison, the same year, out of a total income of over £4623, he earned over £237 for briefs in Exchequer and £114 9s. for briefs in the “Cockpit,” a reference to the Privy Council chamber at Whitehall Palace. See George H. Cunningham, London: Being a Comprehensive Survey of the History, Tradition & Historical Associations of Buildings & Monuments, Arranged Under Streets in Alphabetical Order 799 (1927); 2 Edward Raymond Turner, The Privy Council of England in the Seventeenth and Eighteenth Centuries 1603-1784, at 43, 49 (1928). The same trends appear throughout the accounts. He earned far more on Chancery briefs than in any other court, but also substantial amounts in Exchequer, and in briefs for the House of Lords. In 1766 and 1770, he listed no briefs in King’s Bench. His 1768 King’s Bench fees were his highest for that court at just over £264 (though this also included Old Bailey briefs), but his Exchequer total that year was over £313. See Accounts of William de Grey, Norfolk Record Office, WLS XIII/63-8, 10. Even while solicitor and attorney general, he was seemingly almost entirely absent from the motions books of King’s Bench. By contrast, his predecessor in those two positions, Fletcher Norton, had been a constant presence in the motions books while holding the royal offices. See King’s Bench Rule Books, National Archives (Kew, London), KB 125/158 (1763-64), KB 125/160 (1767), KB 125/161 (1769).

Add to this that the chief justice served on the privy council, 70 and that he had to manage a large staff of mostly sinecured underlings with often obstructive traditions to which they clung as their prerogative, and the difficulty of the job becomes readily apparent. 71

Referring to the baby judge school, one recent judicial appointee said, “I cannot imagine taking on such a multifaceted responsibility as becoming a federal district judge without having such classes and materials available . . . .” 72 An eighteenth-century English judge had responsibilities far more multifaceted than his modern counterpart could imagine, and he had no orientation course to attend. Yet he must have figured out how to do his job, for the English legal system did not grind to a halt, and “the perpetuation of the judicial system [is] dependent on the successful socialization of its judges.” 73 The next Part explores how he might have accomplished this.

II. THE METHODS OF JUDICIAL EDUCATION

According to modern studies of judicial education, judges use four basic strategies to teach themselves what they need to know to do their jobs. First, they rely on skills they acquired before joining the court. 74 Second, they learn on the fly, for example, by asking lawyers at trial to review the law and precedent. 75 Third, they consult “more experienced colleagues.” 76 Finally, they read books in an organized program of self-study. 77 Nowadays, of course, they might also attend baby judge schools and continuing judicial education courses,

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10-11 (1927) (advising the House of Lords); John H. Langbein, Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources, 50 U. Chi. L. Rev. 1, 8, 34-35 (1983) (presiding at Old Bailey trials); the eighteenth-century Journals of the House of Lords are full of references to petitions being referred to the judges and the judges being ordered to draw up a new bill.

70 2 TURNER, supra note 68, at 25-26.

71 See, for example, the cases that came before de Grey and Common Pleas concerning the tradition of the Court’s sealing office to close on certain days that were not Court holidays and to charge exorbitant fees for deigning to seal documents on those days. Sparrow v. Cooper (1779) 2 W. Bl. 1314, 1314-15; Figgins v. Willie (1778) 2 W. Bl. 1186, 1186-87.

72 “Baby Judges School” Jump Starts Learning Process, supra note 4, at 1 (internal quotation marks omitted).

73 Carp & Wheeler, supra note 2, at 363-64.

74 Id. at 369-71.

75 Id. at 380-81.

76 Id. at 374-76.

77 Id. at 387.
but such classes are arguably not a great deal more than an extension of talking to colleagues and reading books.

Eighteenth-century judges also apparently employed the same four learning strategies. The normal pre-judicial preparation has already been discussed, so the focus here will be on the other three methods. Of the group, the evidence for learning on the fly is the most limited. Reporters did not record verbatim what was said in court,78 and they may have been particularly unlikely to write down, and later publish, examples of judges demonstrating their ignorance. Nonetheless, we do conserve at least two cases in which relatively new chief justices of Common Pleas admitted to not knowing the law. In the first, from 1784, Chief Justice Loughborough, who joined the Court in 1780 when de Grey resigned, asked for an explanation of the meaning of the statute under dispute, demonstrating in his disagreement with counsel that he did not understand the intent of the provision.79 Justice Gould, at this time the longest-serving member of the court, explained the act, eliciting from Loughborough an astonished, “I had no Idea in all my practice but [that?] it extends to Cases prosecuted.”80 In the second instance, from 1800, Lord Eldon, who had become chief justice only seven months before, made a similar remark in court: “I confess, that when this application was first made, I was not aware, that under the circumstances of the case the Defendant was entitled to demand judgment: but my Brother Heath has satisfied me that the application is supported by the current of

78 See, e.g., CAPEL LOFFT, REPORTS OF CASES ADJUDGED IN THE COURT OF KING’S BENCH, at xi, xiii (W. Strahan and M. Woodfall, 1776) (although claiming to take down the opinions “almost verbatim,” acknowledging that he did not necessarily include everything that was said and did sometimes merely summarize) (emphasis omitted); 1 SYLVESTER DOUGLAS, REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF KING’S BENCH, IN THE NINETEENTH, TWENTIETH, AND TWENTY-FIRST YEARS OF THE REIGN OF GEORGE III, at xiv (London, His Majesty’s Law-Printers, 2d ed. 1786) (“The judgments of the court I could have wished to give in the words in which they were delivered. But this I often found to be impracticable, as I neither write shorthand, nor very quickly. Memory, however, while the case was recent, supplied at home, many of the chasms which I had left in court . . . ”).

79 Manuscript Reports, Lincoln’s Inn Library, Hill MS. 21, fols. 119-120 (Nixon v. Clarke (1784)) (concerning the interpretation of an act instructing that if an excise officer obtained a certificate of probable cause from a judge before executing a seizure, the plaintiff should get no court costs). Alexander Wedderburn (Lord Loughborough, later Earl of Rosslyn) was attorney general from 1778 to 1780, chief justice of Common Pleas from 1780 to 1793, and Chancellor from 1793 to 1801. Alexander Murdoch, Wedderburn, Alexander, First Earl of Rosslyn (1733-1805), in 51 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, supra note 19, at 909.

80 Manuscript Reports, Lincoln’s Inn Library, Hill MS. 21, fol. 121.
authorities." Similarly, special juries of merchants often educated judges on commercial customs and practices in mercantile cases.

Some evidence suggests that new judges also used the third method of education and sought advice from their more knowledgeable colleagues not only about legal matters but also about life on the court. Lord Mansfield, when he became chief justice of King’s Bench, sent drafts of his opinions to two of his well-regarded associate justices for their advice, and the third, Thomas Denison, supposedly taught Mansfield about pleading. Mansfield’s predecessor, Dudley Ryder, received advice from his predecessor, Charles Yorke, that “Denison would be a useful man in point of law to me especially in the form [of pleading] in which he was very good.” Ryder took Yorke’s suggestion and consulted Denison, “who professed great readiness to acquaint me of everything he knew.” And when John Eardley Wilmot joined the Court and confessed a concern about hearing cases on circuit, Denison volunteered to “go with him all round the circuit because of the difficulty of the judge’s going the first time.”

Unlike Mansfield and Ryder, however, de Grey had no group of experienced associate—or puisne—justices to advise him when he took the bench. George Nares joined the Court the same day he did, and William Blackstone had only been

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82 See, for example, the 1798 maritime case of Thwaits v. Angerstein before King’s Bench, where Chief Justice Kenyon “professed himself totally ignorant of navigation, except in so far as he had learned it from his apprenticeship in his judicial office. He had received a great deal of information from the different classes of merchants by whom he had had the honour of being assisted in the administration of justice.” Law Report, Times, Nov. 14, 1798, at 3. (The author thanks James Oldham for this reference.)

83 1 OLDHAM, MANSFIELD MANUSCRIPTS, supra note 15, at 53, 55.

84 Id. at 55 (internal quotation marks omitted).

85 Id. at 55.

86 Id. at 55 n.31 (internal quotation marks omitted); see also id. at 129-30 (detailing entries in the Ryder diaries concerning information he learned from other judges and court officers about the various circuits).

87 Cf. 1 OLDHAM, MANSFIELD MANUSCRIPTS, supra note 15, at 53, 55 (Dudley Ryder, Chief Justice of King’s Bench from 1754 to 1756 and his successor, Lord Mansfield, Chief Justice from 1756 to 1788, both took advice from their more experienced puisne justices).
appointed the previous year.\textsuperscript{88} De Grey could and perhaps did rely on his senior \textit{puisne}, Henry Gould, a solid judge who was then in his eighth year on Common Pleas.\textsuperscript{89} But the new Chief Justice may not have known Gould very well, for before his appointment Gould had been an unremarkable barrister, had never been a member of Parliament, and had been serving on a court before which de Grey did not practice.\textsuperscript{89}

Perhaps as a consequence of having no colleague to whom he felt comfortable turning for guidance, de Grey chose (at least in part) the final method: he read books. In his first ten months on the bench, he purchased six basic books on pleading and procedure. The following year, he bought a new edition of Francis Buller’s \textit{Introduction to the Law Relative to Trials at Nisi Prius} and proceeded to restructure it into a bench book to which he could refer while on circuit. The specific details of these acquisitions and how de Grey used them will be examined in the following two Parts. For now, the question is not only why de Grey sought information from books but also

\textsuperscript{88} 2 W. Bl. at 734-35.

\textsuperscript{89} On Gould as a judge, see Emily Kadens, \textit{Justice Blackstone’s Common Law Orthodoxy}, 103 NW. U. L. Rev. (forthcoming 2009). Blackstone, for instance, at least twice sought Gould’s advice on cases. 2 THE POLYANTHEA: OR, A COLLECTION OF INTERESTING FRAGMENTS, IN PROSE AND VERSE: CONSISTING OF ORIGINAL ANECDOTES, BIOGRAPHICAL SKETCHES, DIALOGUES, LETTERS, CHARACTERS, ETC. 195 (London, J. Budd 1804) (Letter from Blackstone to Gould datable to April 1774). Blackstone wrote: “Mr. Blackstone hopes he has not been too presumptuous in thus intruding a second time on Mr. Justice Gould’s goodness, which nothing but an anxiety to perform the task which he has undertaken with as much accuracy as possible, would have induced him to have done.” Id.

\textsuperscript{90} Gould appears to have obtained his appointment to the bench (originally to the Exchequer, then after two years to Common Pleas) by means of patronage. His wife had an “interest” with the Chancellor at the time, and the Chancellor appointed \textit{puisne} justices. Bray, supra note 57, s.v. Gould. On barristers knowing the Common Pleas judges see the observations of the lawyer, Isaac Espinasse, about bar and bench relations in the 1790s: “With the judges of the Court of Common Pleas, or Barons of the Exchequer, the members of the King’s Bench Bar had little intercourse. It was confined to occasional meetings at \textit{nisi prius} or on the circuit.” [Isaac Espinasse], \textit{My Contemporaries: from the Note-Book of a Retired Barrister}, 6 FRASER’S MAG. 220, 427 (1832). This would have been less true of de Grey, who would have interacted with the judges in his position as sollicitor and then attorney general, but his dealings with Gould may have been limited to the performance of his official functions. However, if the chocolate and on one occasion, diet bread, de Grey purchased for Gould can be understood as his way of showing his appreciation, then during his years as chief de Grey probably came to rely heavily on his senior \textit{puisne}, in particular because bad episodes of gout frequently forced de Grey to miss sittings. See, e.g., Accounting Records of William de Grey, Norfolk Record Office, WLS LV/16/13 (Feb. 24, 1780) (“[P]aid for Diet Bread for Mr. Justice Gould at Westmr 0.0.6.”); \textit{id.} (Feb. 14, 1780) (“[P]aid for Chocolate for Mr. Justice Gould at Guild Hall 0.1.0.”). Other examples of records showing de Grey buying chocolate for Gould are at: Norfolk Record Office, WLS LV/13/14 (June 14, 1776 and June 24, 1776); WLS LV/13/20 (April 26, 1776).
why he selected the particular sorts of practice manuals and reference works he did.

In an early but still seminal study of modern judicial education, the authors found that “the judge himself is responsible for much of his own socialization simply by going to his library and consulting the casebooks, legal treatises, reporters, and statute books which pertain to his particular judicial problems.”

One judge interviewed admitted that his judicial education consisted of “an extensive study program, on the weekends and even at night.” For de Grey, too, turning to books may have been second nature. He came of age in the legal profession at a time when students embarking upon a legal career depended on textbooks for much of their education. The decline of the teaching function of the Inns of Court in the seventeenth century and the uncertainty of receiving any real training as a law clerk had given books a vital role in preparing students for the bar. Having been acculturated as students to learning the law from books, lawyers appear to have continued the practice once they entered the profession. In response, the legal printers produced a growing stock of textbooks, practice manuals, treatises, and reference works to meet the demands of both students and practitioners. It should come as no surprise, therefore, that those same lawyers, when they

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91 Carp & Wheeler, supra note 2, at 387.
92 Id.
93 See 12 HOLDSWORTH, supra note 30, at 85-87 (describing how students educated themselves); LEMMINGS, supra note 10, at 136-37, 139-40, app. B (discussing advice given in the eighteenth century to law students, listing books to be read); THE DIARY OF DUDLEY RYDER 1715-1716, at 49, 91, 147, 184, 281, 87, 113, 116 (William Matthews ed., 1939) (discussing the law books he was studying while a law student); Tariq A. Baloch, Law Booksellers and Printers as Agents of Unchange, 66 CAMBRIDGE L.J. 389, 419-20 (2007) (quoting letter of a law clerk giving advice in the 1790s to a new law student about what books to read); Lobban, supra note 17, at 70 (decline of Inns and use of commonplace books).
94 Lobban, supra note 17, at 71, 73 (eighteenth-century market in books aimed at lawyers); Ian Williams, "He Creditted more the Printed Booke": Common Lawyers' Receptivity to Print (c. 1550-1640) (unpublished manuscript, on file with the author). With regard to lawyers' use of practice books and treatises, some evidence includes the notes Henry Bathurst, eventually a judge on Common Pleas, took on Geoffrey Gilbert's treatise on evidence, see Parliamentary Archives, HL/PO/LB/1/22/2, vol. 7; Michael Foster's notes on Hale's Pleas of the Crown, JOHN BAKER & ANTHONY TAUSSIG, A CATALOGUE OF THE LEGAL MANUSCRIPTS OF ANTHONY TAUSSIG 167 (2007) (ms. F2); Chief Justice John Willes's mention of "Booth on Real Actions" and "Mr. Pigot's Book of Recoveries" in opinions from 1742 and 1744 respectively (Willes 344, 345 and 444, 451).
95 6 BAKER, OXFORD HISTORY, supra note 26, at 499-504; Lobban, supra note 17, at 73-74.
ascended to the bench, returned once again to their books to teach themselves the law they now needed as judges.

Fortunately, it is not necessary merely to speculate on the judges’ knowledge of such books. Evidence from their opinions indicates that they were familiar with a wide range of practice books and recent treatises. The overwhelming majority of books cited in Common Pleas in the 1770s were case reports or the sorts of canonical works Coke discussed in the preface to his tenth volume of reports in 1614 and that Blackstone denominated works of “intrinsic authority”: Brooke’s, Rolle’s, and Fitzherbert’s Abridgments; Littleton’s Tenures; Coke on Littleton; Fitzherbert’s New Natura Brevium; Bracton’s de Legibus; Coke’s Book of Entries, all works by de Grey’s time written well in the distant past. Nonetheless, a few more recent books also appeared in counsels’ arguments and the judges’ opinions. Chief among them were Hale’s and Hawkins’s Pleas of the Crown, Gilbert’s History of the Common Pleas, Viner’s Abridgment, and Comyns’s Digest. Two of these—the Gilbert and the Comyns—would reappear on the list of books de Grey bought in his first months on the bench.

More unexpectedly, the opinions indicate the judges’ familiarity with the sorts of modern treatises and practice manuals with which they presumably had grown up professionally. In 1738, John Willes, chief justice of Common Pleas from 1737 to 1761, called the book, The Common Law Epitomiz’d: With Directions How to Prosecute and Defend Personal Actions, Very Useful for All Lawyers, Justices of Peace, and Gentlemen (1660), by William Glisson and Anthony Gulston “a book of good credit,” and George Townesend’s Tables of Most of the Printed Presidents of Pleadings, Writs and Retort of Writs at the Common Law (1667) “a book of very good authority.” In a 1757 case he “re[lied] much” upon that “most excellent book,” William Sheppard’s 1641 Touchstone of Common Assurances, an early work on conveyancing. In 1771, Justice Gould made a similar approbatory comment in Dawkes v. De Lorane, a case concerning the non-payment of a bill of exchange. Plaintiff’s counsel objected that defense counsel

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96 See 1 THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 337-43 (Steve Sheppard ed., 2003); 1 WILLIAM BLACKSTONE, COMMENTARIES *72.
97 See notes 159-164 and accompanying text.
100 (1771) 3 Wils. 207.
“had got all his cases out of Mr. Cunningham’s book of Bills of Exchange.”101 Timothy Cunningham’s The Law of Bills of Exchange, Promissory Notes, Bank-notes, and Insurances was first published in 1760, and its author was still alive at the time of Dawkes.102 But the recent vintage of the work did not, apparently, bother Gould, whose response to plaintiff’s complaint was to assert that, “Mr. Cunningham’s book was a very good book.”103

De Grey relied far more explicitly on a modern treatise in his jury instructions in the case of Sayre v. Rochford in 1776.104 In October 1775, a successful American banker living in London, Stephen Sayre, had been arrested and detained on charges of conspiring to overthrow the King.105 An American officer serving in the British Army had alerted the Secretary of State, Lord Rochford, to the plot. Sayre was released from custody after six days for lack of credible evidence, but not before Rochford’s officers had searched his house and removed his papers.106 Sayre sued for illegal search and seizure and false imprisonment, and de Grey presided over the trial.107 A transcript of the witness testimony and of counsels’ arguments was published at the time, but it excluded the jury instructions.108 However, the court reporter, William Blanchard, took what appear to be verbatim notes of de Grey’s discussion of the law and summation of the facts, and he presented a

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101 Id. at 212.
103 Dawkes v. De Lorane, 3 Wils. at 212. A bit later in the argument Gould drew support from “a little book called Lex Mercatoria,” id., which could have been Gerard Malynes’s oft-reprinted Consuetudo, vel, Lex Mercatoria, first published in 1622, though at two volumes that was hardly a “little book.” Other possible candidates include Giles Jacobs’s 1718 work Lex Mercatoria, or, The Merchant’s Companion and Wyndam Beawes’s massive 1752 Lex Mercatoria Rediviva.
105 A summary of the plot can be found in James Lander, A Tale of Two Hoaxes in Britain and France in 1775, 49 Hist. J. 995, 1013-17 (2007).
106 Id.
107 See generally Gurney, supra note 104.
108 See generally id.
clean copy to the Chief Justice as a gift. This manuscript is extant in the de Grey archives.

De Grey, who clearly believed that Rochford should be found blameless, took great pains in explaining the controlling legal principles to the jury. He borrowed the law he applied straight from that “very learned & able modern writer,” Sir Michael Foster (1689-1763), late Justice of the Court of King’s Bench and author of a work published in 1762 that combined reports of criminal trials with short “discourses” on various aspects of criminal law. De Grey followed the gist, as well as the rhetoric, of Foster’s chapter on “High Treason in Compassing the King’s Death.”

De Grey instructed the jury, adhering to Foster, that intent to imprison the King—supposedly Sayre’s plan—was alone sufficient to support a charge of high treason, even if mere intent to imprison an ordinary person would not be a crime. He continued:

In the same learned author I mentioned to you before—it is said—writings not published but found in a mans [sic] Closet may be under circumstances evidence of high Treason. Letters & correspondence proved to be sent—the sending in such Case is an ouverte Act or the Evidence of an Ouverte Act at least that would be high Treason connected with the design that I mentioned and used as the Means or measure of effectuating the intent—nay that is so far settled in Law That Words & Discourse may be evidence of high Treason—may be Ouverte Acts of High Treason. And as this is going a great way and treading upon very tender ground[,] I would not be content with

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111 In fact, the explanation was probably largely for the benefit of counsel, presumably in case they wanted to object in order to reserve a point on error. See, e.g., id. fols. 1-2 (de Grey commented, “I am very glad I do this in the presence of the Council [sic] on both sides who are almost all of them attending because I now call upon them & desire that if in saying what I apprehend to be the Law they think I am mistaken they will tell me so—and I shall be either able to change my opinion or put it in a course of inquiry as may be fit and proper for Justice to the party[s] [sic].”).

112 Id. fol. 3.


114 Compare, e.g., de Grey’s wording in Transcript of Sayre v. Rochford Jury Instructions, Norfolk Record Office, WLS XLIX/3/23, fols. 3-6, with FOSTER, supra note 113, at 193-96.
Foster was a “great Judge,” who earned the approbation of his contemporaries, but he was also a modern writer whose statement of the law appeared not in a particular case, nor in a collection of case summaries, but in a discussion hung only at a remove upon the authority of a judicial opinion, and yet de Grey felt not only comfortable but compelled to cite him as an authority.\textsuperscript{116}

What these examples suggest is that the methods of judicial education matter. If, for instance, the primary means of training new judges comes from the dispensing of wisdom by more experienced colleagues, then one might expect to see the perpetuation of institutional traditions even beyond their usefulness. On the other hand, if judges learned largely from books, then the content of those books and the way they organized and explained the law would color the judges’ understanding and influence their opinions.\textsuperscript{117} However, such influence has not been ascribed to the sorts of practice manuals and reference books de Grey purchased. Some of them have been written off as no more than textbooks for students or young lawyers.\textsuperscript{118} As a group they have been declared to have had limited bearing on the development of the law in the eighteenth century.\textsuperscript{119} The English legal historian, William Holdsworth, claimed that barristers did not read practice books.\textsuperscript{120} Perhaps attorneys, those lesser members of the legal profession who filed papers and dealt with clients, read such books.\textsuperscript{121} But the more elevated barristers who pleaded in court

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\item \textsuperscript{115} Transcript of Sayre v. Rochford Jury Instructions, Norfolk Record Office, WLS XLIX/3/23, fols. 5-6 (emphasis added).
\item \textsuperscript{116} 12 Holdsworth, supra note 30, at 136 & n.6.
\item \textsuperscript{117} David Ibbetson, Legal Printing and Legal Doctrine, 35 Irish Jurist 345, 345 (2000) (“[T]here is a close relationship between the way in which the law operates and the sources that are available to the lawyers who operate it.”); Simpson, supra note 17, at 633 (arguing for a “close relation between the forms of legal literature and lawyers’ ideas of what they are doing, and of the appropriate way for jurists to behave.”).
\item \textsuperscript{118} Lobban, supra note 17, at 73 n.20.
\item \textsuperscript{119} Id. at 70; Simpson, supra note 17, at 639 (ignores practice books, and claims that “abridgments and common-place books . . . remained dominant forms of legal literature until the nineteenth century”).
\item \textsuperscript{120} 6 W.S. Holdsworth, A HISTORY OF ENGLISH LAW 436-38.
\item \textsuperscript{121} See 3 William Blackstone, Commentaries *25-28; 12 Holdsworth, supra note 30, at 8-9.
\end{itemize}
required skills, such as advocacy and examining witnesses, that could only be learned in practice. But a judge needed more than courtroom skills. He also needed to be familiar with those aspects of law and procedure, of which, as a barrister, he might have had only glancing knowledge. If he turned to books to acquire that knowledge, then those books in part shaped him as a judge. In de Grey’s case, the evidence is insufficient to determine how the books he may have read formed his jurisprudence. However, given how little is known about judicial education historically, it is already a step forward even to identify the sorts of books a judge used. That is the subject matter of Part III.

III. STAGE ONE OF CHIEF JUSTICE DE GREY’S JUDICIAL EDUCATION

Preserved in the de Grey archives is a letter written on Monday, January 21, 1771, addressed to William de Grey from Lord North, the prime minister. It informs the then-attorney general that, “Lord Chief Justice Wilmot having this evening resign’d his office, I am commanded by his Majesty to inform you that he has pitched upon you for his successor.” The appointment was made official on Friday the twenty-fifth, and the next day de Grey took the coif as a serjeant-at-law, as was a prerequisite for all English common law judges, and was

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122 See 6 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 438 (1924) (“The art of examining witnesses, and of presenting the facts in a manner favorable to his client, was more important than a minute knowledge of how to put and keep in motion the formal machinery of process.”).

123 Cf. Letter from William Blackstone to Lord Shelburne (July 29, 1762), reprinted in THE LETTERS OF SIR WILLIAM BLACKSTONE 1744-1780, at 93 (W.R. Prest ed., 2006) (“My Ambition now rises to the Post of an English Judge; for which I hope that my Studies have in some degree qualified me (else I should be ashamed to think of it) though I fear that my natural Diffidence will never permit me to make any very great Progress at the Bar; for which Talents very different are required than those . . . that will qualify for the Bench.”).

124 Letter from Lord North to William de Grey, Norfolk Record Office, WLS XIII/9/3. The letter is not dated. It only indicates that it was written on “Monday Night.” However, Wilmot’s resignation was made public by at least Thursday, January 24, 1771 and de Grey was sworn in on January 26, so the date of the letter can be securely identified. 2 W. Bl. 734 (“O’n January 24”, Sir John Eardley Wilmot (on account of ill health) resigned his office . . . .”). The letter continues, “You will know better than I do the steps that are proper to take upon this occasion; as Lord Chief Justice Wilmot has actually resign’d, it will be right to proceed in them with all convenient speed.”
At some point that same Saturday he, or someone on his behalf, made a visit to the bookshop of Barnes Tovey in Bell Yard, a few blocks from de Grey’s house in Lincoln’s Inn Fields. From Tovey he purchased Robert Richardson’s *The Attorney’s Practice in the Court of Common Pleas*, a primer on Common Pleas procedure ostensibly aimed at students and young clerks but apparently also of use to neophyte judges.

Between February 28 and November 16, 1771, according to the receipt from Tovey reproduced on the next page, de Grey bought five additional practical pleading or procedure manuals. The question is how he used these books. Since he does not cite the works in his judicial opinions and since none of his personal copies have been located, this is impossible to answer with certainty. However, the nature of the books themselves, the order and timing of his purchases, and several additional pieces of evidence concerning his book-buying habits generally suggest that he bought the works in order to teach himself about his new court and its procedure.

In all, de Grey obtained eight works from Tovey between January 1771 and January 1772, six on pleading and procedure and, at the end of the period, two others that did not belong to his judicial self-education project: Francis Vesey’s reports of Chancery cases from the years 1746-1755 and volume three of James Burrow’s King’s Bench reports for the years 1761-1766. He presumably bought these two reports to add to an impressive collection that by 1781 included over seventy nominate reports, ten volumes of the Year Books,
assorted other collections of cases, and seventeen volumes of reports in manuscript. Burrow and Vesey both reported decisions from important judges, respectively Lord Mansfield and Chancellor Hardwicke, so it is no surprise that de Grey would have wanted to own the works. Furthermore, the timing of the purchases can likely be accounted for at least in part by the fact that both volumes were published in 1771, the Vesey in January and the Burrow as a second edition put out by Tovey and his partner John Worrall in mid-November, just a few days before de Grey obtained it.


131 See Advertisement for the Burrow Volume, PUB. ADVERTISER, Nov. 11, 1771, at 1. The Vesey volumes appear to have been published in January 1771 by Thomas Cadell. The price listed in the advertisement is the same as that paid by de Grey in January 1772. See Advertisement for the Vesey Volume, PUB. ADVERTISER, June 6, 1771, at 1; Advertisement for the Vesey Volume, PUB. ADVERTISER, Jan. 31, 1771, at 3.
That leaves the six works on procedure. These fall neatly into two types. In one category are three basic procedural primers, aimed primarily at solicitors. In the second category are three more works that, due to tradition or the esteem in which their authors were held, had acquired sufficient authority to be cited in court. Nonetheless, these still had the characteristics of textbooks or reference manuals, albeit respectable ones.

A. Procedural Primers

To begin with the category of procedural primers, as mentioned above, de Grey acquired the first book on the list, Richardson’s *Attorney’s Practice in the Common Pleas*, the day he became a judge. One month later, on February 28, two weeks after the end of his first term, he purchased Joseph Harrison’s *Present Practice of the Court of Common Pleas*. The two books are virtually indistinguishable. Indeed, the Harrison was largely a bowdlerized version of the Richardson. They would have been ideal introductory or refresher “nutshells” for a new judge who had spent most of the prior two decades in Chancery and eight years serving in high government offices far removed from mundane common law practice.

Practice books such as these two appear to have been directed at the paper-filing attorneys rather than barristers. As such, they focused on the practical procedure of the courts, pleading technique, fee structures, and model forms. Such information was of obvious use to de Grey, for, although he had practiced a certain amount in King’s Bench (though, of course, not Common Pleas), he was unlikely to have retained an intimate knowledge of whatever arcane details of common law procedure that he might once have mastered.

Perhaps even more usefully, the long initial chapter in each work described the officers and machinery of the Court. This served two purposes for de Grey. First, it was a quick introduction—conveniently including name, position, and job

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132 See supra note 127 and accompanying text.
133 Hilary term ended on February 12. See PUB. ADVERTISER, Jan. 29, 1771, at 3.
134 See Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS L/4/1, fol. 7. He also bought Harrison’s *PRESENT PRACTICE OF THE COURT OF KING’S BENCH*; both Harrison volumes were published in 1761. The Richardson edition he purchased was published in 1769. See id.
135 6 HOLDSWORTH, supra note 122, at 437-48.
description—to his Court employees. Obtaining this information furthered a crucial element of his socialization, namely, learning his way around the organization. Second, more crassly, the chapters informed him which of the Court’s bureaucratic positions were under his patronage, this being a significant source of a chief’s income.

The case reports provide an inkling that de Grey needed to upgrade his knowledge of procedure. In two early cases, he demonstrated himself to be a bit at sea with the procedural question before the Court. In Long v. Linch, heard during de Grey’s first term, the plaintiff had sued the defendant for a debt, and in order to hold defendant to bail, had filed an affidavit. Defendant argued that plaintiff should have made a positive oath of the debt, and that an affidavit “only of mere inference and conclusion” was insufficient. Gould and Nares disagreed. Blackstone dissented, probably correctly. Blackstone records de Grey as “dubitante.”

The following term, in April 1771, Common Pleas heard a habeas corpus petition by the Lord Mayor of London, Brass Crosby, who had been ordered imprisoned by the Speaker of the House of Commons for violating the parliamentary privilege of a House officer. The wily serjeants who argued the case ex parte on behalf of the Mayor initiated the proceedings by moving to have the return of the writ read then tried to maneuver the court into admitting that errors in the return should result in their client’s discharge. De Grey became quite embroiled in the dispute, demanding to see the writ and the return, which...

136 See Wasby, supra note 2, at 10 (“[New judges] must learn to deal with court staff, both lawyers and non-lawyers—in short, the court bureaucracy.”).
137 DUMAN, supra note 10, at 112, 120.
139 Id.
140 Id.
141 Id. at 740 & n.p (Elsley ed., 1828) (reviewing the development of the case law on the issue).
142 Id. at 740. Wilson’s report of the case has de Grey agreeing with the majority. Long v. Linch, 3 Wils. 154, 154.
144 Postscript, MIDDLESEX J., Apr. 20, 1771, at 3.
“he perused . . . with great attention.” Gould and Blackstone eventually had to steer the neophyte chief out of trouble and move the case beyond the procedural hurdle.

The fifth purchase de Grey made from Tovey, on July 11, was also an attorney’s practice book, but this time the work, *The Crown Circuit Companion*, concerned trial procedure on circuit rather than the procedure of the Court sitting en banc in Westminster. According to newspaper reports, de Grey left for his first assize three days after buying the book.

He may have made this purchase because he felt some trepidation about sitting on assize. He would have had little recent circuit experience, as he likely had not gone a full assize circuit as a barrister for many years. For one thing, Chancery barristers often could not go on assize because Chancery did not cease its work during the months when the common law courts in Westminster shut down so that the judges could go on circuit. Second, the solicitor general and attorney general generally did not go on circuit. In a big trial, they might be called in on the brief, but then they would not have had to occupy themselves with routine or technical matters.

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145 Id.
146 Id.; see also Pole v. Jonson, (1771) 2 W. Bl. 774, 766 (heard during de Grey’s third term, in which he gave the opinion of the Court and was promptly put in his place by his three *puissnes*, who announced that, though they “agreed, that the judgment should be for the defendant, [they] thought the rule laid down by the Chief Justice too lax and general, and introductive of infinite litigations”).
148 London, GAZETTEER & NEW DAILY ADVERTISER, July 13, 1771, at 2; Norfolk Gaol Book, National Archives, ASSI 33/5, fol. 37 (listing de Grey and Adams as hearing suits). De Grey apparently did not go the Lent 1771 circuit. Although the *Middlesex Journal* of March 2, at page 1, reported that de Grey had set out for the Norfolk circuit during the Lent assize of 1771, he is not listed in the assize record for the circuit, and on March 6, the *Public Advertiser* noted at page 2 that, “Lord Chief Justice De Grey is at this Time so severely afflicted with the Gout as to be incapable of all Business.” See Norfolk Gaol Book, National Archives, ASSI 33/5, fol. 15 (listing Adams and Serjeant Whitaker as hearing cases). However, de Grey’s papers do include an account for this assize. Accounts for Lent Assize 1771, Norfolk Record Office, WLS LV/9/14. This might just reflect the share of the cut he received as Chief Justice.
149 LEMMINGS, supra note 10, at 184.
150 1 TWISS, supra note 15, at 189 (“It is usual for a barrister, advanced to the rank of a law officer of the Crown, to quit his circuit and confine himself to the business of London, except when taken on special retainer to lead some particular cause at the assizes.”).
To assuage his anxiety, de Grey presumably could rely on two sources of education. First, he went the circuit with Sir Richard Adams, baron of the Exchequer. Adams had been appointed to the bench in 1753, making him at that time one of the longest-serving central court judges and therefore perhaps a very good person to mentor the neophyte. However, on circuit the judges presided individually, usually with one judge hearing the civil suits and the other concurrently hearing the criminal cases. Thus, de Grey was on his own in open court, which might explain why, shortly before the assize, he bought a reference book.

The *Companion* was part description of the circuit proceedings, part form book, and part fee schedule. The first section of the work briefed the reader on the details of the assize trial process: when things happened, which court officers did and said what, which forms had to be filed at different points in the process and what they said, and similar steps in the process. This was followed by model indictments for dozens of crimes and then an explanation of which fees were received by each court officer. If de Grey wanted to remind himself about the most basic choreography of the assize he could have obtained that information from this book. And if he wanted to look over the forms of indictments or the criminal procedure, he could do that too. This might have been especially useful for him because he had probably seen little routine criminal law since he had been a young barrister, if he had even then.

In his *Commentaries*, Blackstone indicated that books like the Harrison, the Richardson, and the *Companion* had a genuine role to play in teaching about court procedure. He instructed those students who wished to gain a deeper knowledge of procedure that “[a] book or two of technical learning will also be found very convenient . . . . These books of practice, as they are called, are all pretty much on a level in point of composition and solid instruction; so that which bears the latest edition is usually the best.” De Grey had certainly

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151 Norfolk Gaol Book, National Archives, ASSI 33/5, fol. 37.
152 According to de Grey’s predecessor as Chief Justice, Sir John Eardley Wilmot, Adams “was a very good Lawyer, and an excellent Judge, having every quality necessary to dignify that character: I never saw him out of humour in my life, and I knew him intimately for forty years.” JOHN WILMOT, MEMOIRS OF THE LIFE OF THE RIGHT HONOURABLE SIR JOHN EARDLEY WILMOT, KNT. 199-200 (London, White & Cochrane 2d ed. 1811) (internal quotations omitted).
153 1 OLDHAM, MANSFIELD MANUSCRIPTS, supra note 15, at 134-35.
154 3 WILLIAM BLACKSTONE, COMMENTARIES *271 n.(a).
known Blackstone before joining the bench, for they had been in Parliament together and had been opposing counsel on several cases in the 1760s.\textsuperscript{155} De Grey must also have known that Blackstone, author of the already famous \textit{Commentaries on the Laws of England}, knew books.\textsuperscript{156} Indeed, only three years earlier, in the third volume of the \textit{Commentaries}, Blackstone had published his own well-regarded 155-page mini-treatise on (primarily) Common Pleas procedure.\textsuperscript{157} Thus, one might wonder whether, upon joining the Court, de Grey had sought from Blackstone advice about useful reference books and whether Blackstone had given the Chief the same advice about practice manuals that he had offered to his students.

\textbf{B. Authoritative Works}

Two of the books de Grey bought that fell into the second category, that of works authoritative enough to be cited in court, concerned pleading. Pleading had, in the previous centuries, become an excessively technical system, and one which skillful advocates could use to prevent the court from getting to the merits.\textsuperscript{158} As a Chancery barrister, this was probably yet another common law skill at which de Grey was pretty rusty. The extent to which he felt it important to learn about pleading can be seen in the information provided on Tovey’s receipt about de Grey’s third purchase, on March 25, of volume five of John Comyns’s \textit{Digest of the Laws of England}. The \textit{Digest} was a popular legal encyclopedia, in which the rules of law and the relevant cases and statutes were collected under alphabetically-organized general headings and subheadings. The work had originally been written in French but was translated into English and published posthumously in five

\begin{itemize}
\item \textsuperscript{155} In \textit{Lowe v. Joliffe}, (1762) 1 W. Bl. 365 (K.B.), Blackstone was on the brief for plaintiff, de Grey for the defendant; in \textit{Baskett v. Cunningham}, (1762) 1 W. Bl. 370 (Ch.), de Grey was on the brief for the plaintiff, Blackstone for the defendant; in \textit{Torriano v. Legge}, (1763) 1 W. Bl. 420 (Exch.), Blackstone was on brief for the plaintiff, de Grey for defendant; and in \textit{King v. University of Cambridge}, (1765) 1 W. Bl. 547 (K.B.), de Grey moved for plaintiff in his role as solicitor general, Blackstone was on the brief for the University. Obviously there may have been other cases, but these are the cases that a search of the published reports turns up.
\item \textsuperscript{157} Id. at 221; see also 3 \textit{William Blackstone, Commentaries} *279-425.
\item \textsuperscript{158} 9 W.S. Holdsworth, \textit{A History of English Law} 308-10, 314-15 (3d ed. 1926) [hereinafter Holdsworth, History].
\end{itemize}
volumes between 1762 and 1767. De Grey owned the first edition of the whole five-volume set, and, given the importance of the Comyns as a reference, he probably had added it to his library as soon as it came out.

In purchasing only volume five in 1771, de Grey had something special in mind. He bought the volume unbound ("in sheets") and then had the 300-page-long first heading or title, "Pleader," separately bound in vellum. Comyns (c. 1667-1740), a serjeant practicing before Common Pleas, and later a judge on that Court and on Exchequer, had been particularly knowledgeable about the rules of pleading. The title "Pleader" was "exceptionally well developed" and authoritative. The Comyns also was, as a dense, encyclopedic compendium of case law on every conceivable issue that could arise on a given legal subject, very much a reference manual. The fact that de Grey went to the expense of possibly purchasing a duplicate of a volume he already owned and of having the single title separately bound, indicates that he believed this was a reference work to which he would be referring repeatedly, either for its own information or as an index to the relevant case law.

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159 M. Macnair, Comyns, Sir John (c. 1667-1740), in 12 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, supra note 19, at 910-11.
160 Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS L/4/1, fol. 1. There is no record of his purchasing the whole set while on the bench.
161 Read the receipt: "Doing up [the] Title, 'Pleader,' of Ditto in Vellum." Interestingly, the Cambridge bookseller, John Woodyer, hired to make a list of de Grey's law books in November 1781, soon after de Grey retired from the bench, did not understand what the Pleadere volume was. The catalogue lists the book as "The Pleadere a Law Book unfinishd [sic] & without a Title." Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS LV/4/1, cover page & fol. 1.
162 M. Macnair, Comyns, Sir John (c. 1667-1740), in 12 OXFORD DICTIONARY OF NATIONAL BIOGRAPHY, supra note 19, at 910.
163 Id. at 911; see W.S. HOLDsworth, SOURCES AND LITERATURE OF ENGLISH LAW 118-19 (1925) [hereinafter HOLDsworth, SOURCES]; 9 HOLDsworth, HISTORY, supra note 158, at 312 (quoting Serjeant Stephen calling the Comyns title on pleader "a more systematic compilation upon this subject than had previously appeared" (internal quotation marks omitted)).
164 Baloch, supra note 93, at 420 (quoting a letter from an eighteenth-century law clerk stating that reading the Comyns "would prove but a dull task as he does not preserve a connected style and besides might give you a distaste for study" (internal quotation marks omitted)).
165 The library catalogue does not indicate whether volume five of the set was incomplete, and there is no mention of an additional volume five. However, the Pleader volume is listed in the catalogue immediately before the Comyns is listed, so they were likely shelved together. Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS LV/4/1, fol. 1. It is possible that de Grey bought a new volume five just so that he could have the title "Pleader" bound as a separate reference work.
The last book on de Grey's list, acquired on November 16, 1771, also concerned pleading. The anonymous *A System of Pleading* consisted of the first English translation, reworking, and updating of a well-known seventeenth-century law French work by Samson Eure called the *Doctrina Placitandi, or the art and science of pleading*.

The English legal historian, William Holdsworth, noted that the *Doctrina Placitandi* was “[o]ne of the earliest” systematic works on pleading, and in 1759 John Willes, Chief Justice of Common Pleas, announced in court that there was “more law and learning in Doctrina Placitandi than in any book he knew.” De Grey did not seem to own the *Doctrina*, and he may have bought the *System of Pleading* when he did because it had been published in July 1771. However, coupled with the Comyns, the purchase suggests that this clear and informative overview on the method and tactics of successful pleading could have been standing in for the sort of oral instruction Justice Denison gave to Mansfield and Ryder. De Grey may have had nowhere else to turn. Gould had been an apparently quite average barrister; Blackstone was renowned as a weak advocate; and Nares, though an experienced courtroom lawyer, may not have impressed de Grey with his judicial abilities.

On June 25, de Grey purchased his fourth book, Geoffrey Gilbert’s *The History and Practice of Civil Actions, Particularly in the Court of Common Pleas*. The Gilbert was a standard work by an eighteenth-century judge and prolific writer of elementary texts, whose posthumously-published treatises enjoyed great popularity. It was, as Blackstone said, “a book of a very different stamp [from other practice books]; it . . . traced out the reason of many parts of our modern

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166 *SAMSON EURE, DOCTRINA PLACITandi, OR L’ART & SCIENCE DE BON PLEADING* (London, Robert Pawlet 1677).

167 *HOLDSWORTH, SOURCES*, supra note 163, at 118.

168 White v. Willis, (1759) 2 Wils. 87, 88 (K.B.).

169 See *LONDON EVENING POST*, June 22, 1771, at 4 (printing advertisements announcing the forthcoming publication of the *System of Pleading*); see also *LONDON EVENING POST*, July 6, 1771, at 4 (announcing the publication).

170 See supra notes 89-90.

171 See Kadens, supra note 89.

172 See supra note 60.


practice, from the feudal institutions and the primitive construction of our courts, in a most clear and ingenious manner. This historical approach may have appealed to de Grey, whose library and opinions demonstrate his interest in history. But on another level, the Gilbert may have offered to de Grey, an interloper of sorts in the Common Pleas, a means to a greater sense of legitimacy. By learning about the history of the Court and the development of its procedure, he could also place himself in that story. It made him less of an outsider and helped him understand the reason for the procedures he was now obligated to continue. In the parlance of modern studies of judicial education, he was socializing himself to his new role by seeking “to find some sense of fit with the court organization.”

More pragmatically, the Gilbert was worth having because it was a respectable enough authority to be cited in court. Justice Blackstone referred to the book in an opinion in 1775 to state a rule on venue; and defense counsel in 1772 relied on it for a rule concerning the actions that could be joined in a single declaration. Defense counsel also used the book in 1776 alongside more traditional authorities such as Brooke’s and Rolle’s Abridgments to make a point about local custom; and in the same term plaintiff’s counsel adduced it as the source of a rule about the proper place to make a plea to

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175 3 WILLIAM BLACKSTONE, COMMENTARIES *271 n.(a).
176 De Grey owned a remarkable variety of historical works, ranging from William Wotton’s History of Rome (1701), to David Jones’s Compleat History of the Turks (1701), to Michel Le Vassor’s ten-volume Histoire du regne de Louis XIII, roi de France et de Navarre (1760), to, of course, Sir Matthew Hale’s History of the Common Law (1739). Catalogue of the Home Library of William de Grey, Norfolk Record Office, WLS LV/4/2, fols. 13, 24; Catalogue of the Law Library of William de Grey, Norfolk Record Office, WLS LV/4/1, fol. 8 (Hale). His opinions, too, demonstrate an interest in history where that was called for. In Wood’s Case, 2 W. Bl. 745, 745, heard during his first month on the bench, he “expressed his Surprize” at the claim that Common Pleas had no jurisdiction to grant a writ of habeas corpus at common law. To answer this assertion, de Grey examined the legal history, using cases and treatises, to demonstrate the origin of this belief and to prove its falsity. In Rowning v. Goodchild, (1773) 2 W. Bl. 906, 908-09, he deployed historical sources to interpret the meaning of the word “delivery” in one of the early statutes related to the post office. And in Bolts v. Purvis, (1775) 2 W. Bl. 1023, 1026-27, he examined the history of the law governing the East-India trade. Another case in which de Grey used historical analysis was Barker v. Braham, (1773) 2 W. Bl. 869, 871 (history of law of set off).
177 Santler v. Heard, (1775) 2 W. Bl. 1031, 1033.
178 Mast v. Goodson, (1772) 2 W. Bl. 848, 849.
179 Mayor of Berwick v. Ewart, (1776) 2 W. Bl. 1068, 1069.
the jurisdiction. In other words, this was a book with which de Grey was going to come into contact in court, which increases the likelihood that he bought it to read or consult. Furthermore, the fact that de Grey did not already own such a standard work is arguably evidence of how little he had concerned himself with Common Pleas procedure prior to his elevation to the bench.

C. Evidence of Self-Study

Although, based on his library catalogues, de Grey appears to have had a lifelong habit of collecting books on subjects about which his schooling, career, or merely personal interest demanded that he be familiar, it is unlikely that he purchased the books on Tovey’s receipt from mere bibliophilic interest. First, he kept them in his law library with what was evidently his active reference collection. Second, the other additions he made to his law library during his tenure on the bench did not have the coherence of the 1771 acquisitions. Between de Grey’s accounts and his library catalogues, several purchases can be identified. He added three volumes of reports on King’s Bench and Exchequer, the 1772 second edition of Henry Barnes’s Notes of Cases in Points of Practice Taken in the Court of Common Pleas at Westminster, John Lilly’s Practical Register, the 1777 edition of Joseph Sayer’s Law of Costs to go with the 1768 first edition he also owned, and a volume of the laws of the province of Quebec. While on the bench, de Grey may also have obtained the first edition of

181 Grant v. Lord Sondes, (1776) 2 W. Bl. 1094, 1095.

182 See VIRGINIA F. STERN, GABRIEL HARVEY: HIS LIFE, MARGINALIA AND LIBRARY 194 (1979) (“The titles in an individual’s library are usually an excellent indicator of his interests.”).

183 King’s Bench reports by Sayer (1775), Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS LV/4/1, fol. 2; the just-published volume four of Burrow’s King’s Bench reports, Record of Purchase, Burrow’s Reports, Norfolk Record Office, WLS LV/13/14 (June 24, 1776); Exchequer Reports by Chief Baron Parker (1776), Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS LV/4/1, fol. 2; Barnes’s Notes, Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS LV/4/1, fol. 6; the 1735 edition of Lilly’s Practical Register, Record of Purchase, Lilly’s Practical Register, Norfolk Record Office, WLS LV/14/13 (Jan. 15, 1777); Sayer’s Law of Costs (1777), Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS L/4/1, fol. 6. He appears to have had a special interest in Quebec. Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS L/4/1, fol. 1. He had three more such volumes in his home library (a work on the custom of the French in the Province of Quebec also published in 1772 and two copies of a “Code of Laws for Quebeck” published in 1774). Catalogue of Home Library of William de Grey, Norfolk Record Office, WLS L/4/2, fols. 3, 22.
Blackstone’s Commentaries that he kept in his law library.\textsuperscript{184} Finally, as will be discussed at length in the next section, in 1772, he bought Buller’s Law of Trials at Nisi Prius.

The third piece of evidence suggesting that de Grey bought the procedural works in 1771 as part of a methodical campaign to educate himself in the practice of Common Pleas is the fact that he did not immediately acquire the standard collections of Common Pleas cases. Coming in, case law was probably not his foremost concern. As the twentieth-century Canadian judge, Edson Haines, said in an article on judicial education:

>[S]ubstantive law will be recalled and learned as [the new judge] matures on the bench. He can take time to consider this and refurbish his knowledge. He cannot postpone the learning of the rules by which causes are tried and evidence admitted. The guarantees of a fair trial are found in the laws of procedure and evidence.\textsuperscript{185}

As an experienced barrister, de Grey must have had a nearly encyclopedic knowledge of cases, albeit predominantly those decided in King’s Bench.\textsuperscript{186} He owned the primary seventeenth and early eighteenth-century Common Pleas reports as well as a collection of (unidentifiable) manuscript reports, but the records give no indication of when he obtained them, and none of the receipts or accounts from the 1770s records the purchase.

\textsuperscript{184} According to his library catalogues, he eventually possessed two complete sets of the Commentaries. In his law library, he had the first edition of 1765-1769. Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS LV/4/1, fol. 6. At home he had the pirated Dublin 1775 edition. Catalogue of Home Library of William de Grey, Norfolk Record Office, WLS LV/4/2, fol. 20. However, his papers also contain two receipts for the purchase of the Commentaries. One, from February 12, 1777, notes that he “paid Mr. Chamberlayne for Blackstone Commentaries 0:6:6;” and the second records a purchase from the publisher in 1774. Record of Purchase, Lilly’s Practical Register, Norfolk Record Office, WLS LV/14/13 (Jan. 15, 1777); Record of Purchase, Blackstone’s Commentaries, WLS LV/12/11 (May 17, 1774); see also Record of Payment, Binding of Blackstone’s Commentaries 1774, Norfolk Record Office, WLS LV/12/21 (July 5, 1774); Record of Payment, Binding of Blackstone’s Commentaries, Norfolk Record Office, WLS LV/14/20 (June 4, 1777). The question is to which editions these receipts refer, if either.

\textsuperscript{185} Haines, supra note 13, at 233.

\textsuperscript{186} He was also said to have possessed an excellent memory. I Twiss, supra note 15, at 113 (Lord Eldon said he had a “most extraordinary power of memory.”—‘Lord Chief Justice De Grey,’ said Lord Eldon, ‘was a severe sufferer from gout. I have seen him come into court with both hands wrapped in flannel. He could not take a note, and had no one to do so for him. I have known him try a cause that lasted nine or ten hours, and then, from memory, sum up all the evidence with the greatest correctness. I have known counsel interrupt him in his summing up, and represent that he had misstated evidence. I am right,’ he would say, ‘I am sure I am right; refer to your shorthand writer’s notes.’ He invariably proved to be correct.”).
of Common Pleas reports. Yet he did not include in his 1771 buying spree either the first edition of Henry Barnes’s Notes on Common Pleas cases or George Cooke’s Reports and Cases of Practice in the Court of Common Pleas, both of which were cited regularly by the serjeants in oral argument. At some point de Grey did acquire the second, expanded edition of the Barnes, though there is no record in his accounts of the purchase, and it is possible he received it as a gift from the author, who was an officer of the Court. The Cooke, however, never appeared in either his purchase receipts or his library catalogues.

De Grey may not have worried a great deal about knowing the Common Pleas precedents for two reasons. First, counsel and the judges often cited King’s Bench cases in their argument and opinions. This may have been due to King’s Bench’s greater prestige, or it may simply have been a result of the comparative lack of published Common Pleas reports. Second, the judges and barristers worked together to find the relevant cases and discussed them at the hearings, so that any lacunae in de Grey’s knowledge could have been addressed in this give and take.

However, when presiding on circuit, de Grey could not dodge substantive questions, so after squaring away his

188 Catalogue of Law Library of William de Grey, Norfolk Record Office, WLS L/4/1, fol. 6 (listing the Barnes in the law library catalogue). Barnes was a Secondary and Clerk of Errors in the Court of Common Pleas.
189 Looking at the twelve cases from Blackstone’s Reports in which de Grey is recorded as giving the greatest number of citations, references to King’s Bench cases outnumber those to Common Pleas by more than two to one. The cases sampled were: Wood’s Case, (1771) 2 W. Bl. 745; Atkinson v. Teasdale, (1772) 2 W. Bl. 817; Hitchin v. Campbell, (1772) 2 W. Bl. 827; Parsons v. Lloyd, (1772) 2 W. Bl. 845; Powel v. Milbank, (1772) 2 W. Bl. 851; Murray v. Harding, (1773) 2 W. Bl. 858; Barker v. Braham (1773) 2 W. Bl. 866; Doe d. Wightwick v. Truby, (1774) 2 W. Bl. 944; Abbott v. Smith, (1774) 2 W. Bl. 947; Hawkins v. Plomer, (1776) 2 W. Bl. 1048; Miller v. Seare, (1777) 2 W. Bl. 1140; Cameron v. Lightfoot, (1778) 2 W. Bl. 1190.
190 Oldham, Underreported and Underrated, supra note 50, at 119-21. De Grey also seems to have known many decisions from the 1740s and early 1750s by John Willes, Chief Justice of Common Pleas from 1737-1761, because he cites them in the annotations to his Buller’s Nisi Prius.
191 Counsel seems to have been expected to produce case reports at argument. See, for example, the statement of counsel in the trial of Fabrigas v. Mostyn (1773), in 11 A COMPLETE COLLECTION OF STATE TRIALS AND PROCEEDINGS FOR HIGH TREASON AND OTHER CRIMES AND MISDEMEANORS 169 (Francis Hargrave ed., 4th ed. 1781) (“I have Sir Bartholomew Shower’s parliamentary cases upon the table.”).
knowledge of pleading and procedure, he turned to the rules of law. The next Part examines how he did this.

IV. STAGE TWO: CREATING A BENCH BOOK

One of the educational services the Federal Judicial Center provides to new federal judges is a bench book tailored to the law and procedure of their type of court and distributed in a three-ring binder to facilitate updating and supplementing. Even judges who do not need to make use of the supplied bench book end up writing their own checklists, notes, and cheat-sheets. Not having the benefit of a pre-made guidebook to the job of a Common Pleas judge, de Grey created his own. And much like modern judges might do with the supplied bench book, he began with a printed text and built onto it an extensive structure of additions and annotations that would make the final work useful to him. His choice of base text was the 1772 edition of the Introduction to the Law Relative to Trials at Nisi Prius, by Francis Buller, a precocious, brilliant, and successful young barrister who would soon become the youngest judge to be appointed to the Court of King's Bench.

That work, popular enough to be published repeatedly until 1817, contained a summary of the law encountered at civil trials on assize (so-called nisi prius trials). It consisted of seven parts covering, first, injuries to the person, to personal property, and to real property, then a long section on actions on contract, followed by a series of brief accounts of actions given by statute, criminal prosecutions relative to civil rights, and traverses to land titles and stays of proceedings in lower courts. The last two parts concerned trial practice, with an

192 Federal Judicial Center, Benchbook for U.S. District Court Judges (5th ed. 2007) (“[T]he purpose of . . . the Benchbook . . . is to provide a quick, practical guide to help judges with situations they are likely to encounter on the bench . . . . New judges in particular should benefit from the Benchbook . . . .”).
193 Carp & Wheeler, supra note 2, at 383. I thank Judge Sam Sparks (W.D. Tex.) and Judge Lee Rosenthal (S.D. Tex.) for discussing with me the material they created when they took the bench.
196 See Francis Buller, An Introduction to the Law Relative to Trials at Nisi Prius (London, C. Bathurst 1772). The “Actions given by Statute” include
extensive treatment of evidence preceding a miscellany of “General Matters relative to Trials.”

The *Nisi Prius* was the logical book for de Grey to choose. Buller described it in the preface to his sixth edition as “a *vade mecum* on the circuits,” intended to provide practitioners with a mobile law library containing much of what they needed to get through assize trials. At least some late eighteenth-century lawyers took him at his word. Copies survive with blank pages interleaved with the text and bound in leather with large flaps that tied over the book to protect the pages and keep out the dust of the road. On the blank pages the owners made notes on existing precedent, added new law, and reported on trials they attended. For them, the Buller was a storage site for *nisi prius* law. On the other hand, Isaac Espinasse, who later wrote a competing guide to *nisi prius* law, took issue with the claim that Buller’s work was an aid for experienced practitioners. Instead, he said, “it was certainly used by the younger part of the Profession for a very different purpose: it was used by them as an Elementary Book on the Law of *Nisi Prius*, as a necessary Volume of preparatory legal information.” For de Grey, the Buller may have served as both elementary guide and reference library. Either way, he made the book his own. In a manner far more extensive than the interleaved lawyers’ copies and unusually invasive of the author’s text, de Grey reconstructed Buller’s book, adding pages of new material and hundreds of marginal annotations to turn his own copy into something quite different from the original.

By the time he purchased the Buller around December 1772, Chief Justice de Grey had presided over at most two assizes in the country and several sets of trials for London.

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actions upon the statute of hue and cry, *id.* at 180-83, and actions on the statute of 5 Eliz. governing apprenticeships, *id.* at 188-90. The section on “criminal Prosecutions relative to Civil Rights” concerns writs of mandamus and quo warranto. *Id.* at 195-209. Traverses to land titles was a method of proving possession of land against the King.

197 *Francis Buller, An Introduction to the Law Relative to Trials at Nisi Prius*, at first page of the unpaginated “Advertisement” (London, R. Pheney 1793).

198 *Baker & Taussig, supra* note 94, at 80, 106 (mss. 217, 218, 278).


200 See *infra* note 243 and accompanying text for a discussion of the dating.

201 He did not go on the Lent 1772 circuit according to the Norfolk Gaol Book, National Archives, ASSI 335, fol. 63, even though he was scheduled to go, *Middlesex J.*, Feb. 4, 1772, at 3. For Summer 1772, he was scheduled for the Midland Circuit. *Gen. Evening Post*, June 25, 1772, at 1.
Thus, although he did not yet have a great deal of trial experience, he presumably had some idea of the sorts of law he would encounter and the sorts of reference material that would be helpful to have at hand. He knew, for instance, that presiding over a trial, especially on assize, was different from hearing a case en banc in Westminster. Sitting en banc, de Grey had the assistance of his brethren.\textsuperscript{202} Gould had more experience on the bench; Nares, the former serjeant, had spent a career practicing before Common Pleas; Blackstone had the authorities at his fingertips.\textsuperscript{203} And if the Chief was unsure about the law or the cases, he could adjourn the hearing until the judges had time to research and consider the issue.\textsuperscript{204} At assize trials, by contrast, de Grey sat alone. He had to make decisions immediately, in open court, before a jury, and in the face of aggressive and compelling arguments by counsel.\textsuperscript{205} He would often have to hear many cases in a row, had less time to prepare for them, and did so with access to fewer books.\textsuperscript{206} He could not carry a load of law books with him on the road, and provincial cities could not always provide the books a judge

\textsuperscript{202} Bernard v. Bishop of Winchester, (1774) Lofft 401, 415 (C.B.) (“Lord Chief Justice De Grey—I find, on conferring, we agree in opinion, and will give no further trouble, though we are always glad to hear you.” (second emphasis added)); Tyssen v. Clarke, (1774) 3 Wils. 541, 548-50 (K.B.) (trial at bar, heard en banc, all four judges giving opinion on objection regarding admissibility of evidence).

\textsuperscript{203} See supra note 89.

\textsuperscript{204} See, e.g., Parsons v. Lloyd, (1772), Manuscript Reports, Lincoln's Inn Library, Hill MS 15, fol. 30 (“Serjeant Glynn not ready in his Cases so Per Curiam: It requires looking into the Cases.”).


\textsuperscript{206} In Westminster, judges were supposed to receive papers from counsel containing the pleadings in the case several days before it was heard. 1 Robert Richardson, The Attorney's Practice in the Court of Common Pleas 190, 192, 201-02 (London, J. Worrall 1769) (attorneys must deliver copies of the issue or demurrer book to the judges several days in advance of the hearing). The issue book consisted of the pleadings, procedural history, and any jury verdict. Stephen, supra note 69, at 103-04; see also 1 Sylvester Douglas, Reports of Cases Argued and Determined in the Court of King's Bench in the Nineteenth, Twentieth, and Twenty-First Years of the Reign of George III, at xii (London, T. Cadell & E. Brooke, 2d ed., 1786) (mentioning briefs of counsel). On assize, the judge presumably also received the pleadings in advance, but it is unclear how much in advance. See the letter of William Blackstone to Lady Blackstone, (Mar. 29, 1775) in The Letters of Sir William Blackstone, supra note 123, at 151 (“I have 20 Causes at this place, none of them of considerable Length. Three are tried already, & the rest will be finished with Ease on Friday Morning, or perhaps Thursday Night.”).
might require. What de Grey needed was a compact reference book, an encyclopedia of nisi prius law.

To turn Buller’s Nisi Prius into that encyclopedia, de Grey had to do some significant reengineering, and because only half of de Grey’s copy of the Nisi Prius is extant, reconstructing his steps takes some guesswork. The 1772 edition that de Grey bought consisted of an unbound 330-page text, plus some front matter and an index. Although the book was usually bound as a single volume, one of the first things de Grey did was to separate the pages into two volumes of unequal size. The second volume has not been located and may be lost; nonetheless, the division can be reconstructed from a table of contents to both volumes that de Grey wrote on the inside front cover of volume one and a separate index he created covering both volumes. These sources suggest that volume one primarily, though not completely, covered substantive law, while evidence and procedure ended up in volume two.

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207 See, e.g., Trial Report, Lincoln’s Inn Library, Dampier MS, Buller Bundle 51, at 2 (unnumbered) (Blackstone, J. relating in one trial report that he “in vain sent all round East Grinstead for an Edition of ye Statutes, which had in it the Book of Rates with the Rules thereunto annexed.”); see also PUB. ADVERTISER, Feb. 29, 1776, at 2 (judges at criminal trial in London calling for statute books and reading them prior to commencing the case).

208 The booksellers were advertising the book “in sheets,” meaning unbound. In addition, the dimensions of de Grey’s copy (11” (27.8 cm) x 8.5” (21.6 cm)), roughly similar to copies in the British Library and Middle Temple indicate that the book could not have been disbound and rebound, with the concomitant trimming.

209 What became volume one consists of pages 3-112, 125-92, 265-78, 299-306, 311-12. Most of the remaining pages ended up in volume two. The divisions did not always occur along part or chapter lines, one result being that pages on occasion break off or start in the middle of a sentence. In addition, the front matter, the original index, and pages 1 and 2 are presumably missing entirely. De Grey evidently discarded any pages that had no value to him. He did not need the title page or the dedication, for example, and the table of contents was no longer relevant, as will be seen. The index was also rendered unnecessary after he wrote his own. The likely explanation is that de Grey wanted to trim the book as much as possible if he was going to carry it with him on assize.

210 Index to William de Grey’s Nisi Prius, Norfolk Record Office, WLS LV/17.

211 The first volume includes all of part one, books one and two on injuries to the person and injuries to personal property, respectively. It also includes the first two chapters—on trespass and ejectment—of book three on injuries to real property. All of part two, on contract, is in volume one, as is all of part three on actions given by statute. The remaining sections in this volume come from two pockets carved out of pages otherwise found in volume two. These pockets shifted to volume one consist of pages 265-78 and 299-306. These include the material on notes and bills, Statute of Frauds, juries, pleas puis darreign continuance, and abatement by death. Volume two, by contrast, consisted of the old, mostly little used real property wits, the majority of the long chapter on evidence, and most of the miscellaneous chapters on procedural matters. De Grey’s reason for including the sections on bills and the Statute of Frauds
However, de Grey did not stop with reorganizing the Buller, because he also felt that the original book left out, or failed to cover adequately, several areas of law that he considered important. Sale of goods, for example, did not have its own section in the Buller, neither did nuisance, nor such procedural matters of importance to judges as special verdicts, nonsuit, and granting certificates of notice to the court in volume one is easy to explain. Although the treatment of bills and notes occurs in the long chapter on evidence, the section itself is mostly substantive. Furthermore, it deals in part with contracts, a subject included in volume one, and mentions sale of goods, about which de Grey included manuscript pages in volume one. The bills and notes section also required several additional manuscript pages to hold all the annotations. For reasons discussed below, de Grey likely wanted all the manuscript additions to be in volume one. The two pages on the Statute of Frauds—not a separate section in the Buller—remained in volume one essentially by accident. The bills and notes section ended on the top of page 277, followed on the bottom of the page by the beginning of Statute of Frauds, and 278 is the verso of 277. By contrast, the pages on juries, pleas puis darreign continuance, and abatement by death have no obvious connection to volume one. They all focus on procedural matters and none has a great deal of marginalia.

Furthermore, retaining these pages in volume one forced de Grey to split two gatherings, thereby orphaning pages in both volumes. Understanding this requires an explanation of bookbinding techniques. Each page, or leaf, of a book, consisting of a front and back (or recto and verso), is a folio. However, eighteenth-century books were not composed of a stack of folia. Each page was in fact a double page—a bifolium—consisting of four text pages. The bifolia were folded and nested together to form a gathering, and the gatherings stacked to form the volume. In de Grey's Nisi Prius, each gathering had two bifolia, and the whole book consisted of forty-eight gatherings. To give a concrete example, pages 1 to 8 made up the second gathering. The first bifolium—the outer part of the gathering—was page 1 (recto) and 2 (verso) and also 7 (recto) and 8 (verso). The inside bifolium was page 3 (recto) and 4 (verso) and 5 (recto) and 6 (verso). If de Grey pulled out a single leaf, it would have to be cut off its bifolium partner, leaving a small tail in the margin. So, if de Grey removed page 1, page 8 would be orphaned, and in order to bind it in, a small piece of the inside margin of page 1 would have to be left attached to page 8. Conversely, he might choose not to cut any pages but rather to remove an entire bifolium. If he removed the bifolium composing pages 3 to 6, for instance, the remaining pages would go: 1, 2, 7, 8. The last two pages of volume one, 311-12, deal with bills of exception, which de Grey's table of contents lists in volume two though half the section is in volume one. These pages clearly ended up in volume one because they are part of the bifolium with pages 305-06. De Grey appears not to have cared much about them, since he wrote only one annotation on the two pages and since he split the chapter on bills of exception in half in order to keep 311-12 in volume one, even though he had already divided the gathering of which they were a part. What is odd is that de Grey split gatherings in other parts of the book, so there would seem to be little reason not to do it with these two pages as well.

Evidence that de Grey was correct in believing that Buller's treatment of some of these topics was inadequate, or, if nonexistent, that they were necessary additions can be found in ESPINASSE, supra note 199, at vii-viii, where he writes, it may, perhaps, be considered as a more serious objection, that several very material heads of the Law are totally omitted [from the Buller]. The Law of Policies of Insurance, a part of the Law of great extent and importance, is not touched on at all: The Law of Bills of Exchange and of Bankruptcy, very imperfectly...
Westminster. De Grey’s response to these lacunae was to add pages, some consisting of his own handwritten notes, others coming perhaps from one or more printed sources.

To the front of volume one, he appended blank pages on which he wrote his own entries on Servants’ Contracts, Sale of Goods, Special Verdict, What Maintains the Issue, Damage feasant, and Judge Certifying. At the end of the volume he wrote a half page on usury and eleven additional pages of overflow annotations from the book, in particular from the section on bills of exchange. The pages in front were marked A through M; the pages at the end were numbered 312a-312m, 312 being the last printed page in this volume.

In volume two, by contrast, de Grey added pages both at the end and in the middle of the book, and all pages were numbered, but the numbers were neither continuous with the Buller pages nor in numerical order. The additional entries in volume two are as follows:

- [Evidence] What the Best ...... 381, 378
- [Evidence] Copies of ............ 375
- Demurr[e]r to Evidence ........ 299

These additions fell in the middle of the volume, in the section on evidence, coming between what de Grey in the table of contents called “Evidence vivâ voce” at page 279 and “Bills of Exceptions” at page 309. At the end of the table the list continues:

- Witnesses not attend[in]g ...... 385
- Plees, w[hi]ch tryed first ...... 383

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213 He did not list this page in the table of contents, perhaps because he viewed it as overflow from the text. However, the Nisi Prius does not have a section on master and servant, and the few scattered paragraphs to which de Grey cross-referenced his extra page mention servants only in passing. By contrast, he separately lists the page on usury, even though he cross-references that page to a paragraph in the text, which also mentions usury only in passing. It may be that he wrote the page later, after the table of contents was made, though the writing shows no signs of the distortion that would have occurred if it had been done after binding.

214 Usury was at 312a, followed by overflow notes on malicious persecution (312b), false imprisonment (312c to 312e), rates (312f), trespass (312g), and bills and notes (312h to 312m).

215 The Buller contained a section on demurrer to evidence at page 307, which de Grey left out of his table of contents.

216 The Buller table of contents did not break up the content of the evidence chapter nor were there subheadings in the text. De Grey created his own subheadings.
He also moved the *Nisi Prius* pages 253-264 (fraudulent conveyances, wills of land, and stamps) out of order, extracting them from the general discussion of evidence and sandwiching them as a group between the last section of the book, on costs, and the new material on witnesses not attending. The fact that the pages in the second volume were in part arranged with no semblance of numerical order apparently did not hinder de Grey in using the book.

Without the second volume and without being able to identify the source or sources of the extra material, which has thus far proven elusive, it is not possible to demonstrate conclusively how de Grey rebuilt his *Nisi Prius*. However, the evidence that does exist suggests that he did what a modern judge might do. He inserted his own notes in some places and used the eighteenth-century equivalent of photocopying pages from treatises in others. 218

The handwritten additional pages in volume one probably came from de Grey's commonplace books. Nearly every individual note is attributed to one or more reports, just as they would be in a commonplace book. In volume two, pages 113a and 113u, resembling in their numbering the handwritten pages in the back of volume one, suggest that de Grey might have used notes he had written at the end of another book.

217 The Buller table of contents just reads “Policies,” but de Grey’s index makes it clear that this refers to insurance. Index to William de Grey’s *Nisi Prius*, Norfolk Record Office, WLS/LV/17, fol. 398; see also supra note 212.

218 Cf. BAKER & TAUSIG, supra note 94, at 104 (ms. 270: printed attorney’s manual bound with manuscript notes).
These he may have cut out and inserted into the *Nisi Prius*, or he may have recopied them, maintaining the original page numbering so that he could find the originals easily in the book from which they came.\footnote{De Grey’s index indicates that these sections consisted of multiple pages. “Copyhold,” for instance, had at least four: 113u, 113w, 113x, and 113y. Index to William de Grey’s *Nisi Prius*, Norfolk Record Office, WLS LV/17, fols. 41-42. The index lists only three pages for “General Issue”: 113c, 113d, 113e. Id. fol. 80.}

By contrast, it seems rather doubtful that the remaining extra material came from de Grey’s notebooks. His equity notebooks, his bench notebook from 1775-76, and his *Nisi Prius* index suggest that he preferred relatively small, top-bound lawyers’ notebooks.\footnote{Index to William de Grey’s *Nisi Prius*, Norfolk Record Office, WLS LV/17 (index); William de Grey Equity Notebooks, Lincoln’s Inn Library, Misc. MS 178, 179, 180, 181, 182; William de Grey Bench Notebook, Lincoln’s Inn Library, Misc. MS 183.} The Buller, by contrast, was a large folio measuring 11” (27.8 cm) x 8.5” (21.6 cm). Not only would the notebook pages have been significantly smaller, but they would have had little marginal space for rebinding, and, because they were top-bound, the writing on the back of each page would have been upside-down if bound into the Buller along the side margin. If de Grey had recopied the pages onto larger sheets, it would have made little sense to retain the original page numbering, because the size differential of the pages would have meant that the pagination would quickly cease to correspond. Furthermore, in volume one of the Buller, de Grey numbered his additional manuscript pages consecutively, and it is unclear why he would have chosen an inconsistent system for volume two.

The logical explanation for the odd page numbering is that the pages came already numbered, presumably meaning they were pages from printed books.\footnote{It is technically possible, given the page numbers listed in his Index, that de Grey took all of the material from a single book. If so, then he reorganized them entirely, as the table of contents demonstrates. Index to William de Grey’s *Nisi Prius*, Norfolk Record Office, WLS/LV/17. To give one example, the Index entry for “Commoner[s],” contains references to pages 368-72 and 332-34. Id. De Grey’s table of contents lists Commoners Pledges beginning at page 332, followed by some intervening material by Customs Proved at 335, Customs & Prescriptions at 373, and Commoners at 368. If his Index lists the contents of pages 332-34 under the same heading as the contents of pages 368-72, it is not clear why de Grey would have kept them apart in the book when he was already reordering the pages such that page 373 came before pages 368-72, and page 335 was separated from pages 332-34 by page 357 and page 380.} Although this raises the question whether de Grey would have bought new copies to
take apart or cut pages out of existing books, the fact that the pages of the other books would likely not correspond in size to the Buller might explain why so much substantive law—insurance policies, commoners, nuisance, etc.—ended up in the volume dominated by procedure. Rather than have both volumes be ungainly, de Grey may have wanted to put all the odd-sized pages in one place.

However, after arranging his volumes and adding quite a few additional pages, de Grey was only part way finished with his reconstruction project. His next step was to annotate the books. This he did in two steps. First he went through the Buller and made signposting annotations in the inner margin. (See the picture of page 265 of de Grey’s book reproduced on the following page.) He numbered the main points on each page, starting from the top, and often wrote very brief descriptions summarizing the issue covered by each point. On some pages, he added additional text in the bottom margin, to which he also assigned numbers following in order on the marginal numbers he had placed next to the printed text. These signposting annotations permitted de Grey to make cross-referencing notes throughout the volume that pointed him not only to a particular page but also to a paragraph or even a sentence on that page.

Nevertheless, if the signposting marginalia made the book easier for de Grey to navigate, they did not fill the gaps he found in the Buller. Consequently, on nearly every page, he made extensive annotations, sometimes filling the margins and even flowing over onto the following page and onto the pages added at the end of the book. These notes provide a window into the sorts of information de Grey felt that he needed to have when preparing for trials.

222 Neither seems terribly likely, especially given that de Grey was something of a bibliophile. This might argue that the source of the extra material was a single book.

223 De Grey’s edition of Comyn’s Digest, for example, was a much larger work than the Buller; whereas his Tryals per pais—a precursor to the Buller—was a far smaller volume. The law library catalogue, Norfolk Record Office, WLS LV/4/1, lists the Comyns under folio (fol. 1), as does the English Short Title Catalogue, citation number T140618, and the Tryals per pais under octavo (fol. 8), as does the English Short Title Catalogue, citation number T121428.

224 These annotations clearly preceded the other notes, because de Grey had to write his longer notes around them. Among the evidence that de Grey actually read the book fairly carefully are the corrections he makes throughout to typographical errors.

225 Thus, a note such as the one found at the very bottom of the illustration on the next page that reads “v. 267.4” meant, “see page 267, point 4.” William de Grey’s Nisi Prius, Norfolk Record Office, WLS/LV/17.
The disjointed mélange of substantive rules, instructions on proper pleading, and strings of case squibs in Buller’s *Nisi Prius* offered the lawyer a checklist of sorts. If his client had been accused of conversion, for instance, the *Nisi Prius* explained what evidence had to be proved, beginning with the general reminder that “it must be known how the Goods came to his Hands,” then proceeding through a series of specific scenarios relating to refusal to return a good: a carrier’s failing to deliver, an inn-keeper retaining possession of a guest’s horse, an attorney’s refusing to turn over a document, and so on.\(^{226}\)


\(^{226}\) *Id.* at 44-45.
To this material, de Grey added notes that supplemented, explained, and even occasionally questioned the text, and in so doing readied himself to perform the primary tasks of a trial judge: instructing the jury and making decisions on motions. This required him to know the law in detail, of course, and to be able to call up the signature cases, but perhaps even more importantly, he had to be prepared to address and parry counsels’ arguments, and he had to have sufficient depth and breadth of knowledge such that he could deal with unusual cases and explain his decisions in a manner that sounded authoritative and convincing. He used different sorts of marginal notations to meet these needs.

Most of the annotations elucidated the law in greater detail than did the *Nisi Prius*, providing the more obscure exception or paraphrasing another case on a slightly narrower point. So, for example, the text discussing the special right of an innkeeper to refuse to hand over a horse until his feed had been paid for gave rise to this marginal comment:

\[\text{An innkeeper cannot by law sell a horse for his feed except in London and Exeter, and there by custom the innkeeper may call 4 neighbours and value the horse and meat, and if the meat is worth the horse, the property is changed and he may sell.} \]

In an interlinear note on the same text, de Grey also observed, “nor can a stable keeper retain because not obliged to take in.”

His annotations could grow quite long. To the text addressing the husband’s liability for the debts of his wife due to the “Credit the Law gives her by Implication in Respect of Cohabitation,” de Grey added,

even during cohabitation they should be proper for her rank and by Holt, where she bought fine Clothes, unknown to Husband, and left them at a Friend’s house, and dressed and undressed there and went into public and visited, Husband not liable. 1. Never came to his use. 2. Secrecy takes away presumption of consent. Contra, if he had seen her in them. 3. Not necessary apparel. He is liable during his life for her debts contracted before coverture. If she is used to trade by herself, and takes up goods, he is liable because cohabitation. If he declares his dissent, so that it came to the knowledge of the tradesman or his servant, Husband not liable. She must be content

\[227 \text{Id. at 45 marginal note a. The actual text of the note reads: “an Innkeeper cannot by Law sell a Horse for His Feed Salk 388 except in London & Exeter, & there by Custom the Innkeeper may call 4 Neighbours & value the Horse & meat & If the meat is worth the Horse, the Property is changed & He may sell.”} \]

\[228 \text{Id. at 45 interlinear note at end of carry-over paragraph.} \]
with what he provides her or apply to Spiritual Court. If she takes up silks and pawns them, Husband is not answerable because they did not come to his use.\textsuperscript{229}

With such notes, de Grey readied a checklist so that he would have at hand the factors he might have to list for a jury or upon which he could base a decision.

He displayed a similar interest in thoroughness in reacting directly to Buller’s case summaries. Where de Grey thought that Buller had described a case inadequately, he would fill in additional facts,\textsuperscript{230} and where he felt that the \textit{Nisi Prius}'s treatment of a subject was incomplete, he would add more cases. In the discussion of defamation, for instance, he added several more case squibs, including one about \textit{King v. Newport}, heard during Hilary Term 1728 by the Chief Justice of King's Bench, Lord Robert Raymond, at a trial held in the Guildhall in London. In that case, de Grey wrote, an information was brought “for publishing a libel called ‘the Post Boy’ in which was contained a paragraph reflecting on A. It is not sufficient to prove that Defendant ordered that paragraph

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\item\textsuperscript{229} \textit{Id.} at 132 marginal note c. The note reads,

even during Cohabitation They sh’ be proper for Her rank and by Holt, where She bought fine Cloaths, unknown to Husb', & left em at a Friends house, & dress & undress there & went into pub. & visited, Hus. not liable 1. never came to his use. 2. Secrecy takes away Presumption of consent. Contra, if He had seen Her in Them. 3. not necessary apparel. He is liable during His L for her debts contracted bef. coverture. 3. W. 411. If she is used to trade by Herself, & takes up Goods, He is liable bec. Cohabit. Holt. Salk. 113. If he declares his dissent, so y’ it came to the Knowledge of the Tradesman or His Serv’. N. not liable. She must be content w’t he provides Her or apply to Spir’ C. Ld R 1006. If She takes up Silks & pawns them, H. is not answerable bec. they did not come to His use. d’ & Salk 118.

For a similar example, see \textit{id.} at 266 marginal note o:

There are 3 sorts of Protests. 1. When party can’t be found. 2. refus’ to accept. 3. refus’ to pay—protest proves itself. A Protest of a Foreign Bill is part of the Constitut’ of the Custom enabling the Payee to recover ag’t. Drawer. Ld R. 993[,] Salk 131. If He has protested for non-acc. He may tender the bill for paym’ when the time comes; & then He protests for non-paym’. V. J. Strange Can. 39 on the first He sends the Protest on the Last, the Protest (& Bill. Q. this i[s] bec. of recovery ag’t Drawer).

\footnotesize\item\textsuperscript{230} For instance, see \textit{id.} at 28 interlinear note to Buller’s description of \textit{Woolston v. Scott} (1753), about proof of marriage even by non-Anglicans, where de Grey wrote,

\begin{quote}
& This was an Anabaptist; & not in the Church nor by the Church Service; & not being a Q’ to be certifyed by the Bp. but act’ ag” a wrongdoer Denison J. was so clear He w’t not suffer it to be debated but s’ they might move for a new Trial, w’ they did not do. tho’ dam were 500’
\end{quote}

\end{enumerate}
\end{footnotesize}
to be inserted, it being a charge for *publishing* the whole Post Boy.\(^{231}\)

Although the *Nisi Prius* focused on cases, it also provided some model forms. In such instances, de Grey used his annotations to offer alternative phrasing, presumably to remind himself what changes would not vitiate the form. As part of a form for a bill of exception asking that a case be heard en banc, Buller provided the instruction, “(So set out the Evidence on both Sides, and then proceed as follows) ‘Whereupon the said Council for the said Defendants, did then and there insist . . . ,’”\(^{232}\) to which de Grey added, “or ‘P *offered* to give in evidence,’ or ‘Defendant’ or either party ‘insisted that such evidence ought not to have been admitted,’ or ‘desired the Judge to inform the Jurors or declare to them the Law to be’ etc.”\(^{233}\)

Although most annotations provided additional law or cases to supplement the text of the Buller, de Grey also extended his own thinking into analogous matters. In one note he wrote, “In contracts, action by sole Plaintiff, Defendant may prove Plaintiff a partner with other. Contra in tort; must plead it. If Plaintiff should recover for half the wrong, it would discharge the whole.”\(^{234}\) In another annotation he explained, “a plea that A was bankrupt within the several acts is enough without saying how. Contra of simonist to show some act that brings them within the statute because it does not mention the word simony.”\(^{235}\)

A number of de Grey’s notes pertained to judges and judging. He was quite interested in the doctrinal disputes of his

\(^{231}\) *Id.* at 5 marginal note 4. The note reads, but in Informa’t for publish’ a Libell called “the Post Boy” in wh’n was contain’d a Paragraph reflecting on A. it is not sufficient to prove y’ D. order’d That Paragraph to be Inserted, it being a Charge for *publish*’ the whole Post boy. K’ & Newport. H. 13. G. 1. G.H. Raym’. C.J.

\(^{232}\) *Id.* at 312.

\(^{233}\) *Id.* at 312 marginal note s. The note reads, “or ‘P. offer’d to give in Evid.’ or ‘Def’ or Either Party ‘Insisted that such Evid. ought not to have been admitted’ or ‘desired the Judge to inform the Jurors or declare to them the Law to be’ &c.” Regarding the word “evidence” in the text, de Grey noted, at note m, “all the Evidence, & not That only on w’ch. the Q’. arises.” *Id.* at 312 marginal note m.

\(^{234}\) *Id.* at 149 marginal note m. The note reads, “In Contracts, act’ by Sole P. D. may prove P. a Partner w’oth’ Contra in Torts must plead it. If P. sh’. recover for half the wrong it w’ disch. y’ whole v. Salk. 440 290 2 Lev. 56. 112. 2 Mod 82. 3 K 39.”

\(^{235}\) *Id.* at 43 marginal note s. The note reads, “a Plea y’ A was a Bankr. within the Sev acts is eno’ w’. say’ How—Contra of Simonist to shew some act y’ brings Him within y’ Stat. bec. it does not mention the word Simony. Comb. 108.”
predecessors, in particular the renowned judges of the early and mid-eighteenth century. Perhaps so that he would know where the pitfalls lay, he devoted many annotations to a review of these disagreements. To give a brief example, though these sorts of notes were often quite long, regarding a text about set-off in the context of a bankruptcy, he wrote, “Eyre C.J. held Defendant could not set off against assignees, a debt due to him from bankrupt. Afterwards Willes, C.J. doubted on such point and gave no opinion.”

Just as de Grey was interested in what other judges had decided and thought in specific cases, he also provided himself with reminders of things he needed to keep in mind when he was on the bench. With regard to a jury viewing a crime scene, he wrote, “The Judge at Nisi Prius may direct it. If 3 attend at the View, or if 6, and 3 at the Trial, it is Sufficient. They may inform the rest. The Court may compel attendance by amercing absentees for a contempt.”

In another place, where Buller stated that it was at the discretion of the judge whether to hear a plea from defendant that some new evidence had arisen after the issue was joined but before trial, de Grey noted that, “it may be tried perhaps so far as to enable the judge to see whether he ought to accept or reject it, not to join issue on it.”

Finally, de Grey did not limit himself to strictly legal observations. His marginalia also contain the occasional bits of history, background explanation, and color. Annotating a discussion of the length of time after her husband’s death that a woman was considered to have given birth to a legitimate child, he wrote, citing a work on civil law, “9 months & 10 days, 30 days [per] month solar, not lunar; may be a perfect birth at 7. May go 10 or more—at Wittenburg one held legitimate in

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236 Id. at 177 marginal note at the top of the page. The note reads, “Eyre C.J. held Def. c’d not set off ag’ assignees, a debt due to Him from B’. afterw’ Willes. C. J. doubted on such point & gave no opinion.”

237 Id. at 300 note m. The note reads,

The Judge at ni: Pri: may direct it—If 3 attend at the View or if 6, & 3 at the Trial, it is Suffic’ they may Inform the rest. the C. may compel attendance by amerc’ absentees for a Contempt. L’ Hard. In D’ of Ely & S’. J. Stuart. 5 June 1746.

238 Id. at 95.

239 Id. at 95 note w. The note reads, “1 Sid. 238 says it may be tried Perhaps so far as to enable the Judge to see W’ He ought to accept or reject it. not to join Issue on it.”
11th month; at Paris, 14 months after.” When Buller discussed the origin of trials at *nisi prius*, de Grey added, “Circuits first erected into 6 by Henry 2, A.D. 1179, 3 Judges to each,” and cited Paul Rapin de Thoyras’ *History of England*, a work he owned. At the beginning of the chapter on trover, de Grey explained, “it is an action on the right. Trespass on possession; it was introduced instead of detinue to avoid wager of law; and of trespass to avoid the necessity of pleading specially. Yet it is founded on tort, and sounds in trespass.”

The marginalia show that de Grey sought to have at his fingertips the various types of information that would help him decide questions of law, give explanations to juries, and engage with counsel. He put into his notes not just the rules and checklists, but also summaries of judges’ discussions, conflicting opinions, pointers to analogous concepts, and bits and pieces of background material that would prepare him to address all the angles and arguments that might arise.

According to his accounts, de Grey completed the restructuring and annotation of the Buller over the course of at most two weeks during early December 1772. Under those

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240 Id. at 112 marginal note o. The note reads, “9 mo. & 10 days. 30 days to mo. solar. not lunar. may be a Perfect birth at 7.—may go 10. or more—at Wittenburgh one held legitimate in 11th mo.—at Paris, 14 mo. after. v. Redley’s Civil Law. 55.”
241 Id. at 299 note m, which reads, “Circuits first erected into 6. by Hen. 2. A.D. 1179. 3 Judges to Each 1 Rapin 239.” The Rapin is listed in a 1732 edition in his home library, Norfolk Record Office, WLS LV/4/2, fol. 5. If de Grey was using the 1732 edition, however, he got the page number wrong. The correct page was 276, and the year Rapin referred to was 1176. Similarly, on page 180 at marginal note c, to the text “the Hundred within which any Robbery is committed shall be answerable for the same,” William de Grey’s *Nisi Prius*, Norfolk Record Office, WLS LV/17, de Grey wrote: “a neighbor by 1 Rapin 151 means ‘near pledge’ or ‘Burghs’ 10 families composing one, & the Heads pledging for Each other—Qui est in Eadem vice. but in West 2. extending Stat. Merton to neighbors & neighbor means all in adjoining Towns. 2 Ins 474 . . . .” Id. at 180 marginal note c. The correct page in the 1732 edition was 179, and the Rapin text speaks of a “near security” rather than a “near pledge.”
242 Id. at 32 note d, which reads, “it is an act. on the right. Trespass on Poss”. it was introduced instead of detinue to avoid wager of Law; & of Trespass, to avoid the necessity of pleading specially. yet it is founded on Tort, & sounds in Trespass.”
243 According to his accounts, he bought the book in December 1772, though the account does not indicate when in the month he made the purchase, and it could be, perhaps, that the book had been purchased somewhat earlier. Accounts of William de Grey, Norfolk Record Office, WLS LV/10/43. The archives also contain a receipt from a bookbinder that reads, “Rec’d Dec[ember] 16. 1772 Of the Rt. Hon. Lord Grey the Sum of Nine Shillings for bindin g two vols. of Nisi Prius in Vellum . . . .” Record of Payment, Binding of *Nisi Prius*, Norfolk Record Office, WLS LV/11/43. The same receipt indicates that two days later de Grey paid an additional 2 shillings sixpence for unspecified alterations. Id. The total price of 11 s. 6 d. for binding in vellum is odd. By comparison, de Grey paid 7 s. to have two large folio volumes of the *Journals of the House of Commons* half-bound in leather in April 1772. Record of Payment, *Binding of Journals of the House of Commons*, Norfolk Record Office, WLS LV/10/3. Based on the
circumstances, it comes as no surprise that his annotations do not appear to represent new research. Most of the authorities cited in the annotations came ultimately out of sixteenth-, seventeenth- and early eighteenth-century reporters. When de Grey cited unreported cases and attributed them to a specific judge, the judges mentioned most frequently were those, current and recently past, of greatest prominence when he was a student and young barrister in the late 1730s and 1740s. Citations to cases and to the judges serving during the years of his mature practice were very rare. Despite Mansfield’s importance to the jurisprudential development of the time, he was never mentioned by name, and only one case was cited from Burrow’s reports of Mansfield’s opinions. De Grey’s predecessor on Common Pleas, John Eardley Wilmot, merited only two mentions, and de Grey made only three references to cases decided during his own first two years on the Court. Furthermore, he did not continue to update the *Nisi Prius* with new law made while he was on the bench. Apparently, he intended his copy of the Buller exclusively as a storage place for older precedents. Very likely he used separate bench notebooks to record new material.

Given the speed with which the book was compiled, the best explanation for the choice of sources is that he copied from predigested material and did not, except perhaps in rare instances, return to the original reporters to cull material for

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244 These include most prominently, John Holt (Chief Justice of King’s Bench 1689-1710), Robert Raymond (Chief Justice of King’s Bench 1725-1733), Lord Hardwicke (Chief Justice of King’s Bench 1733-1737, Chancellor 1737-1756), William Lee (Chief Justice of King’s Bench 1737-1754), Robert Eyre (justice on King’s Bench 1710-1723, Chief Baron of the Exchequer 1723-1725, Chief Justice of Common Pleas 1725-1735), and John Willes (Chief Justice of Common Pleas 1737-1761).

245 *William de Grey’s Nisi Prius*, Norfolk Record Office, WLS/LV/17, at 86 marginal note c.

246 *Id.* at 88 marginal note a, 103 marginal note c.

247 *Id.* at 5 marginal note 4, 103 marginal note c. Both have references to 1772 cases before Common Pleas. See *id.* at 274 marginal note m for a reference to a Common Pleas case from 1771.

248 For instance, he decided a case in 1776 that was exactly on point with notes he made on page 133 of the Buller concerning elopement, yet he did not add a citation to the later case. Hatchett v. Baddeley, (1776) 2 W. Bl. 1079, 1080-82; Inner Temple MS 97, fols. 132, 133-39, 140-41.

249 We know, for instance, that he kept a bench notebook when sitting at Westminster. The one from 1775-76 is extant, and it mentions other notebooks, e.g., William de Grey Bench Notebook, Lincoln’s Inn Library, MS. 183, fol. 2r (“v. my notes”); *id.* fol. 4v (“v. 1’ arg. from vol. 97 & Popes Book.”).
his annotations. While he could have copied from someone else's annotated *Nisi Prius*, certain stylistic similarities with the method of annotation in his equity notebooks tend to argue against this.\(^2^{50}\) Instead, a quirk in the form of the marginalia suggests the hypothesis that de Grey created the notes by searching his own commonplace books for relevant cases and observations. This quirk is that he used only thirteen letters (a, b, c, d, h, k, m, n, o, s, w, x, and z) to key the text to the marginalia. For example, an “a” written above a word in the text led him to a note in the margin marked with an “a.”\(^2^{51}\)

The letters did not correspond to placement on the page. He made no obvious attempt to use the letters in order from top to bottom, nor did he always use certain letters in the top, middle, or bottom quadrants of the page. Furthermore, he occasionally used the same letter multiple times on a single page, corresponding to different annotations.\(^2^{52}\) It is likely, therefore, that each letter referred to a specific source, and given the fact that the notes corresponding to a certain letter do not come from the same book—for instance, the “m” notes refer to cases from many different reporters—and that no other published book covered the same material as the Buller, it is rather unlikely that de Grey was using printed material.\(^2^{53}\)

A more plausible hypothesis is that de Grey used his own notebooks and commonplace books. If so, he worked something like this. He began by pulling only the thirteen notebooks that contained relevant material. The notebooks were likely labeled with letters.\(^2^{54}\) For each topic in the Buller,

\(^{250}\) He also uses the first person on occasion. See, e.g., William de Grey's *Nisi Prius*, Norfolk Record Office, WLS/LV/17, at 66 marginal note c (“I always do it.”); *id.* at 189 interlinear note after last line (“I suppose not liable to penalty.”).

\(^{251}\) Of these, a, c, m, and s were by far the most common. The letters b, d, k, n, o, x, w, and z were infrequently used. The letter z was used only once; x four times; d five times; n seven times; o eleven times; b twelve times; w fifteen times; k sixteen times.

\(^{252}\) For example, m is used three times in the text on page 88, keyed to two different notes, see *id.* at 88, or where m and o are both used twice, keyed to different notes. See *id.* at 274.

\(^{253}\) Of course, the choice could simply be random. That is, de Grey liked using these particular letters, perhaps because he felt they were distinct and would not be confused with other letters. But if the letters were indeed chosen at random, one might expect a more random distribution. And yet, certain letters predominate throughout the book, and other letters are used in fits and starts. In the first 125 pages of de Grey's copy of the *Nisi Prius*, for example, “o” appears only on pages 5 and 112, and “n” shows up on pages 13, 33, and 89. In the same range, “m” appears on almost every page that has annotations.

\(^{254}\) See, e.g., the eighteenth-century notebooks of Charles Fearne at the Middle Temple library, labeled on the spine with letters.
he looked through the notebooks, starting generally with the one corresponding to the letter “a,” because the “a” annotation was usually placed in the top margin. He may normally have ended with the notebooks “s” and “w,” because those notes were often written in the bottom margin.

If de Grey were indeed using his own notebooks, it would not be at all exceptional to find that most of the citations came from reporters and judges prominent in the 1730s and 1740s when he was a young barrister building up his personal library of legal reference material. Increasing the likelihood that this was how de Grey worked are two other examples of judges using this sort of letter system to refer to their own notebooks. In his commonplace book, Sir Matthew Hale marked each entry with a letter code to denote the notebook from which he had taken the case he was abstracting. A similar system is apparent in a notebook of cases that might have been owned by Justice Gould or one of the justices of the Common Pleas who immediately preceded de Grey on the court.

The amount of work de Grey put into remaking his *Nisi Prius* suggests he placed a great deal of importance upon having a compact circuit reference book that gathered together all the relevant law previously recorded in a number of different notebooks. That such a reference could have been useful is demonstrated by a manuscript report of a trial for slander over which de Grey presided in London, recorded, ironically, in an anonymous lawyer’s copy of Buller’s *Nisi Prius*. “This was an Action for calling the Plt. a Sodomite & a Bugger[e],” began the report. The question was whether

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255 One reason an “a” note might be displaced is because the top margin is already filled with a note carried over from the prior page. See, e.g., William de Grey’s *Nisi Prius*, Norfolk Record Office, WLS/LV/17, at 269.

256 The system could also explain why he evidently on occasion forgot to write the key letter at the beginning of a note and only added it above the annotation later, and why he sometimes did not place a key letter in the text of the *Nisi Prius*, even if he did write it in front of the annotation. If he were copying notes from another Buller, these sorts of omissions would be unlikely, since he would copy exactly what he saw. But if he had to go back and forth between notebooks, searching for, then copying or maybe only paraphrasing into the *Nisi Prius* what he had written in the notebook, he may easily have lost track of the letter of the source notebook or forgotten which word exactly had spurred him to make this notation.


258 *Baker & Taussig*, supra note 94, at 148 (ms. 381).

259 *Id.* at 80 (ms. 217) (the case, from the “Sittings after Mich[aelma]s Term” possibly 1778, is reported on the interleaved page between text pages 8-9).
defendant had a right to make such a comment because she was speaking to the plaintiff's wife, her niece, and speaking out of concern. The *Nisi Prius*, and one of de Grey's annotations, squarely addressed this legal issue in the chapter on slander.\(^{260}\)

The last question is whether de Grey actually used his bench book. The evidence is indirect because, notwithstanding the example just given, his *nisi prius* trials were rarely reported, and he did not update the book with new law. First, a bookmark remains in the book. It is a scrap of paper torn from a book auction catalogue that can be identified as dating to around February 1777,\(^{261}\) and the summer 1777 assize may have been the last time de Grey rode circuit.\(^{262}\) Second, a piece of paper is folded and tucked between pages 312d and 312e. It contains fragmentary notes on at least two different legal issues—lack of proof in an action for possession of real property by prescription and an action for a ship—neither of which correspond to marginalia in the book, and which could possibly be trial notes. Third, the Buller was not included in either of de Grey's library catalogues, and it found its way into the archives with his papers. This suggests that it was a desk book, a book for use, and not a book for sitting on the shelf.

Finally, there is de Grey's index. The Buller came with an index, but de Grey ignored it and created a new one in a separate notebook. He relied neither on the headings in the Buller index nor on its list of topics under each heading but instead devised his own. The Buller index, for example, begins with: Abatement, Abuttals, Account, Actions, Administration, and Admittance, while the de Grey index begins: Almanacs, Abatements, Abstract, Attaint, Awards, Assets Real.\(^{263}\) Under

\(^{260}\) *Buller*, *supra* note 197, at 10.

\(^{261}\) Bookmark Between Pages 162-63 in William de Grey's *Nisi Prius*, Norfolk Record Office, WLS LV/17. The paper was torn from *Benjamin White, A Catalogue of Several Libraries Lately Purchased, Containing a Very Large Collection of the Most Valuable Books in Every Language and Class of Learning* 219-20 (n.d.) (the catalogue indicates that “The Books will begin to be Sold on Thursday the 6th of February, 1777”).

\(^{262}\) According to his accounts, serjeants seem to have gone the circuit for him in the summers of 1778 and 1779. Accounts of William de Grey, Norfolk Record Office, WLS LV/15/5 (Sept. 22, 1778), WLS LV/16/18 (Dec. 23, 1779) (gratuities of £10 de Grey paid to Serjeant Foster and Serjeant Heath respectively in appreciation for their taking over his assize circuit during those summers). He was supposed to go on circuit with Blackstone in 1776 but did not because of an attack of the gout. *Prest*, *supra* note 156, at 261. De Grey generally appears to have skipped the lent assize, as did Chief Justice Mansfield. 1 *Oldham, Mansfield Manuscripts, supra* note 15, at 129.

\(^{263}\) Index to William de Grey's *Nisi Prius*, Norfolk Record Office, WLS LV/17, fol. 1 (unpaginated first page).
each heading, de Grey included anywhere from one to dozens of listings summarizing, in a manner similar to Buller, the point referenced. For instance, under “Lost Evidence” he wrote: 264

1. Postea, proved by associate 343.8.
2. Verdict [proved] by his Notes ib. 9
3. Circumstances [sufficient] Proof of original sufficiency ib. 9
4. Record proved by a Copy 229.3 265

And the list continues for another two pages. All of this organizing and summarizing must have taken de Grey a quite substantial amount of time, and the index is entirely in his hand. He would have had little reason to do all this work unless he believed that he needed a means to access the information he had stored in his Nisi Prius. Furthermore, the index shows signs of a certain amount of updating. In particular, the last several pages of the notebook contain notes on customs officials deriving from cases heard en banc by Common Pleas between 1772 and 1777. 266 These additional notes indicate that de Grey continued to make use of the index, and the index would have been useless without his reconstructed Buller volumes nearby.

V. Conclusion

The fortuitous preservation in the de Grey archives of traces of his approach to his own judicial education cracks open a tiny window into this mysterious rite of passage that judges have undergone for centuries. In revering its judges, the

264 Id. at fol. 100.
265 The number represents the page number followed by de Grey’s own internal marginal numbering.
266 The first page and a half of notes follow the standard practice of the rest of the index, with each new entry being consecutively numbered and taking up one or two lines. But the remaining pages read more like bench notes, abstracting judges’ opinions from a case heard en banc; see also 1) a reference on fol. 32 in the section on Certificate of Judge to a case from 1778 (or 1775, the 8’s and 5’s on rare occasions can be difficult to tell apart), Index to William de Grey’s Nisi Prius, Norfolk Record Office, WLS/LV/17; 2) the entry on fol. 33 [116] added at the end of the section on Criminal Conversation, reading: “Prostitution before marriage Evidence to mitigate If Husband knew it then. Lord Mansfield—If did not. Query by me.” Index to William de Grey’s Nisi Prius, Norfolk Record Office, WLS/LV/17, fols. 32-33. De Grey and Mansfield obviously did not sit on the same court, and it seems unlikely that this entry referred to a case considered by the judges together in Serjeants’ Inn. But Mansfield and de Grey did ride circuit together during the Summer assize of 1777. 2 OLDHAM, MANSFIELD MANUSCRIPTS, supra note 15, at 1498.
common law systems have been loath to acknowledge that they do not always, or even very often, come to the bench prepared to serve. And in desiring, perhaps, to preserve their aura of authority, judges, too, have been reluctant to admit to their own deficiencies. Fortunately, the recent era of the baby judge schools has seen a growing transparency about the need for judicial training. 267 Such openness facilitates the study of judicial education, and the topic deserves more attention than it has received from either modern scholars or legal historians. If the sources from which judges learn their law affect the law they make, then uncovering and investigating those sources might provide significant insights into how and why the law developed as it has. 268

267 On Becoming a Judge, supra note 2, at 144.
268 See, for example, observations that what judges learn at baby judge school later affects their judging in Arnold, supra note 13, at 771 (“[T]he impetus towards settlement is becoming the major theme, it seems to me, in classes that are held for new judges.”); William G. Young, Vanishing Trials, Vanishing Juries, Vanishing Constitution, 40 Suffolk U. L. Rev. 67, 79 n.74 (2006) (“[T]here are . . . pressures to keep you in line. In baby judge school, one trainer went so far as to begin a session on employment discrimination by saying, ‘here’s how you get rid of these cases!’” (internal quotation marks omitted)).
INTRODUCTION

The state secrets privilege is a common law evidentiary privilege, which enables the government to prevent disclosure of sensitive state secrets in the course of litigation. The claim of privilege by the government, if upheld by a court, can result in consequences ranging from the denial of a discovery request for a particular document to the outright dismissal of a suit. Some describe the state secrets privilege as the “most powerful secrecy privilege available to the president” and the executive branch.¹ Its scope is coextensive with any kind of information classified as “secret” or a higher level of secrecy,² and applies to both criminal and civil lawsuits.

The privilege has been invoked by every administration since the Supreme Court acknowledged its existence in the 1953 case of United States v. Reynolds,³ which was based in large part on English precedent. The privilege has never been

¹ Associate Professor of Law, Western New England College School of Law. J.D. Columbia Law School, A.B. Stanford University. I owe great thanks to those who discussed with me the ideas in this Article, or who reviewed and commented on drafts, including Leonard Baynes, Erin Buzuvis, Lauren Carasik, Matthew Charity, Robert Chesney, Jane Cross, Anil Kalhan, Kim Lane Schepple, Tayyab Mahmud, Peter Margulies, Manoj Mate, Bruce Miller, Trevor Morrison, Giovanna Shay, and Ujjwal K. Singh. I am grateful for the insight, suggestions, and commentary of participants at the 2008 Northeast People of Color Legal Scholarship Conference and the LatCrit XIII Conference, where I presented earlier drafts of this Article. Finally, I thank John Hejduk, Jeremy Bramson, and Hanok George for their invaluable research assistance.
³ 345 U.S. 1 (1953).
clarified by statute; Congress undertook reform efforts in 2008 out of concerns that the Bush administration overreached in its claims of privilege by seeking more dismissals during the pleadings stage, and that courts have not used a uniform standard to assess those claims.\footnote{154 CONG. REC. S198-201 (daily ed. Jan. 23, 2008) (statement by Sen. Kennedy on the State Secrets Protection Act).}

Congress reintroduced reform legislation in February 2009\footnote{See Press Release, Office of U.S. Senator Patrick Leahy, Leahy, Specter, Feingold, Kennedy Introduce State Secrets Legislation (Feb. 11, 2009), available at http://leahy.senate.gov/press/200902/021109b.html.} after the Obama administration appeared to adopt the Bush administration’s stance in favor of a broad and sweeping invocation and application of the state secrets privilege.\footnote{Editorial, Continuity of the Wrong Kind, N.Y. TIMES, Feb. 11, 2009, at A30 (disagreeing with the Obama administration’s decision to continue the Bush administration invocations of the state secrets privilege to try to have litigation against the government dismissed at the pleadings stage).} The proposed legislation is pending even as the Obama administration released a new policy for the Department of Justice, mandating a more rigorous internal review prior to invoking the state secrets privilege.\footnote{See Memorandum from Eric Holder, U.S. Attorney Gen., to Heads of Executive Departments & Agencies (Sept. 23, 2009) [hereinafter Holder Memorandum], available at http://www.usdoj.gov/opa/documents/state-secret-privileges.pdf (establishing layers of internal review within the Department of Justice and including a new executive branch policy to report to Congress any invocations of the state secrets privilege).}

As with many other initiatives related to the prosecution of the war on terror, the question of the appropriate application of the privilege turns on the balance between national security and the need to preserve the rule of law, individual rights, liberty interests, and government accountability. Congress’s reform efforts continue to be necessary to restore the long-term appropriate balance among these competing interests.

This Article considers the modern application of the privilege in Scotland, England, Israel, and India—an analysis that contextualizes both the current use of the U.S. privilege and the efforts at legislative reform. Such comparative analysis is necessary to fully understand the transnational implications of the U.S. application of the state secrets privilege that have recently come to light in litigation involving both the United States and England.

This Article considers the reform efforts in the context of the experience of other nations. This Article concludes that
the current application of the privilege follows English precedent and modern English practices, although English courts have recently expressed concern at the broad application of the privilege by the U.S. government. Indian practices are more restrictive on information disclosure than the current or proposed practices in the United States. Other countries that take precedent from the British system—including Scotland and Israel—mandate a more limited application of the state secrets privilege and conform generally to the standards contained in the proposed legislation. Finally, this Article finds that Israel, unlike the United States, further explicitly accounts for allegations of government human rights abuses in determining whether a case involving national security matters ought to be heard by the courts.

Part I of this Article details the efforts to reform the state secrets privilege and addresses the motivation behind these proposed reforms in the United States, namely the desire to curb perceived executive branch overreaching, to create a uniform and workable judicial standard, and to reassert the rule of law in the adjudication of national security litigation. This Part discusses some of the most prominent cases in which the state secrets privilege has been invoked, where allegations of gross violations of human and civil rights have been quashed by invocation of the privilege. This Part considers and ultimately rejects concerns that congressional reform efforts impermissibly impinge on constitutionally reserved presidential powers, and also rejects concerns that a more restrictive privilege may lead to the unnecessary dissemination of sensitive information and may infringe on the constitutional rights of the Executive branch.

Part II examines the history of the U.S. state secrets privilege, including its origins in the United Kingdom, the intended balancing test set forth in Reynolds, and the subsequent expansion of the invocation of the privilege since Reynolds. Although Reynolds sets forth a specific balancing test for determining whether a claim of privilege should be applied, that test has been abdicated in most instances. As currently applied, almost any invocation of the state secrets privilege is

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8 The U.S. Supreme Court described the state secrets privilege as “the evidentiary state secrets privilege” in Tenet v. Doe, 544 U.S. 1, 6, 8 (2005), making clear that the privilege is not a constitutionally-based privilege, but rather one developed by the courts, id. at 9.
accepted at face value and without examination of the documents over which the privilege is being claimed.

Part III examines from a comparative perspective how the state secrets privilege has evolved in four other countries drawing on the English legal tradition—Scotland, England, Israel, and India. These countries offer a spectrum of responses as to the appropriate application of a state secrets privilege and each strikes a different balance among the interests of national security, liberty, and the rule of law.

Finally, Part IV considers how the U.S. treatment of the state secrets privilege fits into the comparative context. Here, I conclude that in the interest of creating a better balance between the rule of law and national security concerns, the United States should not only consider reforming and clarifying the privilege, but also should consider adding an additional element advising courts to consider the human rights interests that may be at stake in a particular lawsuit.

I. WHY REFORM THE STATE SECRETS PRIVILEGE?

In January 2008, a bipartisan group of senators introduced the State Secrets Protection Act, calling for the passage of a “safe, fair, and responsible state secrets privilege Act.” In March 2008, members of the House of Representatives introduced their own State Secret Protection Act of 2008, seeking to establish “safe, fair, and responsible procedures and standards for resolving claims of state secret privilege.” Representative Jerrold Nadler, Chairman of the House Judiciary Subcommittee on the Constitution, Civil Rights and Civil Liberties, described the need to reform the privilege as follows:

If you have an Administration that is abusing civil liberties . . . improperly arrests someone . . . improperly tortures that person . . . one presumes that that Administration will not prosecute itself [or] . . . its own agents for those terrible acts.

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12 Id.
The normal remedy in American law—the only remedy I know of—is for that person, once recovered from the torture, to sue for various kinds of damages and in court elucidate the facts . . . and get some justice and perhaps bring out to light what happened so that that Administration would not do it again or the next one wouldn’t.

If, however, that lawsuit can be dismissed right at the pleadings stage by the assertion of state secrets, and if the court doesn’t look behind the assertion . . . and simply takes it at face value . . . the government says state secrets would be revealed and it would harm the national security if this case went forward, therefore case dismissed, which seems to be the current state of the law—if that continues and we don’t change that, what remedy is there ever to enforce any of our constitutional rights?13

Although the impetus for legislative reform appeared to weaken with the election of President Obama,14 recent invocations of the privilege by the Obama administration and pressure applied by the Obama administration to foreign governments making their own state secrets determinations prompted Congress to reintroduce similar legislation in February 2009.15

By re-assessing the privilege, Congress is taking an important first step toward providing additional rule-of-law protections against executive branch overreaching, maintaining the judicial role in executive oversight, and strengthening the protections for individual litigants bringing suit against the government.16 In doing so, Congress appropriately took into account the changing national security landscape in the years since the recognition by the Supreme Court of the U.S. privilege in United States v. Reynolds.17

14 Mark Mazzetti & William Glaberson, Obama Issues Directive to Shut Down Guantanamo, N.Y. TIMES, Jan. 22, 2009 (quoting Obama administration representatives as highlighting the importance of “protecting our national security, respecting the Geneva Conventions and the rule of law, and respecting the existing institutions of justice in this country”).
16 William G. Weaver & Robert M. Pallitto, State Secrets and Executive Power, 120 Pol. Sci. Q. 85, 90 (2005) (arguing that the courts should clarify the privilege to enhance these protections against executive branch overreaching).
17 345 U.S. 1 (1953).
A. United States v. Reynolds: The Domestic Standard is Established

The formal acknowledgement of the state secrets privilege in the United States is, perhaps surprisingly, rather recent. The 1953 case of United States v. Reynolds stands as the seminal case in which the U.S. approach to invocations of the state secrets privilege was established.

In Reynolds, the family members of three civilians killed in the crash of a military plane sought compensation from the government for wrongful death. The government asserted the state secrets privilege in response to a document request by plaintiffs for the flight accident report. When the government refused, the judge made an adverse inference and ordered a $250,000 judgment for the plaintiffs. The Third Circuit affirmed the decision, noting that a court should diligently refuse to accept blindly all claims of privilege; instead, a court should conduct an ex parte examination of the evidence to make an individualized privilege determination.

The Supreme Court reversed, although it agreed with part of the Third Circuit’s reasoning in noting that the greater the necessity for the allegedly privileged information in presenting the case, the greater the need for the court to “probe in satisfying itself that the occasion for invoking the privilege is appropriate.” The Court further reasoned that “[j]udicial control over the evidence in a case cannot be abdicated to the caprice of executive officers.” However, the Court acknowledged the strength of the evidentiary privilege of the

18 345 U.S. 1 (1953).
20 Reynolds, 345 U.S. at 3-4. The government also cited to Air Force Regulation No. 62-7(5)(b), which precluded disclosure of such reports outside the authorized chain of command without the approval of the Secretary of the Air Force. Id. at 3-4 n.4.
21 Id. at 5.
22 Id.
24 Reynolds, 345 U.S. at 11.
25 Id. at 9-10.
and noted in passing that some commentators believed the privilege to be constitutionally grounded as well.\textsuperscript{26}

The Court ultimately upheld the right of the government to refuse to provide evidence and laid out a more deferential analytical framework by which future courts should evaluate a claim of privilege: (1) the claim must be asserted by the head of the department which has the responsibility for the information and evidence in question;\textsuperscript{27} (2) the court has the responsibility to determine whether the disclosure in question would pose a “reasonable danger . . . [to] national security”;\textsuperscript{28} (3) the court should take into account the plaintiff’s need for information to litigate its case;\textsuperscript{29} (4) the court should, if necessary, undertake an ex parte, in camera review of the information at issue to determine whether a reasonable danger exists;\textsuperscript{30} and (5) if the court determines that the “reasonable danger” standard is met, the privilege is absolute—it cannot be overcome by the plaintiff’s showing of a need for the information,\textsuperscript{31} whether the case involves issues of human rights or any other countervailing considerations.

Given the ease with which the government could satisfy the low “reasonable danger” standard, the Reynolds court decided that the trial court did not need to examine the flight accident report over which the government was claiming the privilege, noting that “this is a time of vigorous preparation for national defense.”\textsuperscript{32} If it had ordered disclosure for the court’s review, it may have discovered what was revealed only when the report was de-classified in the 1990s: there were no military secrets in the report, as claimed by the government, but there was evidence that the plane lacked standard safeguards that might have prevented its crash—the very

\textsuperscript{26} Id. at 6-7.

\textsuperscript{27} Id. at 6 n.9. The idea that the state secrets privilege is rooted in the President’s inherent constitutional authority was rejected in Tenet v. Doe, which made clear that the state secrets privilege is an evidentiary privilege, meaning Congress can be involved in setting parameters on the invocation and use of the privilege. 544 U.S. 1, 9 (2005).

\textsuperscript{28} Reynolds, 345 U.S. at 7-8.

\textsuperscript{29} Id. at 10.

\textsuperscript{30} Id. at 11.

\textsuperscript{31} See, e.g., Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190,1204 (9th Cir. 2007) (pointing out that the district court had the option of holding an ex parte, in camera review of the government’s wiretapping records in accordance with the strict procedures of FISA, but that it chose not to do so).

\textsuperscript{32} Reynolds, 345 U.S. at 11.

\textsuperscript{33} Id. at 10-11 (concluding that, given the “circumstances of the case,” no need to review the accident report existed because of an “available alternative”).
negligence on which the family members in Reynolds based their lawsuit. The decision by the Reynolds Court to decline to at least ascertain whether the document in question contained the information claimed to be privileged was a fundamental and determinative flaw—one that has been replicated by many courts in the intervening years.

Reynolds is the only instance in which the Supreme Court has articulated a standard for the state secrets privilege; given the dearth of U.S. precedent, the Court based its reasoning on numerous other sources, including the English case of Duncan v. Cammel, Laird & Co. decided in 1942. Cammel, Laird’s acknowledgement of a robust evidentiary privilege available to the executive was not, however, the only basis on which the Reynolds court made its decision; the Court also considered other sources, such as earlier U.S. cases involving various privileges and Wigmore’s treatise on evidence. Wigmore noted the need for a state secrets privilege, but cautioned—even then, in 1940—that the privilege “has been so often improperly invoked and so loosely misapplied that a strict definition of its legitimate limits must be made,” and that courts, not the executive branch itself, were the appropriate decision-makers regarding the privilege.

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35 See Weaver & Pallitto, supra note 16, at 101 (noting that courts have looked at the underlying documents in less than one-third of cases in which the state secrets privilege was asserted).

36 Reynolds, 345 U.S. at 7.


39 Reynolds, 345 U.S. at 7 n.11.

40 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2212a(4) (3d ed. 1940); see also Reynolds, 345 U.S. at 6-7.

41 WIGMORE, supra note 38, § 2212a.

42 Wigmore further commented,
In *Reynolds*, the Supreme Court established a standardized doctrine by which to evaluate claims of a state secrets privilege; this doctrine balanced national security matters with adherence to the rule of law and attention to rights of individual litigants. However, the balancing test set forth in *Reynolds* has often been subsumed by a judicial tendency to uphold claims of privilege without engaging in a meaningful analysis of the underlying evidence or the government’s claimed need for nondisclosure. In recent years, that tendency has come under scrutiny as the current war on terror has led to numerous lawsuits in which national security programs have been implicated.

### B. Impetus for Reform

Congress took up the question of the privilege in 2008 for several reasons. First, the “war on terror” has led to highly controversial actions such as the National Security Agency’s warrantless wiretapping program as well as the extraordinary rendition of individuals by the Central Intelligence Agency. Although the Obama administration has already begun to modify the executive branch’s stance on many of the issues surrounding the war on terror and the prosecution of alleged terrorists and enemy combatants, it is unclear how administration intelligence programs will ultimately be structured. See Adam Liptak, *Early Test of Obama View on Power Over Detainees*, N.Y. Times, Jan. 3, 2009, at A1; Sheryl Gay Stolberg, *Great Limits Come with Great Power, Ex-Candidate Finds*, N.Y. Times, Jan. 25, 2009, at A22 (detailing the hurdles to fulfilling President Obama’s campaign promises regarding, among other areas, reform of national security policies).

Id. § 2379.  

See also Ilann Margalit Maazel, *The State Secrets Privilege*, N.Y.L.J., July 24, 2008, at 3 (noting that the *Reynolds* doctrine was initially “narrow and sensible”).  

Weaver & Pallitto, *supra* note 16. This judicial tendency is analyzed in further detail in *infra* Part II.

W. Bush administration led to suspicions that the government was not necessarily acting in good faith in invoking the privilege, and that such trends would persist in future administrations. Further, a “mosaic theory” of terrorist

(The Department of Justice will no longer defend an agency's withholding of information merely because there is a 'substantial legal basis' for doing so. Rather, in determining whether or not to defend nondisclosure decisions, we will apply a presumption of disclosure.). Congress’s attempts to strengthen FOIA in December 2007 were undermined by the Bush administration’s efforts to have disputes mediated by the Department of Justice, as opposed to the less partisan National Archives. See Editorial, The Cult of Secrecy at the White House, N.Y. TIMES, Feb. 7, 2008, at A30.

State Secrets Protection Act of 2008: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 110th Cong. 78 (2d Sess. 2008) (statement of Steven Shapiro, legal director of the A.C.L.U.) (noting the need for reform of the privilege, since “courts need to look at the invocation of the state secrets privilege skeptically and make sure it is really being raised to protect national security and not to shield government officials from legal and political accountability”). In the government’s brief in the case of New York Times Co. v. United States, then-Solicitor General Erwin N. Griswold wrote:

[I]n the present case high government officials have explained the reasons for their concern; that judgment is enough to support the Executive Branch’s conclusion, reflected in the top secret classification of the documents and in the in camera evidence, that disclosure would pose the threat of serious injury to the national security.

Brief for the United States at 18, New York Times Co. v. United States, 403 U.S. 713 (1971) (No. 1873). Decades later, Griswold conceded, “I have never seen any trace of a threat to the national security from the publication [of the Pentagon Papers]. Indeed, I have never seen it even suggested that there was such a threat.” Erwin N. Griswold, Editorial, Secrets Not Worth Keeping; The Courts and Classified Information, WASH. POST, Feb. 15, 1989, at A25.

In September 2009 the Obama administration released a new set of guidelines governing invocation of the state secrets privilege by the administration. See Holder Memorandum, supra note 7. Although initial reaction from the public and Congress has been positive, many believe that a congressional check is still necessary to counteract the potential for abuse within the executive branch. See Charlie Savage, Justice Dept. to Limit Use of State Secrets Privilege, N.Y. TIMES, Sept. 23, 2009 at A16 (“Congress must still enact legislation that provides consistent standards and procedures for courts to use when considering state secrets claims. Our constitutional system requires meaningful, independent judicial review of governmental secrecy claims.”) (internal quotation marks omitted) (quoting Representative Jerrold Nadler)). As of this writing, there is no information as to how the new policy has affected executive branch decision-making regarding the invocation of the state secrets privilege.

The court in Halkin v. Helms explained the “mosaic theory” of national security as follows:

It requires little reflection to understand that the business of foreign intelligence gathering in this age of computer technology is more akin to the construction of a mosaic than it is to the management of a cloak and dagger affair. Thousands of bits and pieces of seemingly innocuous information can be analyzed and fitted into place to reveal with startling clarity how the unseen whole must operate.

activity would create a broad protection over large swaths of relevant information that may not, at least regarding individual documents, satisfy the *Reynolds* standard.\(^{50}\) Third, many critics see the state secrets privilege as a broad and expansive means for executive branch overreaching in which the bad actions of the administration are withheld from private litigants and the judicial system, and concealed from Congress and the public.\(^{51}\)

The administration’s warrantless wiretapping program was challenged numerous times in court, but the government’s frequent invocation of the state secrets privilege meant that plaintiffs met with little success in pursuing lawsuits against the government regarding the program. Specifically, the government has invoked the state secrets privilege on several occasions\(^{52}\) to protect records that would have allowed the plaintiffs to prove that they were subject to wiretapping and thus had standing to challenge the program.\(^{53}\)

An emblematic case is that of the al-Haramain Islamic Foundation, an Islamic charity based in Saudi Arabia and operating worldwide, including in the United States, which filed suit against the U.S. government for being subject to allegedly unconstitutional warrantless wiretapping of telephone conversations by the National Security Agency.

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\(^{51}\) *E.g.*, Ctr. for Nat’l Sec’y Studies v. U.S. Dep’t of Justice, 331 F.3d 918, 933 (D.C. Cir. 2003) (upholding FOIA’s law enforcement exemption with regard to a mosaic theory of terrorism); *see also* ACLU v. Dep’t of Def., 389 F. Supp. 2d 547, 564-66 (S.D.N.Y. 2005) (upholding, in part, the government’s use of the Glomar Doctrine—neither confirming nor denying the alleged government activity—to exempt it from FOIA disclosure requirements).

\(^{52}\) *E.g.*, ACLU v. NSA, 438 F. Supp. 2d 754, 758-66 (E.D. Mich. 2006), vacated and remanded on other grounds, 493 F.3d 644, 662-64 (6th Cir. 2007), cert. denied, 128 S. Ct. 1334 (2008); *see also* Recent Cases, Federal Courts—Standing—Sixth Circuit Denies Standing to Challenge Terrorist Surveillance Program—ACLU v. NSA, 493 F.3d 644 (6th Cir. 2007), 121 Harv. L. Rev. 922, 922 (2008) (arguing that standing rules should be relaxed under such circumstances).

\(^{53}\) E.g., Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1205 (9th Cir. 2007) (‘Al-Haramain cannot establish that it suffered injury in fact, a ‘concrete and particularized’ injury, because the Sealed Document, which Al-Haramain alleges proves that its members were unlawfully surveilled, is protected by the state secrets privilege.’); ACLU v. NSA, 438 F. Supp. 2d at 765 (state secrets privilege prevented plaintiffs from establishing data-mining claim); Hepting v. AT&T, 439 F. Supp. 2d 974, 984 (N.D. Cal. 2006).
Al-Haramain was in the unique position of being able to offer documented proof that it was subject to NSA wiretapping, since the government had accidentally turned over transcripts and records of the wiretapping activity to an Al-Haramain lawyer. The Bush administration sought to recover most copies of the report in the possession of Al-Haramain’s counsel and others, but did not try to recover those copies that had been sent outside of the United States.

The government moved to dismiss Al-Haramain’s case based on the state secrets privilege; the motion was denied, although the presiding judge agreed to exclude the wiretapping report from the evidence available to plaintiffs. The Ninth Circuit reversed and remanded the case from an interlocutory appeal, holding that because the privilege surrounding the wiretapping records was “absolute,” the district court’s decision to use affidavits was unacceptable. Because the district court should not have considered the document in any respect, the Ninth Circuit reasoned that plaintiffs could not establish an injury in fact, and, therefore, lacked standing. On remand, the district court was tasked to determine whether Foreign Intelligence Surveillance Act (“FISA”) preempts the state secrets privilege such that the lawsuit could survive. The court concluded that FISA trumped the state secrets privilege, noting that “[t]he enactment of FISA was the fruition of a period of intense public and Congressional interest in the

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55 See Leonnig & Sheridan, supra note 54.

56 See Keefe, supra note 34, at 28, 31 (describing how the government did not act to recover copies that were sent to Al-Haramain personnel in Saudi Arabia).

57 Id. at 31-32. The judge instead ordered that the plaintiffs create affidavits based on their recollections of the privileged document. See Al-Haramain Islamic Found. v. Bush, 451 F. Supp. 2d 1215, 1229 (D. Or. 2006), rev’d and remanded, 507 F.3d 1190 (9th Cir. 2007).

58 Al-Haramain, 507 F.3d at 1204. The Ninth Circuit pointed out that the district court could have held an ex parte, in camera review of the wiretapping records in accordance with the strict procedures of FISA, but that it did not do so. Id. at 1205.

59 Id.

60 Id. at 1206.

problem of unchecked domestic surveillance by the executive branch.\textsuperscript{62}

The court reasoned that section 1806(f) of FISA governed how sensitive government information resulting from surveillance ought to be handled by the courts, and that 1806(f) trumped the Reynolds framework for analyzing state secrets claims.\textsuperscript{63} The court went further still, holding that 1806(f) was “in effect a codification of the state secrets privilege for purposes of relevant cases under FISA, as modified to reflect Congress’s precise directive to the federal courts for the handling of materials and information with purported national security implications. . . . [T]he Reynolds protocol has no role where section 1806(f) applies.”\textsuperscript{64} The district court’s holding kept the plaintiff’s claim alive, with Al-Haramain bearing the burden of proving surveillance apart from the wiretapping records that were inadvertently produced by the government.\textsuperscript{65} In April 2009, the district court indicated that the government would not have carte blanche to assert the privilege by instructing both parties to work together to draft a protective order to delineate how classified and sensitive information will be treated.\textsuperscript{66} The court also admonished Obama administration lawyers for their continued attempts to garner a stay and delay the disclosure of information relevant to plaintiff’s case.\textsuperscript{67}

A second motivating factor\textsuperscript{68} for the current push of state secrets reform is growing evidence of extreme cases of detainee...
mistreatment that have shocked the public: emblematic is the case of Khaled El-Masri, a German citizen who was subjected to extraordinary rendition by the U.S. government in what was later acknowledged as a case of mistaken identity.

In December 2003, El-Masri was taking a holiday from his hometown of Ulm, Germany, to Skopje, Macedonia. He was taken into custody by Macedonian authorities while on a bus crossing the border from Serbia. According to El-Masri, in January 2004, he was transported to an airport where he was beaten, stripped naked, photographed, and then sodomized. He was then subject to “extraordinary rendition” by the CIA, who transported him to a prison in Kabul, Afghanistan.

El-Masri was finally released on May 28, 2004, after having been in captivity for approximately five months, during which he was allegedly subject to numerous harsh interrogations by the CIA, which included “threats, insults, pushing, and shoving,” as well as force-feeding through a nasal tube. Upon his release, El-Masri sought out German officials, who launched an investigation regarding his allegations of abduction, detention, and abuse.

In 2005, El-Masri sued George Tenet, the former director of the Central Intelligence Agency, the airlines complicit in his rendition, and various other individuals. The

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Id. ¶ 28.

Id. ¶¶ 29-35 (alleging that El-Masri was blindfolded, shackled, forced into a diaper, and rendered unconscious by injections during his transport).

Id. ¶ 43.

Id. ¶ 40.

Id. ¶ 44.

Id. ¶ 57.

Id. ¶¶ 65-72 (alleging violations of due process); id. ¶¶ 73-82 (alleging prolonged arbitrary detention); id. ¶¶ 83-92 (alleging torture and other degrading treatment); see Reform of the State Secrets Privilege: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary, 110th Cong. 3 (2d Sess. 2008) [hereinafter Privilege Hearings] (prepared statement of H. Thomas Wells, Jr., President-Elect, ABA).
government argued for dismissal of the suit based on the state secrets privilege, claiming that national security interests would be compromised if the litigation were to continue, and that state secrets were central to El-Masri making his case against the government. This privilege claim was made despite the United States’ admission of the existence and operation of a rendition program, as well as the support for El-Masri’s factual account by German investigators and prosecutors. The federal district court agreed with the government’s claim and dismissed El-Masri’s suit at the motion-to-dismiss stage of the litigation, prior to the government’s filing an answer to El-Masri’s complaint. The federal appeals court sustained the dismissal, and the Supreme Court denied certiorari in 2007.

In denying certiorari, the Supreme Court essentially chose to let stand the lack of clarity surrounding the standard for determining what procedures a court should use to evaluate potentially privileged evidence, whether a court should dismiss a suit in response to a valid privilege claim, and whether dismissal can occur prior to evidentiary discovery or even the filing of an answer to the complaint.

In contrast, the Ninth Circuit decision in *Mohamed v. Jeppesen Dataplan, Inc.*, deviates significantly from the Fourth Circuit’s reasoning in *El-Masri* and articulates a narrower standard for upholding an invocation of the state secrets privilege. In *Mohamed*, the district court dismissed a suit brought by five detainees against a Boeing subsidiary allegedly involved in the transportation of the detainees for government-directed rendition and torture. The district court cited many of the same reasons that the courts in *El-Masri* relied on, including the need to dismiss the suit because the

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79 Privilege Hearings, supra note 78, at 3.
81 See El-Masri v. Tenet, 437 F. Supp. 2d 530, 535 (E.D. Va. 2006); Privilege Hearings, supra note 78, at 3. *El-Masri* is only one of many state secrets privilege claims which led to dismissal at the pleadings stage. See, e.g., Halkin v. Helms, 598 F.2d 1, 11 (D.C. Cir. 1978) (affirming a partial dismissal of a suit involving domestic surveillance issues).
82 See El-Masri v. United States, 479 F.3d 296 (4th Cir. 2007).
84 Privilege Hearings, supra note 78, at 3.
85 563 F.3d 992 (9th Cir. 2009).
86 539 F. Supp. 2d 1128, 1130 (N.D. Cal. 2008).
subject matter at issue was itself a state secret that, if revealed, could jeopardize national security interests. The Ninth Circuit reversed, adhering closely to the standard as articulated by the Court in Reynolds and rejecting the government’s claims that the suit needed to be dismissed outright based on its subject matter. The court instead remanded the case to the district court, giving the plaintiffs an opportunity to prosecute their claim without relying on privileged evidence.

The dismissal of El-Masri, which was affirmed by the Fourth Circuit and was subsequently denied certiorari, in conjunction with the recent Ninth Circuit decision in Mohamed, make clear that Congress should step in and clarify the state secrets privilege. The current application of the state secrets privilege raises numerous questions that require clarification: when the government can invoke the privilege, and what can be protected from disclosure; whether it is appropriate to grant a motion to dismiss based on a state secrets claim at the initial pleadings stage; the appropriate relief for a valid claim of the privilege; and how deeply the court must examine the government’s claim.

More fundamentally, the petition for certiorari by El-Masri reflects broader concerns that the Reynolds framework should be reevaluated in light of serious constitutional issues—including allegations of gross violations of the right to privacy and the right to due process—raised in current cases that were not present in Reynolds. Additionally, critics have noted that the nature of national security concerns has changed significantly in recent decades, and the courts’ ability to

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87 Id. at 1134-36.
88 Mohamed, 563 F.3d at 997, 1009.
89 Id. at 1009. The Ninth Circuit further clarified that documents considered “classified” for Freedom of Information Act purposes are not necessarily “secret” for purposes of the state secrets privilege, and that the government had the burden of establishing the need for genuine secrecy. Id. at 1006-08.
90 It is clearly not in the interest of the executive branch to initiate any tinkering with the state secrets privilege, since the current application tends to grant most government requests for dismissal or non-discovery. See Editorial, Secrets and Rights, N.Y. Times, Feb. 2, 2008, at A18 (noting that the proposed Congressional measures were necessary given the courts’ reflexive dismissal of cases involving national security issues).
91 Petition for Writ of Certiorari, supra note 9.
92 Id. at 17-21.
93 Id. at 21-22.
94 Id. at 22-24.
adjudicate cases while protecting sensitive information has improved dramatically in the decades since Reynolds.\textsuperscript{95}

The El-Masri certiorari petition asserted that it was time for the Court to revisit the Reynolds standard and the state secrets privilege generally, arguing that since Reynolds was decided, the privilege has been broadened inappropriately and “has become unmoored from its evidentiary origins” and now provides a type of blanket immunity for bad actions by the government.\textsuperscript{96}

Indeed, the Bush administration invoked the state secrets privilege with far greater frequency, in cases of greater national significance, and sought broader immunity for alleged bad acts by the government than did previous administrations.\textsuperscript{97} It also extended the ability to classify documents as “secret” to additional administrative agencies.\textsuperscript{98} These claims of state secrets, as El-Masri noted, have been raised frequently at the initial pleadings stage, allowing the government to seek dismissal prior to discovery.\textsuperscript{99} Further, courts often have not examined the documents over which the

\textsuperscript{95} Id. at 28-29 (citing the frameworks for judicial treatment of sensitive information laid out in the Freedom of Information Act, the Foreign Intelligence Surveillance Act, and the Classified Information Procedures Act).

\textsuperscript{96} Id. at 12.

\textsuperscript{97} \textit{E.g.}, Amanda Frost, \textit{The State Secrets Privilege and Separation of Powers}, 75 \textit{FORDHAM L. REV.} 1931, 1939 (2007) (“The Bush Administration raised the privilege in twenty-eight percent [28\%] more cases per year than in the previous decade, and has sought dismissal in ninety-two percent [92\%] more cases per year than in the previous decade.”); Weaver & Pallitto, supra note 16, at 100 (claiming that the Bush administration is using the state secrets privilege with “offhanded abandon”). \textit{Compare} Chesney, supra note 51, at 1252 (claiming that a survey of the invocation of the state secrets privilege in the post-Reynolds era indicates that “recent assertions of the privilege are not different in kind from the practice of other administrations”), with Video: Ben Wizner, Staff Attorney, ACLU, Panel Remarks at American Constitution Society for Law and Policy Discussion: The State Secrets Privilege: Time for Reform? (2008), \textit{available at} http://acslaw.org/node/6503 (claiming that the frequent invocation of the state secrets privilege to secure dismissal at the initial pleadings stage is unique to the Bush administration).

\textsuperscript{98} See Weaver & Escontrias, supra note 1, at 9 (noting that the ability to classify documents as “secret” and, therefore, potentially shield them from disclosure in litigation, to the department of Health and Human Services, the Environmental Protection Agency, the Department of Agriculture, and the Office of Science and Technology Policy).

privilege has been claimed, relying solely on government affidavits to determine that the privilege applies and that the suit must be dismissed prior to the commencement of discovery.\textsuperscript{100} Given the likelihood of continued litigation raising issues of national security for the foreseeable future, re-assessing \textit{Reynolds} in light of modern standards is necessary.\textsuperscript{101}

\textbf{C. Proposed Reforms}

The 2008 and 2009 proposed reforms mark the first sustained attempt by Congress to address the concerns of lawmakers, scholars, and activists to allow courts greater flexibility in their evaluation and application of the privilege while protecting sensitive government information.\textsuperscript{102}

Both the 2009 Senate and House bills offer a uniform set of procedures for federal judges to employ when the government asserts the privilege, modeled in large part after the Classified Information Procedures Act (CIPA) of 1980, which established procedures for the use of classified information in criminal trials.\textsuperscript{103}

Under the proposed legislation, courts would have the ability to conduct hearings on the documents claimed to be privileged in camera, ex parte, or through the participation of attorneys and legal experts with “appropriate security

\textsuperscript{100} Petition for Writ of Certiorari, \textit{supra} note 9, at 14.

\textsuperscript{101} Critics have argued for many years that the state secrets privilege needs to be clarified for courts to apply a consistent standard. \textit{See}, \textit{e.g.}, Sandra D. Jordan, \textit{Classified Information and Conflicts in Independent Counsel Prosecutions: Balancing the Scales of Justice After Iran-Contra}, 91 COLUM. L. REV. 1651, 1679 (1991).

\textsuperscript{102} Courts have held that statutes can preempt the application of the state secrets privilege. \textit{See}, \textit{e.g.}, Halpern v. United States, 258 F.2d 36, 37, 44 (2d Cir. 1958) (noting that the Invention Secrecy Act should govern the court’s treatment of sensitive evidence instead of the state secrets privilege); \textit{In re NSA Telecomm. Records Litig.}, 564 F. Supp. 2d 1109, 1124 (N.D. Cal. 2008) (noting that the Foreign Intelligence Surveillance Act (FISA) has primacy over the state secrets privilege in setting forth the parameters of how evidence should be treated during litigation); \textit{see also} Eric Lichtblau, \textit{Judge Rejects Bush’s View on Wiretaps}, \textit{N.Y. Times}, July 3, 2008, at A17 (noting FISA's limitations on executive branch activities).

\textsuperscript{103} 18 U.S.C. app. 3 §§ 1-16 (2006). The Bush administration has pointed out that analogizing the use of the state secrets privilege to the application of the CIPA is inapposite, since the end result of nondisclosure of government held evidence under CIPA is that the government would need to drop its prosecution of a criminal case; in a state secrets situation, the proposed reforms would mean that government nondisclosure after a court order would lead to an adverse inference which increases the likelihood of government liability to private litigants. \textit{See} Letter from Michael B. Mukasey, U.S. Attorney Gen., to Senator Patrick J. Leahy, Chairman of the Senate Comm. on the Judiciary (Mar. 31, 2008) [hereinafter Mukasey Letter], \textit{available at} http://www.usdoj.gov/archive/ola/views-letters/110-2/03-31-08-ag-ltr-re-s2533-state-secrets.pdf.
clearances” to review the materials.\footnote{S. 417, 111th Cong. § 4052 (2009). The bill empowers the judiciary to implement procedures to ensure that a sufficient number of attorneys with high-level security clearances are available to assist with such cases. \textit{Id.}} The bills also require the government to produce each piece of evidence it claims is protected for in camera review, along with a signed affidavit from the head of the agency in possession of the evidence.\footnote{\textit{Id.} § 4052(b)(1) (providing for in camera hearings except in when the hearing relates solely to a question of law). The court can choose to review only a sampling of the documents in question, if the review of every document would be prohibitively time-consuming. \textit{Id.} § 4054(d)(2).} The Senate bill also requires the government to attempt to produce a non-privileged substitute—such as a redaction or summary—for any piece of evidence for which the privilege is upheld by the court.\footnote{\textit{Id.} § 4054(e)(2)(B).}

These proposed reforms mark a stark contrast to the current situation in which the government’s common practice is to rely solely on affidavits to assert the privilege and move for dismissal of a suit.\footnote{See James Oliphant, \textit{Committee Passes “State Secrets” Bill, SWAMP}, Apr. 24, 2008, \url{http://www.swamppolitics.com/news/politics/blog/2008/04/committee_passes_state_secrets.html} (last visited Sept. 20, 2009). S. 417 section 4054(b) requires that the government also provide an affidavit to support a claim of state secrets, and that an unclassified version of the affidavit must be made public.} Judges would be prevented from dismissing cases based on the privilege before plaintiffs have had a chance to engage in evidentiary discovery,\footnote{\textit{Id.} § 4055 (“After reviewing all pertinent evidence, privileged and non-privileged, a Federal court may dismiss a claim or counterclaim on the basis of the state secrets privilege . . . .”).} and the level of deference to be accorded to the executive branch would change from the current standard of giving the “utmost deference”\footnote{“[U]tmost deference” was also the standard accorded to executive claims of privilege in \textit{United States v. Nixon}, 418 U.S. 683, 685 (1974).} to administration claims to one in which judges give only “substantial weight” to such claims.\footnote{See S. 2533, 110th Cong. § 4054(e)(3) (as reported by Senator Patrick J. Leahy, with an amendment, Aug. 1, 2008). Finally, the Attorney General would have been obligated to report to Congress within 30 calendar days “on any case in which . . . the state secrets privilege” was invoked, and any member of the House and Senate Intelligence and Judiciary Committees would have been permitted to request and examine any piece of evidence deemed protected by a court. \textit{Id.} § 4058(a)(1).}

\section*{D. Critiques and Concerns Over Reforming the Privilege}

The 2008 proposed reforms were met with immediate and strong opposition from the Bush administration. In a March 31, 2008, letter to the Senate Judiciary Committee,
then-Attorney General Michael Mukasey offered numerous critiques, including that the state secrets privilege is constitutionally rooted, and not solely a common law evidentiary privilege;¹¹¹ that the courts are not the appropriate decision-makers regarding national security matters;¹¹² that other aspects of S. 2533, including reporting requirements to Congress, are constitutionally suspect;¹¹³ and that the proposed reforms would compromise the state secrets privilege to the detriment of national security.¹¹⁴

First, the Bush administration offered the Article II-based argument that congressional regulation of the privilege is overreaching because the state secrets privilege is not a purely evidentiary privilege for which the parameters can be set by Congress.¹¹⁵ Instead, the Bush administration and other critics argued that the state secrets privilege is grounded in the President’s inherent executive power,¹¹⁶ a position articulated by the Supreme Court in the dicta of United States v. Nixon,¹¹⁷ and mentioned in passing in a footnote in Reynolds.¹¹⁸

¹¹¹ Mukasey Letter, supra note 103, at 2-3.
¹¹² Id. at 3-4.
¹¹³ Id. at 4-5.
¹¹⁴ Id. at 5-6. The Mukasey Letter also detailed four other concerns: that the state secrets privilege is a well-settled doctrine, the Reynolds standard was appropriate for evaluating a claim of privilege, the proposed reforms could affect pending litigation, and the proposed amendments lacked clarity as to classification procedures. Id. at 1, 2, 7.
¹¹⁵ See, e.g., El-Masri v. Tenet, 437 F. Supp. 2d 530, 535-36 (E.D. Va. 2006) (asserting that the “privilege derived from the President’s constitutional authority over the conduct of this country’s diplomatic and military affairs”); Memorandum in Support of the United States’ Assertion of State Secrets Privilege at 3-4, Arar v. Ashcroft, 414 F. Supp. 2d 258 (E.D.N.Y. 2006) (No. 04-CV-249); Memorandum of Points and Authorities in Support of the United States’ Assertion of the Military and State Secrets Privilege; Defendants’ Motion to Dismiss or, in the Alternative, for Summary Judgment; and Defendants’ Motion to Stay Consideration of Plaintiffs’ Motion for Summary Judgment at 10, ACLU v. NSA, 438 F. Supp. 2d 754 (E.D. Mich. 2006) (No. 2:06-cv-10204) (arguing that the “privilege derives from the President’s Article II powers to conduct foreign affairs and provide for the national defense”); see also Chesney, supra note 51, at 1308-09 (asserting that the state secrets privilege is best conceived of as an Article II privilege with an overlay of evidentiary issues, the latter of which can be regulated by Congress).
¹¹⁶ See generally JOHN YOO, THE POWERS OF WAR AND PEACE (2005) (arguing that inherent executive authority during wartime limits Congressional control over the conduct of war to the exercise of its spending and impeachment powers).
¹¹⁷ United States v. Nixon, 418 U.S. 683, 711 (1974) (“Nowhere in the Constitution . . . is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President’s powers, it is constitutionally based.”); see Dept’ of Navy v. Egan, 484 U.S. 518, 527 (1988) (“[The President’s] authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President . . . .”);
Since Reynolds, most courts have construed the state secrets privilege simply as a common law evidentiary privilege, created and enforced to protect information when “disclosure would be inimical to the national security [interests].”\(^{119}\) In 2005, the Court decided Tenet v. Doe\(^{120}\) and made clear the distinction between applying the state secrets privilege and deciding the threshold question of justiciability. In Tenet, two foreign nationals who allegedly worked on behalf of the Central Intelligence Agency (CIA) in return for the promise of financial support and residency in the United States brought claims against the CIA.\(^{121}\) The Supreme Court dismissed the claims of the alleged agents based squarely on the justiciability doctrine announced in Totten v. United States rather than looking to the state secrets privilege for guidance.\(^{122}\) In the course of its reasoning in Tenet, the Court clarified that the state secrets privilege addressed in Reynolds ought to be viewed as purely evidentiary\(^{123}\) in nature.

El-Masri v. United States, 479 F.3d 296, 303-04 (4th Cir. 2007) (noting that the state secrets privilege has a “firm foundation in the Constitution”); Halkin v. Helms, 598 F.2d 1, 9 (D.C. Cir. 1978); Black v. Sheraton Corp. of Am., 371 F. Supp. 97, 100 (D.D.C. 1974) (noting that the privilege is constitutionally based to maintain an appropriate separation of powers).

\(^{118}\) See United States v. Reynolds, 345 U.S. 1, 6 n.9 (1953) (noting that the government claims that the statute determining whether the government can withhold documents “is only a legislative recognition of an inherent executive power which is protected in the constitutional system of separation of power”).

\(^{119}\) In re United States, 872 F.2d 472, 474 (D.C. Cir. 1989); In re NSA Telecomm. Records Litig., 564 F. Supp. 2d 1109, 1118 (N.D. Cal. 2008); Hepting v. AT&T Corp., 439 F. Supp. 2d 974, 980-85 (N.D. Cal. 2006); see also Al-Haramain Islamic Found. v. Bush, 507 F.3d 1190, 1196 (9th Cir. 2007) (“The state secrets privilege is a common law evidentiary privilege that permits the government to bar the disclosure of information if ‘there is a reasonable danger’ that disclosure will ‘expose military matters which, in the interest of national security, should not be divulged.’” (quoting Reynolds, 345 U.S. at 10)).

\(^{120}\) 544 U.S. 1 (2005).

\(^{121}\) Id. at 3-5.

\(^{122}\) Id. at 8-10 (relying on Totten v. United States, 92 U.S. 105 (1875)).

\(^{123}\) Other supporters of the 2008 proposed reforms argued that whether the privilege has some constitutional roots is irrelevant, since the proposed reforms seek to impose the cost of an adverse inference against the government if it does not comply with a judicial request for in camera review, but that the government does not necessarily lose its case. See Aziz Huq, Dir. Liberty & Nat’l Sec. Project, Brennan Ctr. For Justice, N.Y. Univ. Sch. of Law, Remarks at the American Constitution Society for Law and Policy Panel Discussion: The State Secrets Privilege: Time for Reform? (Apr. 4, 2008), available at http://acslaw.org/node/6578. The adverse inference also costs less than the remedy applied by the district court in Reynolds, which entered judgment for the plaintiffs upon the government’s refusal to produce the flight accident report for in camera review. Reynolds, 345 U.S. at 5.

\(^{124}\) The Tenet Court distinguished the evidentiary privilege from the justiciability doctrine articulated in Totten, 92 U.S. at 107 (in which litigation was dismissed at the pleading stage in an action to enforce a secret espionage contract,
Second, the Bush administration argued that the state secrets privilege is best exercised by the executive branch, which is owed a high level of deference on national security matters.\textsuperscript{125} For example, the government, in asking the Supreme Court not to grant El-Masri’s petition for certiorari, cited \textit{Nixon} for the proposition that “[s]uch deference protects the Executive’s Article II responsibility to safeguard national security information and accounts for the fact that the Executive Branch is in a far better position than the courts to evaluate the national security and diplomatic consequences of releasing sensitive information.”\textsuperscript{126}

This argument relied on the premise that judges cannot adequately evaluate some issues that relate to national security matters.\textsuperscript{127} The district court in \textit{El-Masri} emphasized this purported judicial deficiency, quoting from the 1948 case of \textit{C. & S. Air Lines v. Waterman S.S. Corp.},\textsuperscript{128} “the President . . . has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret.”\textsuperscript{129}

This claim—which if followed to its logical conclusion would preclude judicial oversight of almost all national security matters—is questionable, since federal courts are regularly tasked with dealing with sensitive information related to national security issues.\textsuperscript{130} Further, the ability of the courts to

\begin{itemize}
\item because the government could neither confirm nor deny the contract’s existence),
\item describing \textit{Totten} as “unique and categorical . . . a rule designed not merely to defeat the asserted claims, but to preclude judicial inquiry.” \textit{Tenet}, 544 U.S. at 6 n.4. By contrast, the Court described the state secrets privilege as dealing strictly with evidence, not justiciability. \textit{Id.} at 9-10.
\item \textsuperscript{125} \textit{See United States v. Nixon, 418 U.S. 683, 710 (1974) (reasoning that courts “traditionally show” the “utmost deference” to executive branch requests for privilege).}
\item \textsuperscript{127} \textit{See Chesney, supra note 51, at 1267-69.}
\item \textsuperscript{128} \textit{333 U.S. 103, 111 (1948).}
\item \textsuperscript{129} \textit{El-Masri v. Tenet, 437 F. Supp. 2d 530, 536 n.7 (E.D. Va. 2006).}
\item \textsuperscript{130} \textit{See Boumediene v. Bush, 128 S. Ct. 2229, 2277 (2008) (affirming the role of the judiciary in determining constitutionality of counterterrorism measures, noting, “Security depends upon a sophisticated intelligence apparatus and the ability of our Armed Forces to act and to interdict. There are further considerations, however. Security subsists, too, in fidelity to freedom’s first principles.”); see also Weiser, supra note 68 (noting the observation of Second Circuit Judge Barrington Parker, Jr. that courts regularly weigh in on questions of foreign policy); \textit{State Secret Protection Act of 2009: Hearing on H.R. 984 Before the Subcomm. on the Constitution, Civil Rights and}
deal with sophisticated and sensitive matters of national importance has increased dramatically since the *Reynolds* decision. Additionally, the status quo reflects little or no judicial check on executive branch overreaching; the proposed reforms attempt to rectify that by shedding sunlight on executive branch decision-making that would not exist otherwise. Although involved executive branch officials would have a better and more nuanced understanding of national security issues than federal judges, the conclusion that judges are thus incompetent to play any significant role in the application of an evidentiary privilege—even with the protections of in camera review—does not follow.

Third, the Bush administration strongly objected to the proposed requirement that the Attorney General report to Congress on invocations of the state secret privilege and provide copies of privileged documents to members of Congress upon request. Any President who subscribes to a robust view of a unilateralist unitary executive theory—particularly in light of the claim that the state secrets privilege has an Article II core—may decide to refuse to comply with the legislated state secrets framework based on the theory of constitutional

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，《Civil Liberties》，111th Cong. 24-25 (2009) (statement of Hon. Patricia M. Wald, Retired C.J., U.S. Court of Appeals for the District of Columbia) (asserting that federal courts are capable of handling sensitive information related to national security issues). Federal courts have dealt effectively with serious national security issues, such as terrorism, for many years. *E.g.*, United States v. Yousef, 327 F.3d 56, 171 (2d Cir. 2003) (affirming convictions for conspiracy to attack the World Trade Center in 1993); United States v. McVeigh, 153 F.3d 1166, 1176 (10th Cir. 1998) (affirming the death sentence for Timothy McVeigh for his role in the 1993 Oklahoma City bombing).

Various developments have contributed to this trend. One development includes the 1958 amendments to the Federal Housekeeping Statute, 5 U.S.C. § 301 (2006). See Exxon Shipping Co. v. U.S. Dep't of the Interior, 34 F.3d 774, 777 (9th Cir. 1994) (“According to the legislative history of the 1958 amendments, Congress was concerned that the statute had been twisted from its original purpose as a 'housekeeping' statute into a claim of authority to keep information from the public and, even, from the Congress. 1958 U.S.C.C.A.N. 3352 (1958).” (citation omitted) (internal quotation marks omitted)); id. (“The House Report accompanying the 1958 amendment explained that the proposed amendment would ‘correct’ a situation that had arisen in which the executive branch was using the housekeeping statute as a substantive basis to withhold information from the public. H.R. REP. NO. 85-1461, at 2 (1958).”). Other developments include the 1974 amendments to the Freedom of Information Act, the 1978 creation of the Foreign Intelligence Services Act Court, and the 1980 passage of CIPA. See Fisher, supra note 19, at 124-64; The Constitution Project, Reforming the State Secrets Privilege (2007), available at http://www.constitutionproject.org/manage/file/52.pdf.

See Mukasey Letter, supra note 103, at 4-5.


See Setty, supra note 46, at 596-98.
avoidance. If Congress attempted to mandate the Attorney General’s reporting to Congress on information related to national security, the President may choose to “avoid” a potential constitutional question by refusing to enforce the legislation mandating the sharing of information. However, because the judiciary has a central role in evaluating and applying the state secrets privilege, the use of avoidance by the executive branch may be limited to some extent.

Fourth, the administration raised the concern that the proposed reforms, if enacted, would lead to the disclosure of

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135 Constitutional avoidance in the executive context has been understood to mean that the President can “avoid” a constitutional dispute by asserting his own view of his constitutional obligations any time the actions of another branch make an incursion onto the constitutional right of the executive to exert its decision-making primacy in certain areas, such as in the conduct of war. See Trevor Morrison, Constitutional Avoidance in the Executive Branch, 106 COLUM. L. REV. 1189, 1218-19, 1230 (2006) (critiquing the OLC’s use of avoidance to assert more presidential power than is granted under law). Congress attempted to address the question of constitutional avoidance through 2002 appropriations legislation that included a provision mandating notification to Congress whenever the executive branch chooses not to enforce a law as written. See The 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273 § 202, 116 Stat. 1758, 1771 (codified at 28 U.S.C. § 530(D) (2002)). The Bush administration appears to have engaged in “meta-avoidance” by refusing to comply with the congressional notification requirement in the Act. See, e.g., Statement on Signing the 21st Century Dep’t of Justice Appropriations Authorization Act, 38 WEEKLY COMP. PRES. DOC. 1971, 1971 (Nov. 2, 2002) (noting that § 530(D) “purports to impose on the executive branch substantial obligations for reporting to the Congress activities of the Department of Justice involving challenges to or nonenforcement of law that conflicts with the Constitution. The executive branch shall construe section 530(D) . . . in a manner consistent with the constitutional authorities of the President to supervise the unitary executive branch . . .”). Congress continues to attempt to legislate its way around executive branch avoidance. E.g., OLC Reporting Act of 2008, S. 3501, 110th Cong. § 2 (2008) (introduced by Sens. Feingold and Feinstein); Office of Legal Counsel Reporting Act of 2008, H.R. 6929, 110th Cong. § 2 (2008) (introduced by Rep. Miller). Both bills propose amendments to 28 U.S.C. § 530(D) to obligate the Attorney General to report to Congress on non-enforcement of statutes based on OLC opinions claiming constitutional avoidance based on the OLC’s reading of presidential power under Article II.

136 Morrison, supra note 135, at 1250-58. Members of Congress, acknowledging the ineffectiveness of Congressional oversight in the face of the heightened use of executive privilege and constitutional avoidance, have voiced the belief that the courts are the last safeguards of separation of powers. Department of Justice Oversight: Hearing Before the S. Comm. on the Judiciary, 110th Cong. 5, 13-14 (2007) [hereinafter Oversight Hearing Transcript] (statements of Chairman Sen. Leahy and Att’y Gen. Gonzales). Senator Arlen Specter has objected to this meta-use of constitutional avoidance, noting that even if enforcement of a statute is “avoided” by the administration, that avoidance needs to be reported to the appropriate committee in the Senate and House of Representatives. Id. at 13.

137 It should be noted that there is no layer of judicial oversight for the provision of S. 2533 which requires the Attorney General to report to Congress and provide documents for inspection which were withheld under the privilege. See S. REP. NO. 110-442, at 33-35 (2008). Thus, an administration intent on using the avoidance doctrine might do so in the context of this congressional reporting requirement.
more state secrets and compromise national security as a result. Clearly, more information would likely be revealed in litigation if the proposed reforms were enacted: S. 417 elevates the threshold for nondisclosure from “a reasonable danger” that disclosure could harm national security—the standard from Reynolds—to the higher standard that disclosure is “reasonably likely to cause significant harm” to national security. A higher rate of disclosure would be almost inevitable with the proposed standard, particularly given that the courts, not the executive branch, would make the final determination as to the level of potential harm caused by disclosure.

However, it is unclear whether a higher rate of disclosure would jeopardize U.S. security interests. Although the Bush administration asserted that disclosing information regarding administration activities in the war on terror in response to oversight attempts would compromise national security interests, it offered no evidence supporting such a claim. Further, although then-Attorney General Mukasey

138 The court in El-Masri acknowledged the potential danger to national security in disclosing state secrets during litigation. 437 F. Supp. 2d 530, 537 (E.D. Va. 2006) (“Any admission of denial of [the] allegations by defendants in this case would reveal the means and methods employed pursuant to this clandestine [wiretapping] program and such a revelation would present a grave risk of injury to national security.”).


141 See Setty, supra note 46, at 612; Prepared Statement of Hon. Alberto R. Gonzales, Attorney General of the United States (2006), available at http://www.fas.org/irp/congress/2006_hr/020606gonzales.html; Heidi Kitrosser, Congressional Oversight of National Security Activities: Improving Information Funnels, 29 CARDOZO L. REV. 1049, 1056 (2008) (“The administration has offered no explanation of the purported dangers of revealing the program’s very existence beyond the vague assertion that, while terrorists surely already know that the United States can survey their conversations, knowing about the program would remind them of this fact and might lead them to infer that surveillance is broader than they had assumed.” (footnotes omitted)); Bruce Ackerman, Terrorism and the Constitutional Order, 75 FORDHAM L. REV. 475, 478-79 (2006) (arguing that the rhetoric surrounding the war on terror encourages a public and congressional overreaction of ceding powers to the President); see also Joby Warrick & Dan Eggen, Hill Briefed on Waterboarding in 2002, WASH. POST, Dec. 9, 2007, at A1 (offering a second reason for the desire for secrecy: to avoid public and international censure over the use of the harsh interrogation techniques. When the U.S. interrogation program became known widely in late 2006, the uproar from Congress and the public apparently prompted the administration to modify its program.).

142 See Setty, supra note 46, at 613 (noting that repeated claims by the Bush administration that Office of Legal Counsel opinions could not be disclosed because of a purported risk to national security were unsupported and ultimately undermined by
framed the reforms as creating a “Hobson’s Choice of either disclosing classified activities or losing cases,” this overstates the effect of overhauling the *Reynolds* standard. The proposed legislation would not have mandated government liability if relevant evidence were not disclosed to the court, nor would it have required the government to turn over the evidence to a plaintiff after a court determination that the evidence is not privileged. The actual detriment to the government would have been a finding of contempt and an adverse inference against the government’s case.

The Bush administration wanted to see a continuation of the status quo, and believed that the deferential *Reynolds* standard was preferable to creating a stronger judicial oversight mechanism. To date, the common application of *Reynolds* is what still governs, and it is unclear whether the Obama administration and a Democratic Congress will pass legislation to address the process and rule-of-law problems that *Reynolds* has engendered. To evaluate whether *Reynolds* and its progeny offer the appropriate standard to apply, however, it is useful to look back at how the U.S. state secrets privilege evolved to its current state.

II. THE HISTORY AND EVOLUTION OF THE U.S. STATE SECRETS PRIVILEGE

There is little doubt that the U.S. version of the state secrets privilege arose from international sources but has evolved independently, particularly since the *Reynolds* decision in 1953. Both the English and Scottish origins of the privilege, as well as the development of the U.S. state secrets doctrine, provide context for evaluating the proposed domestic reforms to the privilege.

A. The U.K. Origins of the U.S. State Secrets Privilege

Although precedent from England was not the only legal basis for the *Reynolds* decision, it played an instrumental role for the Supreme Court, which had little domestic doctrine to...
rely upon. However, what the Reynolds court viewed as simply English precedent actually represented two distinct and, to some extent, contrary legal precedents from England and Scotland.

1. English Precedent

The first indication that crown privilege extended to protect the government against disclosure of state secrets can be found during the reign of Charles I of England. The heart of the privilege is to protect the public interest by keeping sensitive information out of public purview. In Charles I’s time, the privilege was used to prevent courts from gaining jurisdiction over habeas corpus claims of prisoners unless the Crown agreed to show cause for the detention. This was a controversial proposition since habeas rights had existed since the time of the Magna Carta. Even at the time, commentators argued that the Crown was abusing its privilege and that the rule of law and government accountability were at grave risk.

The Crown’s position on habeas rights was overturned by the Petition of Right of 1628, which forbade Charles I from divesting the courts of jurisdiction over matters of arrest and detention. However, the notion of a state secrets privilege over security-related information was established and uncontested by Parliament or the courts in future years. Still, the scope and parameters of the privilege remained murky even through the 1800s: while some judges believed that a court could invoke the privilege sua sponte even absent a

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145 Crown privilege is one of the crown prerogatives, defined by Blackstone as “those [powers] which [the crown] enjoys alone.” 1 WILLIAM BLACKSTONE, COMMENTARIES 266, 269 (London, A. Strahan & W. Woodfall, 12th ed. 1793-95).

146 Weaver & Escontrias, supra note 1, at 13.

147 Id. at 14-15.

148 Id. at 17.

149 Id. at 19 (citing Magna Carta ¶ 39 (1215)).

150 Id. at 22.

151 Id. at 23.

152 Id. at 23-26 (citing Trial of the Seven Bishops, 12 How. St. Tr. 183, 309-11 (1688) (refusing to require a witness to testify as to the proceedings of a Privy Council meeting); Layer’s Case, 16 How. St. Tr. 94, 223-24 (1722) (denying a witness’s request to have Privy Council proceedings revealed in court); Bishop Atterbury’s Case, 16 How. St. Tr. 323, 495 (1723) (precluding testimony before the House of Lords regarding encrypted communications); The Trial of Maha Rajah Nundocomar, 20 How. St. Tr. 923, 1057 (1775) (denying the claim of privilege over Privy Council records)).
government claim of privilege, others questioned the erosion of individual rights and the rule of law in the face of the government’s ability to hide relevant and potentially damaging information.

Two English decisions—one in the 1860s and the other in the 1940s—were decisive in clarifying the state secrets privilege in England and laying the groundwork for the parameters of the U.S. state secrets privilege as laid out in Reynolds. In the 1860 case of Beatson v. Skene, the court found that “if the production of a State paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice.” Beatson further broadened the power of the government by stating that the judiciary should defer to the head of the government department with custody of the paper to determine whether to disclose the document.

The doctrine of the state secrets privilege was not substantially revisited until the 1942 case of Duncan v. Cammel, Laird & Co. (“Cammel Laird”), a key case cited to support an expansive reading of the privilege by the Reynolds court. In Cammel Laird, the House of Lords followed the reasoning of Beatson to clarify the English standard for public interest immunity. The facts of Cammel Laird are remarkably similar to those of Reynolds: a British submarine sank in 1939 during sea trials, which resulted in the death of ninety-nine people. The families of the sailors who had been killed claimed damages from the builders, Cammel, Laird & Co.

153 E.g., Anderson v. Hamilton, 2 Brod. & B. 156 (1818) (in a suit for false imprisonment, Lord Ellenborough denied the plaintiff’s request to compel production of correspondence between government officials, even absent a government objection to the production, noting that “the breach of the privilege given by the law to such communications would be highly dangerous to the interests of the state”); see also Chesney, supra note 51, at 1275-76; Weaver & Escontrias, supra note 1, at 28.

154 Gugy v. Maguire, 13 Low. Can. 33, 38 (1863) (Mondolet, J., dissenting) (“I can not, I ought not for a moment, as a judge living and administering justice under constitutional institutions, admit such a monstrous doctrine . . . . A doctrine which reduces the judge on the Bench to an automaton, who . . . will bend at the bidding of any reckless politician . . . . If that doctrine be law . . . it would be appalling. It would be such that no one would feel himself secure.”).


156 Id. at 1421.

157 Id. at 1421-22 (noting that if the head of a department “states that in his opinion the production of the document would be injurious to the public service, we think the Judge ought not to compel the production of it”).


159 Id. at 625-26.
The House of Lords upheld an affidavit issued by the British Admiralty claiming that public interest immunity precluded disclosure of the plans of the submarine, and affirmed the rule of Beatson that the courts should take an affidavit claiming public interest immunity at face value: “Those who are responsible for the national security must be the sole judges of what the national security requires.” The Lords further held that if a government officer offers a good faith affidavit as to the need for nondisclosure, then “the judge ought not to compel the production of it.”

In reasoning through the secrecy dilemma, the Lords first attempted to determine whether the question of the appropriateness of in camera review of the disputed information was a matter of first impression. Counsel for the government said that it was not, relying on the Scottish case of Earl v. Vass for the proposition that courts need not conduct an independent review of the materials. Specifically, the Lords agreed with the Vass court’s reasoning that the privilege was absolute when invoked by the government and that the government’s good faith determination of nondisclosure was sufficient. The Cammel Laird court went on to note that such deference to the government would result in an information imbalance between the Crown and other litigants, but that such an imbalance was necessary to preserve the public interest.

The Cammel Laird court also looked at Admiralty Commissioners v. Aberdeen Steam Trawling, in which the Inner House of the Court of Session “insisted that the view of the government department was final.” The Cammel Laird court also relied upon the reasoning of Aberdeen Steam to support the conclusion that the government was better suited to make the final determination of privilege because a court

160 Id. at 626-27. The court noted that the First Lord of the Admiralty offered a sworn affidavit that he and his technical advisers examined the documents being requested and determined for themselves that disclosure would be injurious to the public interest. Id.

161 Id. at 641 (internal quotations omitted).

162 Id. at 639.

163 Id. at 627-28.

164 (1822) 1 Shaw 229.


166 Id. at 633.

167 Admiralty Comm’rs v. Aberdeen Steam Trawling & Fishing Co., (1908) 1909 S.C. 335 (Scot. 1st Div.).

may find certain information “innocuous,” whereas government officials who properly understand the context of the information would know better—one of the same arguments offered by the Bush administration in opposition to the Senate’s current proposed reforms.\textsuperscript{169}

The appellants argued that the Lords should undertake an in camera review of the documents in question prior to making a final determination as to whether the public interest immunity applied, to make sure that an impartial party—the judges—could appropriately balance the need to maintain state security against the possible injustice of nondisclosure suffered by an individual litigant.\textsuperscript{170} The appellants further pointed out the inherent conflict of interest in asking government officials to make their own determination as to whether a document ought to be disclosed.\textsuperscript{171} The Lords found neither argument persuasive,\textsuperscript{172} ultimately holding that “[t]he practice in Scotland, as in England, may have varied, but the approved practice in both countries is to treat a ministerial objection taken in proper form as conclusive.”\textsuperscript{174}

Critics have decried the result of\textit{Cammel Laird} on two fronts—first, that the decision cemented the English rule of giving “carte blanche to crown privilege;”\textsuperscript{175} and second, that\textit{Cammel Laird’s} rationale was faulty because it erroneously relied on the Scottish case law\textsuperscript{176} to defend a broad, deferential state secrets privilege.\textsuperscript{177} If\textit{Cammel Laird} was erroneously decided, then—some argue—the U.S. Supreme Court’s reliance on English law in\textit{Reynolds} becomes less well-founded.\textsuperscript{178}

\begin{itemize}
  \item \textsuperscript{169} Id. at 640-41.
  \item \textsuperscript{170} See Mukasey Letter, supra note 103, at 3-4. Mukasey argued that national security officials “occupy a position superior to that of the courts in evaluating the consequences of a release of sensitive information.” Id. at 3 (internal quotation marks omitted).
  \item \textsuperscript{171} \textit{Cammel Laird}, [1942] A.C. at 627-28.
  \item \textsuperscript{172} Id. at 628.
  \item \textsuperscript{173} Id. at 636-38 (noting the need for a broad public interest immunity to encourage unhindered discussion among government officials).
  \item \textsuperscript{174} Id. at 641.
  \item \textsuperscript{175} ROBERT STEVENS, \textsc{The English Judges: Their Role in the Changing Constitution} 27 (Hart 2d ed. 2005).
  \item \textsuperscript{176} Earl v. Vass, (1822) 1 S.C. (S.) 229.
  \item \textsuperscript{177} Weaver & Escontrias, supra note 1, at 31-32.
  \item \textsuperscript{178} Id. at 32.
\end{itemize}
2. Scottish Precedent

Although the court in Cammel Laird relied on Vass and Aberdeen Steam, Scottish law has always had a considerably narrower view of the state secret privilege than England. In Scotland, the privilege was retained as a limited crown privilege, rather than the broad public interest exception that is embodied in English law.\(^{179}\)

In fact, the application of the state secrets privilege in Scotland has differed greatly from England since at least the eighteenth century. The Scottish courts consistently used a balancing approach between the need to maintain national security and the need for democratic accountability and individual rights. That balancing test yielded a much greater diversity in results than the deferential English standard. For example, in the 1727 case of Stevens v. Dundas, the court compelled production of documents over the government’s objections.\(^{180}\) In the 1818 case of Leven v. Young, the court affirmed that the judiciary—not the government ministers—have the right to make an independent determination as to whether the privilege should allow for nondisclosure of relevant information.\(^{181}\) On the other hand, when applying this balancing standard on a case-by-case basis, Scottish courts stated that the party seeking sensitive information was required to show a significant level of necessity for the court to order disclosure.\(^{182}\)

Both Vass and Aberdeen Steam included language that supported a significant deference toward the executive in determining when the privilege should apply. However, it should have been clear to the House of Lords in Cammel Laird that Scottish law on the application of the privilege differed greatly from English law by assigning a much greater role for the judiciary. Nonetheless, the English court conflated the English and Scottish standards in Cammel Laird, arguably creating the faulty standard that set the stage for Reynolds.

\(^{180}\) See 19 W.M. Morison, Decisions of the Court of Sessions 7905 (1804) (discussing the Stevens case).
\(^{181}\) See Leven v. Young, (1818) 1 Murray 350, 370 (Scot. 1st Div.).
\(^{182}\) Weaver & Escontrias, supra note 1, at 37 (citations omitted).
B. History of the U.S. State Secrets Privilege

Prior to Reynolds, U.S. jurisprudence on the state secrets privilege was limited and vague, and failed to set forth a standardized doctrine by which privilege claims ought to be evaluated. Some scholars argue that the state secrets privilege simply did not exist in U.S. jurisprudence prior to Reynolds, but some evidence does exist that courts accepted the general notion of executive privilege, albeit in the specific context of an informer’s privilege and deliberative privilege, not a state secrets privilege. As early as Marbury v. Madison, the Court mentions the existence of presidential prerogatives not delineated in the Constitution, but does not clarify the nature or extent of those prerogatives. In accepting a presidential prerogative as a natural derivation of the Crown privilege, the Court did not acknowledge the significantly different nature of the Crown or the judiciary in England; unlike U.S. judges, English judges were not independent from Parliament after being appointed. Ironically, Marbury is best known for formalizing the U.S. doctrine of judicial review, but the decision operated under the assumption that there were certain executive privileges that may be beyond the purview of the judiciary.

Soon after Marbury, the Court in United States v. Burr, in analyzing the defendant’s constitutional right to subpoena witnesses and evidence in support of his defense, noted that the government’s right to refuse disclosure of evidence did not turn on whether revealing the document would “endanger the public safety.” However, the question of government nondisclosure did not actually arise in Burr. The Jefferson administration did not attempt to withhold any documents

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183 Id. at 43.
184 Chesney, supra note 51, at 1280 (describing an informer’s privilege as one which “shields evidence of communications between informers and government officials to encourage such disclosures”).
185 Id. at 1274 (describing the deliberative process privilege as one which “provides qualified protection to some government communications to facilitate internal discussions and operations”).
186 5 U.S. (1 Cranch) 137, 169-70 (1803).
187 Weaver & Escontrias, supra note 51, at 40.
189 Some scholars have argued that the mention in Burr of the government’s right to nondisclosure of evidence hints at the court’s belief that public safety ought to be taken into account when making determinations of whether evidentiary disclosure ought to be ordered. See Chesney, supra note 51, at 1272-73.
from production to the court, the court stated both that “it need only be said that the question [of invoking a privilege to prevent disclosure of evidence] does not occur at this time,” and that “[i]f [a document] does contain any matter which it would be imprudent to disclose, which it is not the wish of the executive to disclose, such matter, if it be not immediately and essentially applicable to the point, will, of course, be suppressed.”

Almost twenty years later, an influential treatise on evidentiary law mentions the existence of a privilege based on public policy, noting that some evidence “is excluded because disclosure might be prejudicial to the community.”

The nature of a state secrets privilege remained relatively static until the 1875 Supreme Court decision of *Totten v. United States.* The plaintiff in *Totten* brought suit to enforce an alleged government contract for espionage during the Civil War; the Supreme Court held that it was inappropriate for the lower court to hear the case in the first place, since “public policy forbids the maintenance of any suit in a court of justice, the trial of which would inevitably lead to the disclosure of matters which the law itself regards as confidential, and respecting which it will not allow the confidence to be violated.” *Totten* embodied the idea that some claims against the government are simply not justiciable based on the nature of the claim being made and the need for government secrecy.

However, the relevance of *Totten* to the state secrets privilege is open to debate. Although the *Reynolds* Court cited

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190 Weaver & Escontrias, *supra* note 1, at 46 (citing 11 *The Writings of Thomas Jefferson* 241 (Thomas Jefferson Mem'l Ass'n of the U.S., 1904)).

191 *Burr,* 25 F. Cas. at 37 (Chief Justice Marshall also offered the following on a potential presidential privilege regarding evidentiary disclosure obligations: “What ought to be done under such circumstances present[s] a delicate question, the discussion of which, it is hoped, will never be rendered necessary in this country.”); see Louis Fisher, *In the Name of National Security: Unchecked Presidential Power and the Reynolds Case* 212-20 (2006).

192 *Burr,* 25 F. Cas. at 37.


194 92 U.S. 105 (1875).

195 *Id.* at 105-06.

196 *Id.*

to *Totten* as evidence that an evidentiary privilege against revealing state secrets existed, the Supreme Court stated unequivocally in 2005 that *Totten* does not involve the state secrets privilege. The Court in *Tenet* found that *Totten* dealt with baseline questions of justiciability, and the state secrets privilege as articulated in *Reynolds* required a balancing test for the admissibility of evidence, which may or may not necessitate dismissal of a case.

Even setting *Totten* aside as distinct from the state secrets privilege, the application of a national security-related privilege is found in several cases in the early twentieth century. Other national-security cases involved the invocation of a state secrets privilege in the criminal context. For example, in *United States v. Haugen*, a district court acquitted a defendant charged with forgery while working under a military contract, based largely on the fact that the contract in question could not be compelled for production by the government. Although each of these cases dealt with the question of how to handle state secrets in the litigation context, they did so without a judicial or legislative standard or unifying doctrine in place.

After World War II, the number of lawsuits involving questions of state secrets increased significantly, largely due to the enactment of the Federal Tort Claims Act, which permitted individuals to sue the government for allegedly tortious conduct. This development set the stage for the

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198 United States v. Reynolds, 345 U.S. 1, 6-7 (1952).
199 See *Tenet v. Doe*, 544 U.S. 1, 10 (2005).
200 See id. at 8-11. The Court in *Tenet* noted that, in *Reynolds*, *Totten* was distinguished as having been "dismissed on the pleadings without ever reaching the question of evidence, since it was so obvious that the action should never prevail over the privilege." Id. at 9. The Court further distinguished *Reynolds* from *Totten*, noting that "[t]he state secrets privilege and the more frequent use of in camera judicial proceedings simply cannot provide the absolute protection we found necessary in enunciating the *Totten* rule." Id. at 10.
201 But see Chesney, supra note 51, at 1278 (arguing that *Totten* is properly viewed as part of the spectrum of possible determinations after a government claim of state secrets privilege).
202 E.g., *Poll v. United States*, 85 Ct. Cl. 673, 674, 680-81, 684 (Ct. Cl. 1937) (dismissing a suit involving gun designs); *Poll v. Ford Instrument Co.*, 26 F. Supp. 583, 583, 585-86 (E.D.N.Y. 1939) (citing *Totten* in the decision to deny a discovery request); *Firth Sterling Steel Co. v. Bethlehem Steel Co.*, 199 F. 353, 355 (E.D. Pa. 1912) (citing *Totten* in the decision to dismiss a suit involving the designs for armor-piercing projectiles).
203 58 F. Supp. 436 (E.D. Wash. 1944), aff'd, 153 F.2d 850 (9th Cir. 1946).
204 Id. at 438.
Supreme Court to establish a standard for the state secrets privilege in the seminal case of *United States v. Reynolds*.\(^{206}\)

The early 1970s saw an increase in the number of lawsuits in which the government invoked the state secrets privilege.\(^{207}\) This trend was fueled by several factors. In 1971 the Supreme Court held in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics* that private litigants could seek compensation for the government’s constitutional violations, which opened the door for numerous types of lawsuits against the government.\(^{208}\) Further, the Watergate scandal broke and propelled a massive push for government accountability, including the fortification of the Freedom of Information Act,\(^{209}\) the establishment of additional congressional oversight mechanisms, and the passage of the Foreign Intelligence Surveillance Act.\(^{210}\)

As oversight and lawsuits increased, the state secrets privilege offered a mechanism for the executive branch to both protect sensitive national security information and avoid higher levels of transparency and accountability.\(^{211}\) The problem faced by courts has been determining which of these two administrative motivations was at play in a given situation, and to navigate the interbranch tension inherent in a confrontation with an executive branch assertion of power. The result has often been that courts decline to get involved in the process of weighing evidence altogether: in fact, since 1990, judges have conducted an in camera review of documents over which the privilege has been claimed in only about twenty percent of state secrets privilege cases.\(^{212}\)

In the post-September 11, 2001 era, the question of proper invocation of the state secrets privilege resurfaced, particularly in light of controversial programs such as warrantless surveillance and extraordinary rendition. Some of

\(^{206}\) 345 U.S. 1 (1953).

\(^{207}\) See Chesney, *supra* note 51, at 1292-93 (listing several cases during the 1970s in which the state secrets privilege was invoked).

\(^{208}\) See 403 U.S. 388, 392 (1971) (citations omitted).


\(^{212}\) Id.; see also Ryan Singel, *Feds Go All Out to Kill Spy Suit*, WIRED.COM, May 2, 2006, http://www.wired.com/politics/security/news/2006/05/70785 (quoting Stephen Aftergood, director of the Project on Government Secrecy, as saying that the lack of in camera inspections reflects a “judicial lack of self-confidence in the fact of national security claims made by the executive branch”).
the state secrets cases in the post-September 11 era have involved government attempts to prevent the disclosure of technical information related to military issues,213 somewhat akin to the situation in Reynolds. Other cases involved government contracting and business management issues,214 or internal policies and procedures arguably related to national security.215 Finally, in cases like El-Masri and Al-Haramain, the privilege was invoked to terminate litigation that involved allegations of gross violations of individual civil and human rights.216

III. COMPARATIVE PERSPECTIVES ON THE STATE SECRETS PRIVILEGE

In establishing the U.S. doctrine of the state secrets privilege, the Reynolds court relied significantly on the English precedent of Cammel Laird—and inherent in that decision, an arguably incorrect reading of Scottish law as well. This Part evaluates how the Scottish and English versions of the state secrets privilege, known as public interest immunity, have evolved since the decision in Reynolds. This analysis provides context for evaluating the evolution of the U.S. doctrine since the 1950s, as well as the recent domestic reform efforts. This Part also examines how countries facing significant national

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213 E.g., Crater Corp. v. Lucent Techs., Inc., 423 F.3d 1260, 1262-63 (Fed. Cir. 2005); McDonnell Douglas Corp. v. United States, 323 F.3d 1006, 1010 (Fed. Cir. 2003) (upholding the claim of state secrets privilege); DTM Research, LLC v. AT&T Corp., 245 F.3d 327 (4th Cir. 2001) (upholding claim of state secrets privilege and quashing a subpoena for government’s information on data mining); United States ex rel. Schwartz v. TRW, Inc., 211 F.R.D. 388, 393-94 (C.D. Cal. 2002) (holding that the government had not met the technical requirements of the Reynolds standard).

214 E.g., Sterling v. Tenet, 416 F.3d 338, 341 (4th Cir. 2005) (upholding claim of privilege to dismiss a Title VII complaint related to employment discrimination); Monarch Assurance P.L.C. v. United States, 244 F.3d 1356, 1357 (Fed. Cir. 2001) (upholding claim of privilege to dismiss a complaint related to fraudulent contracting); see also Tenet v. Doe, 544 U.S. 1, 11 (2005) (dismissing the complaint based on the precedent of Totten, not on the state secrets privilege per se).


security challenges that rely heavily on U.K. precedent—such as Israel and India—deal with questions of state secrets during litigation.\textsuperscript{217}

A. Scotland

In the years after Reynolds was decided, Scottish courts clarified that Vass—albeit misread by the English court in Cammel Laird—does not support a broader right by the Scottish government to invoke the state secrets privilege with little or no review by the courts.\textsuperscript{218} The 1956 case of Glasgow v. Central Land Board noted that for Scotland to follow the English rule

would be to go far along the roads towards subordinating the Courts of Justice to the policy of the Executive, and to regulating the extent to which justice could be done by the limits within which that policy would permit it to be done. This has never been the law of Scotland.\textsuperscript{219}

Glasgow was the first case after Cammel Laird and Reynolds were decided to clarify the differences between Scottish and English law. In Glasgow, the Law Lords specifically acknowledged that the rationale of Cammel Laird did not apply to Scottish cases, as “an inherent power in the Court of Scotland provides an ultimate safeguard of justice in that country which is denied to a litigant in England,”\textsuperscript{220} and noted that should the Lords have to judge a Scottish appeal regarding the public interest privilege, they would “be jealous to preserve [the Scottish rights].”\textsuperscript{221}

This distinction between the Scottish and English approaches was revisited in Conway v. Rimmer in 1968.\textsuperscript{222} The Lords articulated the Scottish standard, that “[i]f, on balance, considering the likely importance of the document in the case before it, the court considers that it should probably be produced, it should generally examine the document before

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\textsuperscript{217} India and Israel provide useful comparative examples because they are functioning democratic nations with constitutionally mandated separation of powers, they face serious ongoing national security threats, and, like the United States in the context of the state secrets privilege, derive some legal processes from the United Kingdom. \\
\textsuperscript{218} E.g., Conway v. Rimmer, [1968] A.C. 910, 960-61 (H.L.). \\
\textsuperscript{220} Glasgow, [1956] S.C. at 9-10. \\
\textsuperscript{221} Id. at 11. \\
\textsuperscript{222} Conway, [1968] A.C. 910.
\end{flushright}
ordering the production.”

The court ultimately decided, despite the government’s affidavit to the contrary, that any harm from disclosure was minimal, and that the documents in question should be produced, as they were “vital to the litigation.”

The Court did, however, set forth guidelines defining when greater deference was due to the executive, applicable to documents concerning the national defense, documents “of a political nature, such as high state papers,” and departmental papers involving issues of public interest. On the other side of the balancing test, Crown litigation related to accidents involving government employees and on government premises are areas in which “Crown privilege ought not to be claimed . . . and we propose not to do so in the future.”

In creating a more detailed approach to the balancing test, the court openly acknowledged that “[i]mmunity from unauthorised disclosure and from accountability are two sides of the same coin,” which informs the Court’s careful and narrow approach to applying the privilege.

The Conway court also specifically undertook a dissection of the Cammel Laird opinion that conflated the English and Scottish standards, concluding that the Cammel Laird court’s determination to uphold the claim of public interest privilege was correct, but that the muddling of the Scottish standard was not.

The Lords ultimately concluded that:

it is worth remembering that the conclusion [in Cammel Laird] was reached under a misapprehension as to the corresponding law of Scotland. The Scottish cases show that although seldom exercised the residual power of the court to inspect and if necessary order production of documents is claimed. By a misapprehension, however, in Duncan’s case the protection in Crown privilege cases in both countries was held to be absolute. This misapprehension no longer

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223 Id. at 911.
224 Id. at 911, 918. The court noted that there is no case in which the executive becomes the “final arbiter of the privilege claimed,” since that right is reserved solely for the court. Id. at 918. The court also reaffirmed its right to examine documents in camera in order to make its privilege determination. Id.
225 Id. at 920, 937.
227 Id. at 924.
prevails since the decision of this House in Glasgow Corporation v. Central Land Board.\textsuperscript{230}

The Scottish balancing test enunciated in Conway continues to be used by courts today and has not been reformed significantly since.

B. England

In the years since Cammel Laird was decided, English courts have continued to afford high levels of deference to government officials claiming the public interest immunity, and remained reluctant to conduct in camera inspections of the documents in dispute. This deference toward the government has at times troubled the English courts, as graphically illustrated in the February 2009 decision in the case of Binyam Mohamed, discussed below.

One example of deference toward government claims for a public interest immunity certificate is the 1983 case of Air Canada v. Secretary of State for Trade,\textsuperscript{231} in which airlines sued the English government over increased airline taxes at Heathrow Airport. During the litigation, plaintiffs sought government documents outlining the reasoning behind the tax increase.\textsuperscript{232} The lower court decided to examine the documents in camera, which led to an interlocutory appeal by the government.\textsuperscript{233} The Lords reversed the decision of the lower court as to in camera review, stating that when a government official has proffered a good faith affidavit as to the need for the public interest immunity to apply, the court should give absolute deference.\textsuperscript{234}

The English courts continue to grant extremely broad deference to executive decision-making—certainly as broad as had been afforded in Cammel Laird and that is applied by U.S. courts. English courts often address the invocation of the privilege after initial pleadings have been filed; courts have the option of examining the documents in camera but rarely do so. More commonly, courts uphold a public interest immunity certificate (akin to U.S. courts upholding the claim of privilege) with regard to the evidence in question and allow the plaintiff

\textsuperscript{230} Id. at 977.


\textsuperscript{232} Id. at 394.

\textsuperscript{233} Id. at 395.

\textsuperscript{234} Id.
to continue its case if possible without the benefit of the evidence in question.

However, the ongoing U.K. case of Binyam Mohamed highlights the complexities of such deference to the executive branch, and how political and foreign policy considerations can undermine government accountability for alleged human rights abuses.

Binyam Mohamed is a British resident who traveled to Afghanistan in 2001. According to Mohamed, he traveled to escape a lifestyle that led to drug addiction in England. According to U.S. authorities, Mohamed trained with the Taliban in Afghanistan to prepare for an attack within the United States. Mohamed was arrested in Pakistan in 2002 as he attempted to return to the U.K.; he claims that he was then detained and tortured in Pakistan, and then transported to Morocco, where he was held incommunicado and tortured repeatedly during the following eighteen months. Mohamed alleges that he was then held in Afghanistan for some time, and was ultimately transferred to the U.S. detention center at Guantanamo Bay, Cuba, where he was held from September 2004 until February 2009.

Mohamed and others alleging they were subjected to extraordinary rendition by the United States filed suit in California in 2007 against the company that operated the airplanes which transported the detainees to various detention centers around the world. In May 2008, the United States charged Mohamed under the Military Commissions Act with

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236 Id.
237 Id.
238 Id. Mohamed alleges that he was beaten, scalded and cut with a scalpel by his captors. See id.
239 Id.
241 Amended Complaint at 1-6, Mohamed v. Jeppesen Dataplan, Inc., 563 F.3d 992 (9th Cir. 2009) (No. 07-2798).
conspiracy to commit terrorism,\textsuperscript{243} relying on confessions which Mohamed alleged were elicited under the threat of torture.\textsuperscript{244}

Mohamed’s attorneys began separate proceedings in English courts seeking release of evidence in the possession of the British government that the United States had compiled against Mohamed.\textsuperscript{245} In August 2008, a court ruled in Mohamed’s favor, concluding that Mohamed’s allegations of torture were substantiated and Mohamed had a right to such evidence that supported his claim. As part of its ruling, the court summarized evidence gleaned from U.S. intelligence sources, but redacted that summary after the Foreign Secretary issued a public interest immunity certificate claiming that state secrets were at issue in Mohamed’s suit.\textsuperscript{246}

The Divisional Court of the Queen’s Bench Division reconsidered in early 2009 whether the public interest immunity certificate issued by the Foreign Secretary was compelling such that the previously redacted summary with evidence of Mohamed’s treatment could not be given to Mohamed’s attorneys.\textsuperscript{247} The public interest immunity certificate asserted that the summary report must remain undisclosed because the U.S government had threatened to “re-evaluate its intelligence sharing relationship with the United

\textsuperscript{243} This proceeding was later dropped, as the convening judge determined the prosecution could not proceed without the use of evidence obtained through torture. See William Glaberson, \textit{U.S. Drops Charges for 5 Guantanamo Detainees}, \textit{N.Y. Times}, Oct. 21, 2008, at A1.

\textsuperscript{244} Mohamed \textit{v. Sec’y of State for Foreign and Commonwealth Affairs}, [2008] EWHC (Admin) 2048, [38]-[47] (Eng.).

\textsuperscript{245} Profile: Binyam Mohamed, supra note 235. In May 2007, Mohamed and several other plaintiffs brought suit against the Boeing subsidiary that allegedly organized the “torture flights” of detainees subjected to extraordinary rendition, alleging the company’s complicity in torture and other human rights abuses. See Amended Complaint, supra note 241, at 4-6. That suit was initially dismissed based on the George W. Bush administration’s assertion of the state secrets privilege. Mohamed \textit{v. Jeppesen Dataplan, Inc.}, 539 F. Supp. 2d 1128, 1134-1136 (N.D. Cal. 2008) (relying on \textit{Al-Haramain} and \textit{El-Masri}). The plaintiffs appealed this judgment to the Ninth Circuit Court of Appeals, which heard argument on the matter in February 2009. Mohamed \textit{v. Jeppesen Dataplan}, 563 F.3d 992 (9th Cir. 2009), amended and superseded by 579 F.3d 943 (9th Cir. 2009). At that point, representatives of the Obama administration reiterated the Bush administration argument that the suit was properly dismissed based on the invocation of the state secrets privilege. See John Schwartz, \textit{Obama Backs Off a Reversal on Secrets}, \textit{N.Y. Times}, Feb. 10, 2009.

\textsuperscript{246} Mohamed \textit{v. Sec’y of State for Foreign and Commonwealth Affairs}, [2008] EWHC (Admin) 2048, [150]-[160] (Eng.).

\textsuperscript{247} The court noted that the information in question was “seven very short paragraphs amounting to about 25 lines” of text which summarized reports by the United States Government to British intelligence services on the treatment of Mohamed during his detention in Pakistan. See Mohamed \textit{v. Secretary of State for Foreign and Commonwealth Affairs}, [2009] EWHC (Admin) 192, [14] (Eng.).
Kingdom” and possibly withhold vital national security information from the United Kingdom should the summary be disclosed to Mohamed’s attorneys.\(^{248}\)

The English court laid out the test for balancing the public interest in national security and the public interest in “open justice, the rule of law and democratic accountability.”\(^{249}\) The test involved balancing the public interest in disclosure of the information and the possibility of serious harm to a public interest such as national security if disclosure is made, and determining whether national security interests can be protected by means other than nondisclosure.\(^{250}\)

The English court took pains to detail all of the reasons that disclosure was desirable, including upholding the rule of law,\(^{251}\) comporting with international and supranational standards,\(^{252}\) ensuring that allegations of serious criminality are not dismissed inappropriately,\(^{253}\) maintaining accountability over the executive branch of government,\(^{254}\) and protecting the public and media interest in disclosure of government activities.\(^{255}\) The court also appeared surprised that the United States government was apparently interfering in a matter of government accountability in another country.\(^{256}\)

In applying the test, the court relied heavily on its long-standing precedent of offering deference to the executive

\(^{248}\) Id. [62].

\(^{249}\) Id. [18] (noting that this case revolved around a question of the rule of law, not around the rights of an individual litigant).

\(^{250}\) Id. [34] (citing R v. H, [2004] 2 A.C. 134, [38(3)]).

\(^{251}\) Id. [18], [19].

\(^{252}\) See Mohamed, [2009] EWHC (Admin) 152, [20], [21], [26], [101]-[105].

\(^{253}\) Id. [25(iv)], [25(ix)].

\(^{254}\) Id. [32].

\(^{255}\) Id. [37] (“Where there is no publicity there is no justice . . . . There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves.”).

\(^{256}\) Id. [67]-[72]. The court noted:

[In light of the long history of the common law and democracy which we share with the United States, it was, in our view difficult to conceive that a democratically elected and accountable government could possibly have had any rational objection to placing into the public domain such a summary of what its own officials reported as to how a detainee was treated by them and which made no disclosure of sensitive intelligence matters. Indeed we did not consider that a democracy governed by the rule of law would expect a court in another democracy to suppress a summary of the evidence . . . where the evidence was relevant to allegations of torture, cruel, inhuman or degrading treatment, politically embarrassing though it might be.

Id. at [69].
branch in matters of national security. The court found that the Foreign Secretary acted in good faith in issuing the public interest immunity certificate, that an opportunity for government accountability may still exist with ongoing investigations within the U.K. into Mohamed's allegations, and that the position of the U.S. government had not changed with the change of presidential administrations. The court then decided that there was no basis on which it could question the Foreign Secretary's issuance of the public interest immunity certificate.

In an extremely unusual move, the court re-opened its ruling on public interest immunity and in October 2009 reversed its previous decision to withhold the information regarding Mohamed's treatment by the U.S. government. The court reasoned that there was an extremely low likelihood that the Obama administration would actually withhold important intelligence from the U.K. government, and noted that “a vital public interest requires, for reasons of democratic accountability and the rule of law in the United Kingdom, that a summary of the most important evidence relating to the British security services in wrongdoing be placed in the public domain in the United Kingdom.”

The series of U.K. court decisions in the Mohamed case reflects both the strength of English precedent that mandates a

257 See Mohamed, [2009] EWHC (Admin) 152, [63]-[67]. However, the court noted that such deference needed to be limited to instances of genuine national security, and not cases in which “it appears that while disclosure of the material may cause embarrassment or arouse criticism, it will not damage any security or intelligence interest.” Id. [66].

258 Id. [62]-[63], [76]-[79] (noting that the Foreign Secretary perceived the U.S. threat to be real, and that if the threat were carried out, that U.K. national security interests would be seriously prejudiced). See Ministers Face Torture Pressure, BBCNEWS.COM, Feb. 4, 2009, http://news.bbc.co.uk/2/hi/uk_news/politics/7870049.stm (noting that Foreign Secretary David Milibrand denied that the U.S. made a threat; Milibrand instead stated that the U.S.-U.K. security relationship was based on trust and the trust depended on intelligence remaining confidential).

259 Mohamed, [2009] EWHC (Admin) 152, [102], [104], [105].

260 Id. [78].

261 Id. [79].


263 Id. at [39], [49], [69vi], [104]. The court noted that the objections made by the Obama administration to disclosing the information in question were not as strong as the threats made by the Bush administration. Id.

264 Id. at [105].
high level of deference to the government in matters related to public interest immunity, and the difficulties that courts may have in applying that deferential standard when doing so implicates the rule of law, individual rights and government accountability in matters of serious allegations of human rights abuses. The U.K. court in the *Mohamed* decision weighed the balance and ultimately based its decision on the need to maintain the rule of law and to allow for some public accountability for whatever role the U.K government had in maltreating Mohamed.\textsuperscript{265}

The latest *Mohamed* opinion is also evidence of the fact that although the English and U.S standards on state secrets are in some ways very similar, the expansion of the use of the state secrets privilege by the Bush administration—and supported to some extent by the Obama administration—reflects a significantly broader privilege being invoked and granted in the United States. While U.S. administrations may demand broad grants of immunity for bad acts and high levels of secrecy in the litigation context, peer nations attempting to limit their application of similar privileges are being put in a difficult position by the U.S. government.\textsuperscript{266}

C. Israel

Israel does not apply a standardized doctrine comparable to the U.S. state secrets privilege or the Scottish and English public interest immunity. Instead, the analysis of a state secrets-type claim turns on two questions: whether the case is justiciable, and then, assuming the case survives that analysis, how to evaluate potentially sensitive evidence that relates to national security matters.

Unlike the non-justiciability doctrine of *Totten*, in Israel almost any complaint against the executive branch and its

\textsuperscript{265} Id. The court continues to withhold the seven paragraphs of information at issue pending an appeal by the U.K. government. See John F. Burns, *Britain: High Court Approves Releasing U.S. Intelligence Documents on Torture*, N.Y. TIMES, Oct. 16, 2009, at A5.

\textsuperscript{266} See Defendant’s Open Submissions at 6-9, *Mohamed v. Secretary of State for Foreign and Commonwealth Affairs*, Claim No. CQ/4241/2008, (EWHC (Admin) May 11, 2009) (attaching a May 6, 2009 letter from the Obama administration reiterating its position that disclosure of information in question—even if made unilaterally by English courts over the objection of Her Majesty’s Government—would likely lead to the withholding of valuable counterterrorism information from the United Kingdom).
actions is considered justiciable. The Israeli Supreme Court dismantled various doctrinal barriers to judicial review in the 1990s, such as standing and justiciability, in order to facilitate more private actions. Even with an extremely broad grant of standing—particularly by U.S. standards—Israeli courts undertake a balancing analysis to determine whether national security-related litigation ought to continue or be dismissed as non-justiciable. This is particularly remarkable given the difficult national security situation Israel faces.

In Public Committee Against Torture in Israel v. Israel, the central issue was whether preventative strikes undertaken by the Israeli military in response to alleged terrorist attacks were illegal. The plaintiffs challenged the practices of the military based on the loss of civilian life in the strikes and Israel's obligations under international treaties and international customary law. However, before reaching a conclusion as to the merits of the case, the court considered a challenge by the Government that the suit was not justiciable, based largely on national security grounds.

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268 Stephen J. Schulhofer, Checks and Balances in Wartime: American, British and Israeli Experiences, 102 MICH. L. REV. 1906, 1923 (2004). Schulhofer also notes that Israeli government and military leaders seem to accept the judicial safeguards that have been put into place to modify the conduct of the administration. Id. at 1931.
269 In this regard, the justiciability analysis of Israeli courts can be likened to Totten and other state secrets privilege cases which have been dismissed at the pleadings stage, for example, El-Masri, based on the supposed centrality of the protected material to the claims brought in the lawsuit.
270 See, e.g., Public Comm. Against Torture in Isr. v. Israel 2005 Isr. HCJ 769/02. 10, 16, 47; Public Comm. Against Torture in Isr. v. Israel 1999 Isr. HCJ 5100/94, ¶ 1 (“The State of Israel has been engaged in an unceasing struggle for both its very existence and security, from the day of its founding.”); Schulhofer, supra note 268, at 1919 (describing the security risks faced by Israel since its founding).
271 Public Comm. Against Torture, HCJ 769/02.
272 Id. ¶¶ 1-3.
273 Id. ¶¶ 3-6.
274 Id. ¶ 9 (the government, in arguing against justiciability, cited Israeli High Court of Justice precedent, HCJ 5872/01 Barakeh v. Prime Minister [2002] IsrSC 56(3) 1, for the proposition that “the choice of means of war employed by [the government] in order to prevent murderous terrorist attacks before they happen, is not among the subjects in which this Court will see fit to intervene”). In this respect, the Public Committee Against Torture case is analogous to the question faced by the U.S. Supreme Court in Totten. Although the U.S. Supreme Court in Tenet specified that Totten was not strictly a state secrets case, the analysis of the justiciability element—given the recent trend in the U.S. of claiming the state secrets privilege at the pleadings stage and dismissing suits accordingly, see, e.g., El-Masri v. United States, 128 S. Ct. 373 (2007)—is relevant as part of a larger analysis of state invocation of national security to curtail litigation.
The Israeli Supreme Court considered the broad Israeli justiciability doctrine, and assessed both the government’s claim of normative non-justiciability—where a court could find it cannot try a case because it lacks any relevant legal standard to apply—and institutional non-justiciability—where a court has a relevant legal standard to apply, but chooses not to try the case due to structural factors, such as confronting an issue solely within the purview of a different branch of government.

In Public Committee Against Torture, the court rejected the notion of normative non-justiciability—that the matter does not fall within the realm of law—but applied a four-pronged standard to analyze the question of institutional justiciability—determining whether the courts are the appropriate institution to deal with an issue: (1) a case that involves the impingement of human rights is always justiciable; (2) a case in which the central issue is one of political or military policy and not a legal dispute is not justiciable under the institutional justiciability doctrine; (3) an issue that has already been decided by international courts and tribunals to which Israel is a signatory must be justiciable in Israel’s domestic courts as well; and (4) judicial review is most appropriate in an ex post situation, where the court is evaluating particular applications of a government policy, rather than the policy itself.

If the first and second prongs of the institutional justiciability analysis come into conflict in a particular situation, courts must undertake a proportionality analysis. Applying these criteria to the situation at hand, the Court found that the claims were deeply entwined with alleged human rights violations; that the suit did not implicate political or military policies per se, since the suit did not question the practice of targeted strikes generally, so much as

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275 Public Comm. Against Torture, HCJ 769/02, ¶ 48.
276 Id. ¶ 49.
277 Id. ¶ 50 (citing HCJ 606/78 Oyeb v. Minister of Def., 33(2) IsrSC 113, 124).
278 Id. ¶ 51 (citing HCJ 4481/91 Bargil v. Israel 37(4) IsrSC 210, 218).
279 Id. ¶ 53.
280 Id. ¶ 54.
281 Id. ¶ 58 (“Between these two ends of the spectrum, there are intermediate situations. Each of them requires a meticulous examination of the character of the decision. To the extent that it has a legal aspect, it approaches the one end of the spectrum. To the extent that it has a professional military aspect, it approaches the other end of the spectrum.”).
282 Id. ¶¶ 1-3.
the effect of the specific military strikes on individual civilians; that international courts and tribunals had already opined on this issue, and that this was the type of ex post situation that was most appropriate for judicial review, despite the sensitive nature of the claims.

Following the court’s rejection of the government’s claim of non-justiciability, the court determined that targeted killings are not, per se, illegal under customary international law, and must be evaluated on a case-by-case basis. The Israeli Supreme Court has consistently found that executive branch national security policy is judicially reviewable, has rejected the idea that only the executive branch can adequately evaluate a national security-related issue, and has expressed none of the concern voiced by the Bush administration over judicial involvement in the decision to disclose security-related documents.

Indeed, the Israeli courts have consistently been involved in weighing national security interests against human rights concerns, and have developed a sophisticated analysis to do so. In Adalah Legal Centre for Arab Minority Rights in Israel v. Minister of the Interior, Justice Procaccia explained the balancing act that Israeli courts undertake:

The “security need” argument made by the state has no magical power such that once raised it must be accepted without inquiry and investigation . . . . Admittedly, as a rule, the court is cautious in examining the security considerations of the authorities and it does not intervene in them lightly. Notwithstanding, where the implementation of a security policy involves a violation of human rights, the court should examine the reasonableness of the

283 Id. ¶¶ 8, 51.
284 Id. ¶¶ 19-46, 56 (discussing the application of international customary law).
285 Id. ¶ 54.
286 The institutional non-justiciability argument has been successful in other cases. See Bargil v. Israel, 1993 Isr. HCJ 4481/91 (finding executive branch policies governing Israeli settlements to be non-justiciable).
287 Public Comm. Against Torture, HCJ 769/02, ¶ 63. The court did not mention, however, how it would deal with evidentiary issues involving national security secrets that may arise as an individual instance of a targeted killing was litigated.
288 See, e.g., Schnitzer v. Chief Military Censor, 1989 Isr. HCJ 680/88. This case also reflects how many of the state secrets cases in Israel relate to alleged violations of the Official Secrets Act. See id. at ¶¶ 3-7.
289 See Mukasey Letter, supra note 103.
considerations of the authorities and the proportionality of the measures that they wish to implement.  

Additionally, Israeli courts do not hesitate to use in camera review to assess whether a purported national security risk is real. For example, in *Vanunu v. Head of the Home Front Command*, a case involving a violation of the Official Secrets Act, the court undertook extensive in camera review without the presence of parties or counsel in order to determine whether the information in question, if disclosed, would pose a risk to national security. The Court ultimately agreed with the government’s position that the information needed to remain undisclosed. Likewise, in *Adalah*, the Court found no issue with the trial court reviewing privileged material ex parte in order to determine whether the government’s claim of military necessity in connection with contested national security policies was supportable.

It is noteworthy that in camera and ex parte review of materials in any of these Israeli cases is neither unusual nor subject to objection by either party. These decisions represent an engagement by the Israeli judiciary in the various national security operations utilized by Israel’s military and demonstrate the importance accorded to rule-of-law issues in the court’s analysis.

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290 Adalah Legal Centre for Arab Minority Rights in Isr. v. Minister of Interior, 2006 Isr. HCJ 7052/03 443, 692-93 (citing Ajuri v. IDF Commander in the West Bank [1], at 375-76; Livnat v. Chairman of Constitution, Law and Justice Comm., HCJ 9070/00, 810).

291 2004 Isr. HCJ 5211/04.

292 Id.

293 *Adalah*, HCJ 7052/03, ¶¶ 10-12 (opinion of A. Procaccia, J.) (explaining the two-step balancing test undertaken to determine military necessity).

294 See Public Comm. Against Torture in Isr. v. Israel, 1999 Isr. HCJ 5100/94, ¶¶ 38-40 (finding that the Israeli military's use of physical interrogation techniques on Palestinian detainees was not legally protected activity); Hallett, supra note 38; see also Deborah Sontag, *Israel Court Bans Most Use of Force in Interrogations*, N.Y. TIMES, Sept. 7, 1999, at A1.

295 See, e.g., Public Comm. Against Torture, HCJ. 5100/94, ¶¶ 38-40. The court struggled with several national priorities:

[W]e are aware that this decision does not ease dealing with that harsh reality of Israel’s security issues. This is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand. Preserving the Rule of Law and recognition of an individual’s liberty constitutes an important component in its understanding of security.

*Id.* ¶ 39.
D. India

India, like Israel, does not operate under a standardized state secrets doctrine. However, India’s approach to requests for document disclosure and the need for secrecy is markedly different from that of Israel. Indian courts afford an extremely high level of deference to executive branch claims of the need for confidentiality and secrecy, and although courts undertake a balancing test to determine whether the public interest or individual rights at stake should override executive secrecy, the claim for secrecy consistently prevails.296

Deference to executive branch decision-making is deep-rooted, despite the passage of freedom of information statutes297 and acknowledgement by the Indian Supreme Court that freedom of information is a positive right recognized in Article 19 of the Indian Constitution.298

This deference in the litigation context is consistent with India’s history of granting the executive branch sole power to determine whether to disclose information in any number of contexts, and applying strict and often harsh enforcement of its Official Secrets Act, a legacy of British colonial rule in India.299

296 E.g., People’s Union for Civil Liberties & Anr. v. Union of India & Ors., (1998) 1 S.C.C. 301 (upholding denial of request for disclosure of information).


298 S.P. Gupta v. President of India A.I.R. 1982 S.C. 234 (“The concept of an open Government is the direct emanation from the right to know which seems implicit in the right of free speech and expression guaranteed under Article 19 (1)(a). Therefore, disclosures of information in regard to the functioning of Government must be the rule, and secrecy an exception justified only where the strictest requirements of public interest so demands.”).

299 India operates under the edicts of the Official Secrets Act of 1923 (OSA), enforced in India by the British colonial government. See Winfield & Evans, supra note 297, at 25. Under the OSA, any disclosure of information—intentional or inadvertent—likely to affect the sovereignty, integrity or security of India is punishable by imprisonment for up to fourteen years. Although similar provisions of the Official Secrets Act were removed in England in 1989, the provisions of the 1923 Act remain in effect in India, despite criticism of its application. See Sarbari Sinha, Official Secrets and a Frame-Up, FRONTLINE, May 7, 2005, available at http://www.frontlineonnet.com/fl2210/stories/20050520000607400.htm (addressing how revocation of the Official Secrets Act would curb potential abuses of police powers).

One of the most prominent examples of an OSA-related arrest and detention is the case of Iftikar Gilani, a Kashmiri journalist detained by the Indian government for seven months in 2002 and 2003 for an alleged violation of the Official Secrets Act. See A. Deepa, Presumed Guilty, Secretly, INDIA TOGETHER, July 14, 2005, available at http://www.indiatogether.org/2005jul/brw-gilani.htm. Gilani was arrested and charged with sedition under Sections 3 and 9 of the Official Secrets Act for
Several right-to-information cases are helpful in understanding the level of deference accorded to executive branch assertions of nondisclosure. S.P. Gupta v. Union of India was an early articulation of the view that disclosure of information related to government activities ought to be the norm, and that nondisclosure should be sanctioned only after a balancing test in which the court weighed disclosure against a government claim of public interest immunity.\footnote{S.P. Gupta v. Union of India, (1982) 87 S.C.C. Supp. ¶¶ 73-74.}

However, courts have continued to apply the balancing test from Gupta by giving the utmost deference to an executive branch claim for nondisclosure in the name of public interest. In Dinesh Trivedi v. Union of India,\footnote{Shri Dinesh Trivedi, M.P. & Ors. v. Union of India & Ors., (1997) 4 S.C.C. 306.} the Indian Supreme Court considered whether to order the publication of background documents underlying the Vohra Committee Report, a government compilation of information related to corruption in all branches and levels of government. Members of Parliament, including petitioner Dinesh Trivedi, alleged that the Home Minister refused to disclose evidence about government corruption, not as a matter of public interest, but as a means to avoid government embarrassment.\footnote{Id. ¶ 6.}

The government offered an affidavit from the Home Secretary in response, affirming that a summary report that had been made available to Parliament was accurate, but that additional documents could not be disclosed as a matter of public interest.\footnote{Id. ¶¶ 9-10.}

The court reiterated the test set forth in Gupta, noting, “Sunlight is the best disinfectant. But it is equally important to be alive to the dangers that lie ahead.”\footnote{Id. ¶ 14.} The Court relied heavily on the government assertion that publication of the report may be injurious to the public interest, and further hypothesized that the public furor toward individuals named in the report—should it be published in full—could lead to harassment and violence.\footnote{Id. ¶ 16.} The court, therefore, held that possessing a document that was generated in Pakistan and was publicly available in India—clearly not an official secret of the Indian government—and was imprisoned under harrowing conditions. Gilani was never tried in court, and was released after contradictions in the government’s case were made public. See generally IFTIKAR GILANI, MY DAYS IN PRISON (2005) (detailing the arrest and detention experience of Gilani).
publication of the full report and its underlying documents was unnecessary.\textsuperscript{306}

In 2004, the Indian Supreme Court synthesized much of the reasoning from its earlier right to information cases in deciding the secrecy case of People’s Union for Civil Liberties v. Union of India.\textsuperscript{307} Here, the court evaluated whether a government report on a nationwide nuclear reactor program\textsuperscript{308} must be disclosed in response to a request by various citizens’ rights groups alleging concerns about the safety of the reactors, and over the objection of the government. The Atomic Energy Act of 1962 governed the submission and maintenance of the report, and contained specific provisions for the government to withhold such reports from public dissemination due to a concern that disclosure “would cause irreparable injury to the interest of the State [and] also would be prejudicial to the national security.”\textsuperscript{309} In this regard, the government’s argument in favor of secrecy was bolstered by the statutory language authorizing nondisclosure.\textsuperscript{310}

The citizens’ rights groups offered extensive evidence that details of the report—and specific discussion of the safety concerns therein—had been made public years before through press releases and media interviews.\textsuperscript{311} Petitioners further argued that the public interest of the citizenry to understand the potential safety risks of the nationwide nuclear reactor program outweighed the purported threat to national security that would arise from disclosure.\textsuperscript{312}

The court acknowledged the fundamental right to information as set forth in Article 19(1) India’s constitution.\textsuperscript{313} The court also noted that the general rule of disclosure is necessary to “ensure the continued participation of the people

\textsuperscript{306} Id. ¶¶ 16-20.
\textsuperscript{307} See People’s Union for Civil Liberties & Anr. v. Union of India & Ors. (1998) 1 S.C.C. 301.
\textsuperscript{308} The specific report in question was a November 1995 report by the Atomic Energy Regulatory Board (A.E.R.B.) documenting safety defects and weaknesses in the nuclear reactor system. See id. at Writ Proceedings section.
\textsuperscript{309} See id. (referring to the purpose of the Atomic Energy Act, 1962).
\textsuperscript{310} See id. at Vires of Section 18 of the Act section (noting that Parliament had sanctioned the designation of documents as secret according to the criteria of Section 18 of the Atomic Energy Act, 1962).
\textsuperscript{311} See id. at Writ Proceedings section.
\textsuperscript{312} See id.
\textsuperscript{313} Id. at High Court Judgment section; see also India Const. art. 19, § 1.
in the democratic process” and that “[s]unlight is the best disinfectant” against government overreaching.314

However, the court reasoned, the Constitution’s protection for the right to information was limited: “Unlike Constitutions of some other developed countries, however, no fundamental right in India is absolute in nature. Reasonable restrictions can be imposed on such fundamental rights.”315 The court noted that Article 19(2) of the Constitution gave the government the privilege of withholding information in the public interest, and reasoned that secrecy was sometimes necessary because “[i]f every action taken by the political or executive functionary is transformed into a public controversy and made subject to an enquiry to soothe popular sentiments, it will undoubtedly have a chilling effect on the independence of the decision-maker.”316

The Court also examined India’s Evidence Act, which set forth the standard for evidentiary privilege.317 Section 123 of the Evidence Act provides an extremely deferential standard for government documents: “No one shall be permitted to give any evidence derived from unpublished official records relating to any affairs of State, except with the permission of the officer at the head of the department concerned, who shall give or withhold such permission as he thinks fit.”318 If a lawsuit is brought in which disclosure of a previously undisclosed document is sought, Section 162 of the Evidence Act allows the court to inspect the document, “unless it refers to matters of State.”319 The Court found this standard to be consistent with the English cases on public interest immunity.320

The Attorney General volunteered to submit the government report to the Court for an in camera review, but

314 People’s Union for Civil Liberties, 1 S.C.C. at Right of Information section.
316 People’s Union for Civil Liberties, 1 S.C.C. at Right of Information section.
317 See id. at Criteria for Determining the Question of Privilege section.
318 The Indian Evidence Act, No. 1 of 1872; India Code (2009), available at http://indiacode.nic.in/ (ch. IX, § 123, Evidence as to Affairs of State).
319 Id. (Ch. IX., Sec. 162, Production of Documents).
320 People’s Union for Civil Liberties, 1 S.C.C. at Criteria for Determining the Question of Privilege section (citing State of Uttar Pradesh v. Raj Narain, A.I.R. 1975 S.C. 865, which held that “the foundation of the law behind Sections 123 and 162 of the Evidence Act is the same as in English Law. It is that injury to public interest is the reason for the exclusion from disclosure of documents whose contents if disclosed would injure public and national interest”).
the Court declined, stating that there were no grounds to examine the report itself. Instead, the government proffered affidavits attesting to the need to maintain secrecy for national security reasons, and to the fact that the Atomic Energy Act of 1962 made specific provisions allowing the government to object to disclosure. The Court relied on the government affidavits regarding potential threats to national security to support its decision to deny the petitioner's claim. The holding of the case affirmed the strong protection for the government's unilateral decision to withhold information in the litigation context, should questions of international relations, national security, or other deliberative information be at issue. This protection remains robust despite language from the courts that suggests that disclosure, not government secrecy, ought to be the norm.

The Court decided People's Union for Civil Liberties in 2004, and one year later the Right to Information Act, 2005 (“RTI”) was enacted by the Indian parliament. The RTI was breakthrough legislation in attempting to shed light on governmental practices. The passage of the RTI occurred after sustained efforts by various groups to incorporate strong and enforceable FOIA-type provisions into Indian law.

However, the changes envisioned in the passage of the RTI have not yet materialized. First, the backlog in the processing of RTI claims since 2005 appears to have immediately overwhelmed state and national information officers charged with responding to RTI requests, bringing the RTI request process to a near standstill. These delays are...

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321 See id. at Conclusion.
322 See id. at Writ Proceedings section.
323 See id. at A.E.R.B. Report section, Conclusion (in which the Court noted that the Attorney General had offered to submit the A.E.R.B. Report to the Court for an in camera review, but that the Court saw no need to examine the report itself).
324 Although petitioners claimed that the 1995 report did not implicate matters of national security, the Court disagreed on the grounds that nuclear material was inherently volatile. See id. at High Court Judgment section.
325 E.g., D.K. Basu v. State of West Bengal (1997) 1 S.C.C. 216, (“Transparency of action and accountability perhaps are [the two] safeguards which this court must insist upon.”).
326 The RTI replaced the Freedom of Information Act, which was perceived to be too weak in mandating government disclosure. See The Right to Information Act, No, 22 of 2005, India Code (2009), available at http://indiacode.nic.in/.
327 See Anita Aikara, Information Delayed is Information Denied, DAILY NEWS & ANALYSIS, Sept. 7, 2008, http://www.dnaindia.com/dnaprint.asp?newsid=1188257 (noting that over 15,000 RTI cases were waiting to be processed at the State Information Commission level in one state, Maharashtra); RTI Activists Ask for Fast
compounded with the backlog of years and sometimes decades in the actual litigation of a suit, making it difficult to assess the full impact of the RTI in terms of genuine changes to the Indian judiciary's approach to sensitive government information.

Second, the RTI loophole for excluding disclosure of national security policy is extremely broad and may be used by the executive branch to revert to its usual posture of avoiding disclosure of information that has only an attenuated connection to national security issues. From the few RTI claims that have been adjudicated within the information commission system, it appears that information commissioners are viewing the national security exception to RTI as a broad mandate for nondisclosure.

IV. VIEWING U.S. REFORM EFFORTS WITHIN A COMPARATIVE CONTEXT

Although the current U.S. use and application of the state secrets privilege is roughly analogous to that of England, the Mohamed case suggests that England's current application

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328 A recent report to Parliament by the Indian Law Minister noted that the Indian Supreme Court currently has a backlog of 48,000 cases waiting to be heard. See 48,000 Pending Cases in SC; 38 Lakh in HC: Bhardwaj, ZEENEWS.COM, Oct. 20, 2008, http://www.zeenews.com/Nation/2008-10-20/477538news.html.

329 Historically, Indian courts have granted the utmost deference to the executive branch as to when national security policy should be disclosed. E.g., State of Uttar Pradesh v. Raj Narain, A.I.R. 1975 S.C. 865 (carving out national security as the area in which the Prime Minister can unilaterally decide what information to disclose).

330 In one case, the Central Information Commission upheld the denial of an RTI request for information by environmental activists regarding the cost of processing nuclear fuel at a nuclear reactor then under construction. The Commission reasoned that nuclear material reprocessing was a component of the recent India-U.S. nuclear agreement, and therefore was central to the strategic and scientific interests of India. Although the costs associated with processing were not necessarily sensitive information, the Commission found that the “disclosure of this information can have unforeseen ramifications because of the sensitivity in the nature of the project on which the information is sought.” Right to Information Act of 2005—Sec. 19 Appeal No. CIC/WB/A/2006/00878 at 5, Central Information Commission, Nov. 29, 2006 (decided Sept. 10, 2007), available at http://cic.gov.in/CIC-Orders/Decision_10092007_08.pdf.

In another case, a state information commission relied on the national security exception to refuse an RTI claim seeking a memorandum of understanding between the government and Dow Chemical Corporation to build a research and development facility. See Rajshri Mehta, Govt Rejects RTI Plea on MoU with Dow, DAILY NEWS & ANALYSIS, Apr. 15, 2008, http://www.dnaindia.com/dnaprint.asp?newsid=1159813.
of the privilege may be more narrow than that of the United States, and that the English court in *Mohamed* considered expanding the scope of its own public interest immunity under threat of national security repercussions from the United States. The transnational implications of U.S. pressure regarding the state secrets privilege may be that even if other nations’ courts use a narrower standard for the privilege, those standards may be undermined if the U.S. government uses its considerable clout to pressure governments to claim state secrets in cases where U.S. government actions are implicated.

U.S. courts are also less deferential to the executive branch than India, but much more so than Scotland and Israel. The proposed congressional reforms offer some positive steps to establish procedural safeguards that strike an appropriate balance between national security interests and the rule of law, government accountability, and individual liberty. However, Congress should consider going further in addressing the need for litigation to compensate those who have suffered gross constitutional and human rights violations at the hands of the government.

A. *Future Reform Efforts Should Consider Explicitly Accounting for Alleged Human Rights Abuses*

If the legislative reforms are adopted, the United States’ application of the state secrets privilege would align with the Scottish courts’ treatment of public interest immunity. However, the reforms proffered in the United States fall short of the Israeli standard of justiciability in national security matters—the Israeli standard explicitly requires consideration of allegations of human rights abuses, whereas the proposed safeguards in the United States do not.  

Of course, the Israeli test for justiciability is not directly analogous to the United States doctrine regarding the state secrets privilege. However, reforms in the United States should require courts to consider potential human rights abuses in determining whether a lawsuit should go forward, particularly with regard to whether a case ought to be ultimately dismissed. Although the nature of the allegations should not

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332 Under S. 2533, such a dismissal could not occur until the discovery phase has at least begun. State Secrets Protection Act, S. 2533, 110th Cong. (2008).
be determinative as to whether litigation should proceed, it would be appropriate for U.S. judges—like their Israeli counterparts—to undertake a balancing test which accounts for the nature of the claim when deciding whether a case ought to go forward at the discovery stage. After all, the cases of El-Masri, Al-Haramain, and Mohamed, and the violations of human rights and constitutional safeguards that they represent, are at the heart of the impetus for reforming the privilege.

B. Congressional Reforms Should Encompass Both the State Secrets Privilege and Justiciability

Congress should consider proposing reforms that encompass both the evidentiary issues of the state secrets privilege and the justiciability questions surrounding Totten and its progeny. Although the Supreme Court clarified in Tenet v. Doe that questions of justiciability should be considered independently of the state secrets privilege, courts have struggled with this distinction. It would be appropriate and useful for Congress to assist in the clarification between the state secrets privilege and Totten’s standard of dismissal based on the subject matter of the litigation.

Such clarification should be undertaken simultaneously with state secrets reform because it would close a potential avenue for the executive branch to avoid disclosure of evidence. The post-Watergate era saw a spike in invocations of the state secret privilege precisely because reform efforts had opened avenues for individual litigants to seek redress and information from the government. A partial reform effort which addresses the state secrets privilege but not the question of justiciability may inadvertently provide an incentive to the executive branch to attempt to dismiss cases based on Totten’s non-justiciability standard. Congressional reform efforts should include a justiciability assessment by which courts dismiss cases that fall squarely within the ambit of Totten (involving secret deals related to national security and espionage), but should make

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334 Id. at 11. For example, even the Third Circuit decision in Reynolds conflated Totten with aspects of the state secrets privilege. See Reynolds v. United States, 192 F.2d 987, 996 (3d Cir. 1951), rev’d, 345 U.S. 1 (1953); Chesney, supra note 47, at 1284-85 (arguing that Totten be considered part of state secrets jurisprudence).
335 See supra Part II.
clear that all other cases should be evaluated under the state secrets privilege, with an additional criterion of accounting for allegations of human rights abuses. Such a measure would preclude subsequent abuse of the Totten doctrine as an alternative means for the executive branch to avoid liability or disclosure of allegedly sensitive information.

C. Reforming the Privilege Should Remain a Priority

The national security programs created or enhanced since 2001 as part of the “war on terror” have come under a great deal of scrutiny, but very few concrete oversight measures have taken hold for a number of reasons.

Legislative inertia and a high level of deference to executive branch decision-making have hobbled many avenues for genuine legislative oversight or any kind of substantial reform efforts with regard to national security and the rule of law. This legislative inertia and deference was particularly pronounced from 2001 through 2006, when both houses of Congress and the presidency were controlled by Republicans.

Reform and oversight efforts began to increase when Democrats gained control of Congress in 2006 and initiated investigations and attempted to pass meaningful oversight measures. However, the Democratically-controlled Congress continued to defer to the Bush administration on most national security matters. For example, in July 2008 Congress passed amendments to the Foreign Intelligence Surveillance Act which stripped jurisdiction over allegations of illegal wiretapping from Article III courts, extended executive branch authority to conduct warrantless surveillance, and immunized telecommunications companies from liability regarding their


assistance to the government in conducting warrantless wiretapping of U.S. citizens.\footnote{Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, 50 U.S.C. §§ 1881-1885 (2008); see also Paul Kane, \textit{House Passes Spy Bill; Senate Expected to Follow}, WASH. POST, June 21, 2008, at A18 (detailing the legislation approved by the House); Editorial, \textit{Spying on Americans}, N.Y. TIMES, May 2, 2007 (condemning the legislation for its expansive grant of power to the President).}

The question for Congress in 2009 is how much oversight it is willing to exert over a Democratic President, particularly as President Obama has recently issued stricter internal guidelines for the Department of Justice to use in determining whether to invoke the state secrets privilege.\footnote{See Holder Memorandum, supra note 7.} Historically, congressional oversight of the executive branch falls by the wayside when Congress and the presidency are run by members of the same political party. Efforts to reform and clarify the state secrets privilege are a rare and clear example of legislative initiative to promote genuine oversight and curb executive branch overreaching; reform efforts should not be derailed by unsupported claims that national security programs would be compromised if the reforms to the privilege were enacted, nor by a lack of will to create uniform state secrets standards when Congress and the President are politically aligned. Congress should consider the long-term effects of not reforming the privilege and act to restore the rule of law and appropriate balance of power among the branches of government.

Second, although public outcry regarding the administration of national security programs has been muted at times, the cases which serve as the impetus for the proposed 2008 reforms are specific, public, and graphic—El-Masri’s case of mistaken identity resulted in a horrific experience of alleged abduction and torture, which was reported widely in great detail.\footnote{See, e.g., Mayer, supra note 69, at 282-87.}

Third, whereas various oversight measures attempted by Congress have been met with constitutional avoidance by the executive branch (where it has refused to enforce portions of legislation as written),\footnote{See supra notes 133-134 and accompanying text.} reform of the state secrets privilege would avoid the same fate, since the power to apply the reforms would fall to the courts instead of the executive branch. If the government fails to comply with a court’s request to provide documents for in camera review, the government could be held
in contempt or a court could decide to enter a default judgment in favor of the plaintiffs, as the lower court in *Reynolds* did.

**CONCLUSION**

Invocations of the state secrets privilege have occurred in every administration since *Reynolds* was decided and, given the current national security landscape, litigation which involves sensitive government information is likely to continue for the foreseeable future.

The extensive and expansive use of the state secrets privilege by the Bush administration illustrates the need for process changes to be implemented in order to deal with the most extraordinary situations, when national security concerns are heightened and the temptation to abuse power and maximize secrecy is at its highest. The Bush administration set a precedent that allows President Obama and any future president to continue on a path of exerting a tremendous amount of political power with very little oversight.

The February 2009 decision of the Obama administration to embrace the Bush administration’s expansive view of the state secrets privilege underscores the need for reform as a part of a long term commitment to the rule of law even in the national security arena. The administration’s pressure on the British government reflects the transnational impact of U.S. policies: the broad U.S. interpretation of the privilege almost trumped the domestic analysis of the privilege by U.K. courts. The long-term effects of such pressure are yet to be seen, but the decisions in the *Mohamed* case reflect the possibility that the U.S. application of the privilege could be exported more widely under threat to other countries of national security repercussions from the United States.

The Obama administration’s new policy to determine whether to invoke the state secrets privilege is demonstrably better than the previous policy: the new structure mandates layers of review within the Justice Department, including an initial determination by a Justice Department official, a recommendation by a newly established State Secrets Review

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243 Nat Hentoff, *Consider the Constitutions of Obama and McCain as You Choose Sides*, *Village Voice*, June 17, 2008, at 14 (“Unless explicitly repudiated by the next president and prohibited by law, the precedents of the Bush presidency will stand. The expanded powers of one president typically are carefully guarded by their successors . . . Republican or Democrat.”) (alteration in original) (internal quotation marks omitted) (quoting Prof. David Orr, Oberlin College)).
Committee, and approval of the Attorney General before invoking the state secrets privilege in court. As promising as this new policy seems, congressional reform is still needed to ensure an external, long-term check on executive branch overreaching that would exist independent of what internal policy is adopted by an administration. Passage of a strong state secrets reform measure can ensure a fair standard in the courts and an opportunity for redress for those alleging grave violations of civil rights and civil liberties.

See Holder Memorandum, supra note 7, at 2-3.
Tribal Law and Disorder

A LOOK AT A SYSTEM OF BROKEN JUSTICE IN INDIAN COUNTRY AND THE STEPS NEEDED TO FIX IT

I. INTRODUCTION

On a typical spring night in 2004, Alex Apichito, a young construction worker, and some friends were walking home from a party when they ran into Alex’s older cousin, Leonard. Even though the two had a sometimes turbulent relationship, Leonard invited the group back to his house for drinks. At some point later that night, Alex and Leonard began to argue, eventually provoking Leonard to exit the room. A few minutes later, he reemerged with a combat knife in his hand and attacked Alex, slashing his throat from his neck to his ear. Luckily for Alex, he was able to escape without further injury. Soon after arriving home, Alex sought medical attention and was quickly airlifted to the nearest hospital, where he would spend the next two days recovering. Four months later,
Leonard Apachito would stab another young man, Arthur Schobey. However, this time, Leonard’s victim would not survive the attack.

One of the main reasons why Leonard Apachito was not detained prior to Arthur Schobey’s murder is that both Leonard and Alex Apachito are American Indians who live on the Navajo reservation. While it may seem perplexing that an individual’s race would affect the quality of law enforcement that individual receives, this race-based system of justice is an unpleasant reality for those living on Indian reservations. Due to antiquated laws that severely limit the tribal governments’ ability to maintain criminal justice, Indians rely exclusively on the federal government to investigate and prosecute felonies committed within tribal lands. However, when the federal agencies responsible for policing Indian country do not have the

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7 See Broken Justice, supra note 1; Riley, supra note 1.
8 See Broken Justice, supra note 1; Riley, supra note 1.
9 For crimes committed in Indian country, the race of the offender and race of the victim both affect the criminal jurisdiction of a case. See Greg Guedel, Why Are Tribal Courts the Last Race-Based Jurisdiction in the United States?, http://www.nativelegalupdate.com/2008/12/articles/why-are-tribal-courts-the-last-racebased-jurisdiction-in-the-united-states/ (last visited Sept. 17, 2009); see also Broken Justice, supra note 1 (“[A]s Americans, . . . we have a strong expectation of the way our justice system ought to function; . . . we live in a society where, if you commit a crime, especially a serious crime, people will investigate that crime, people will arrest you and people will try and convict you. What happens actually on reservations doesn’t look at all like that picture.”); infra Part II. According to the United States Department of Justice, an “Indian” is a person who has Indian ancestry and belongs to a federally recognized Indian tribe. U.S. DEP’T OF JUSTICE, OFFICE OF TRIBAL JUSTICE, FAQS ABOUT NATIVE AMERICANS, http://www.usdoj.gov/otj/nafaqs.htm (last visited Sept. 8, 2009); see also United States v. Keys, 103 F.3d 758, 761 (9th Cir. 1996) (citing United States v. Bronchseau, 597 F.2d 1260, 1263 (9th Cir. 1979) (“The test . . . generally followed by the courts [to determine whether a person is ‘Indian’], considers (1) the degree of Indian blood; and (2) tribal or government recognition as an Indian.”). While the use of the word “Indian” may seem archaic, it is commonly used by all government agencies and is generally recognized to refer to both “American Indians” and “Native Americans.” See Christina Berry, What’s in a Name? Indians and Political Correctness, ALL THINGS CHEROKEE, http://www.allthingscherokee.com/articles_culture_events_070101.html (last visited Jan. 30, 2009); see also Peter d’Errico, Native American Studies—A Note On Names, http://www.umass.edu/legal/derrico/name.html (last visited Oct. 8, 2009). For the purposes of this Note, the term “Indian” refers to American Indians, Native Americans, and Alaskan Natives.


11 See infra Part II.
resources to adequately enforce the law, cases are delayed and criminals like Leonard Apachito remain free.\textsuperscript{12}

As a result of this broken system of justice, the prevalence of violent crime within Indian communities is formidable.\textsuperscript{13} Indians endure violent crimes at an average rate of 101 victims for every 1000 persons, almost two and a half times the national rate.\textsuperscript{14} In addition, while Indians make up only 0.5\% of the population, they make up 1.3\% of all victims of violence in the United States.\textsuperscript{15} Despite these high levels of crime, federal prosecutors decline 65\% of criminal cases referred to them, largely due to problems with tribal investigations.\textsuperscript{16} In areas where the federal government does not maintain exclusive jurisdiction over criminal matters within Indian country, tribal governments are severely limited in their ability to punish offenders.\textsuperscript{17}

In response to the “staggering” crime rates in Indian country, Senator Byron Dorgan of North Dakota introduced the Tribal Law and Order Act of 2008 (the “Bill”) on July 23, 2008, which, among other things, aims to increase law enforcement presence on tribal lands, improve communication between the various agencies responsible for policing Indian country, and

\footnotesize{\textsuperscript{12} See infra Part III.B.2. In the case of Alex Apachito, FBI agents did not apprehend Leonard Apachito despite receiving witness testimony identifying him as the assailant. See Riley, supra note 1. Instead, the FBI arrested the wrong man, and subsequently dropped the case, presumably to pursue more serious crimes due to the FBI’s overbearing case load in Indian country. See id. (noting the costs of letting federal law enforcement ignore lesser crimes on Indian reservations).


\textsuperscript{14} See AMERICAN INDIANS AND CRIME, supra note 10, at 4. Among all races, the rate of victimization is 41 per 1000 persons. \textit{Id}. However, this rate of victimization may be deflated when compared to the number of instances of violence which go unreported to police. See U.S. DEP’T OF JUSTICE, NCJ 176354, VIOLENT VICTIMIZATION AND RACE, 1993-1998, at 8 (2001), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/vvr98.pdf. According to an earlier report form the Department of Justice on the relationship between crime and race, American Indians tend to report only 46\% of cases to the police. \textit{Id}. at 1. Among the reasons for not reporting these cases, “Police will not bother” accounted for 12\% of victims declining to report violence, around twice the percentage for this reason among other races. \textit{Id}. at 8. In addition, for the purposes of this note, “violent crime” refers to rape, sexual assault, robbery, aggravated assault, and simple assault, based on the abundance of data on these crimes compared to other violent crimes. See generally AMERICAN INDIANS AND CRIME, supra note 10, at 4.

\textsuperscript{15} See AMERICAN INDIANS AND CRIME, supra note 10, at 4-5. Viewed from a different perspective, Indians experience violence at a rate of approximately one victim for every ten residents in comparison to the national rate of approximately one victim for every twenty-four residents. \textit{Id}.

\textsuperscript{16} See Michael Riley, Promises, Justice Broken, DENVER POST, Nov. 11, 2007; Broken Justice, supra note 1; infra Part III.

\textsuperscript{17} See infra Part II.C.
increase prosecutorial accountability. While the Bill marks an important and necessary step in the fight to lower crime levels and amend the current relationship between various law enforcement agencies in Indian country, it falls short of providing much needed robust infrastructural remedies.

This Note will argue that, in light of the many shortcomings of the current scheme of Indian law, several changes need to be made to federal law in order to allow tribal governments to take charge of the crime-related problems in Indian country. These changes would empower tribes by expanding criminal jurisdiction to all offenders in Indian country regardless of race, increasing tribal sentencing authority, and unifying the tribal and federal law enforcement agencies to provide more efficient policing on Indian reservations. This Note will also argue that, despite the positive suggestions proposed in the Bill, the Tribal Law and Order Act does not go far enough to make the necessary fundamental changes to Indian law. Part II will examine the current scheme of Indian law in the United States in order to provide a legal background for the complexities that have led to the current criminal problems in Indian country. Part III will discuss the difficulties that law enforcement officials and prosecutors face as a direct result of the tribal/federal dichotomy. Lastly, Part IV will analyze the Tribal Law and Order Act of 2008, assessing the Bill’s compelling propositions and noting its weaknesses. Part IV will also advance several suggestions that should be adopted in order to most effectively deal with crime in Indian country.

18 See News Release, Senator Byron L. Dorgan, Dorgan Introduces Legislation Aimed at Giving Boost to Law & Order in Indian Country (July 23, 2008), available at http://dorgan.senate.gov/newaroom/record.cfm?id=301170. The Tribal Law and Order Act was co-sponsored by Senator Baucus (MT), Vice President Biden (former Senator, DE), Senator Bingaman (NM), Senator Cantwell (WA), Senator Domenici (NM), Senator Johnson (SD), Senator Kyl (AZ), Senator Lieberman (CT), Senator Murkowski (AK), Senator Smith (OR), Senator Tester (MT), and Senator Thune (SD). Id. Following the end of the 110th Congress’s term, the bill was reintroduced on April 2, 2009 in the 111th Congress. Tribal Law and Order Act of 2009, S. 797, 111th Cong. (2009). For the purposes of this Note, all references to the Bill are meant to correspond with the Tribal Law and Order Act of 2008, which aside from minor and mainly pagination-based differences, is substantially identical to the Tribal Law and Order Act of 2009.
II. OVERVIEW OF INDIAN LAW

A. The Marshall Trilogy; The Federal Trust Responsibility

In order to best understand the current scheme of Indian law, it is important to look at how the relationship between the federal government and the Indian tribes developed. A set of cases decided by the Marshall Court, commonly dubbed the “Marshall Trilogy,” addressed many unanswered questions regarding the status of the Indian tribes and ultimately established the legal framework for Indian law that persists today. In the first of these cases, Johnson v. McIntosh, the Marshall Court dealt with the question of whether tribes could convey land to private individuals. The Court held that, while Indians enjoyed occupancy rights to their lands, the ultimate title was held by the United States, and thus, the tribes had no basis for transferring that title to private individuals.

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19 “Indian Law” primarily refers to the overarching field of law that designates “the rights and obligations” of Indians and Indian tribes within the United States. GARY A. SOKOLOW, NATIVE AMERICANS AND THE LAW: A DICTIONARY 1 (2000). Further, Indian Law does not cover all legal disputes involving Indians. WILLIAM C. CANBY, JR., AMERICAN INDIAN LAW IN A NUTSHELL 2-3 (5th ed. 2004) (1981). Indian Law comes into play only when the end result of a dispute is influenced by the Indian status of any of the involved actors. Id. at 1-2. If an Indian were to commit a traffic infraction in Brooklyn, the case would not be influenced by the violator’s Indian status and would therefore not fall under Indian Law. See id. at 2-3. However, if an Indian commits a traffic infraction within an Indian reservation in upstate New York, the case would be influenced not only be the violator’s Indian status, but also by the location of the infraction, and would therefore fall under the field of Indian Law. See id.

20 According to the Federally Recognized Indian Tribe List Act of 1994, the Bureau of Indian Affairs must publish an annual list of federally recognized Indian Tribes. 25 U.S.C. § 479a-1 (2006). As of August 11, 2009, the Bureau of Indian Affairs recognizes 564 Indian tribes eligible for “funding and services.” See Indian Entities Recognized and Eligible To Receive Services From the United States Bureau of Indian Affairs, 74 Fed. Reg. 153, 40,218, 40,218-23 (Aug. 11, 2009). Federally unrecognized tribes meeting common law requirements such as sufficient duration, territoriality, organization, and cultural identity have also been successful in securing the same legal rights as federally recognized Indian tribes. See CANBY, supra note 19, at 5; see also Koke v. Little Shell Tribe of Chippewa Indians of Montana, Inc., 68 P.3d 814, 816 (Mont. 2003). See generally Timothy J. Droske, Correcting Native American Sentencing Disparity Post-Booker, 91 MARQ. L. REV. 723 (2008).


22 See generally McIntosh, supra note 19, at 543.

23 See id. at 592 (“The absolute ultimate title has been considered as acquired [by the United States] by discovery, subject only to the Indian title of occupancy, which title the discoverers possessed the exclusive right of acquiring.”).
The second case of the trilogy, *Cherokee Nation v. Georgia*,\(^24\) shed additional light on the role of Indian tribes within the federal regulatory scheme. In *Cherokee*, the Cherokee Nation sued the state of Georgia under Article III, Section 2 of the Constitution as a “foreign State[],”\(^25\) asking the Court to void Georgia legislation “intending to force . . . the Indians from their territory.”\(^26\) The Court dismissed the case for lack of original jurisdiction on the grounds that the Cherokee Nation was not a foreign nation, but rather a “domestic dependent nation[].”\(^27\) Justice Marshall likened the Indians’ relation to the United States not to that of two individual sovereigns, but instead to that of “a ward to his guardian.”\(^28\) In the third case of the Marshall Trilogy, *Worcester v. Georgia*, the Court explicitly exempted Indian tribes from the jurisdiction of state laws,\(^29\) and, in doing so, established a federal “trust responsibility” by the United States over the Indian tribes.\(^30\)

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\(^{24}\) 30 U.S. (5 Pet.) 1 (1831).

\(^{25}\) U.S. CONST. art. III, § 2.

\(^{26}\) See *Cherokee Nation*, 30 U.S. (5 Pet.) at 9.

\(^{27}\) See *id.* at 17. In the Marshall Trilogy, the Supreme Court often described the trustee relationship between the Indians and United States with lengthy narrative. For example, in *Cherokee Nation*, the court noted:

> Though the Indians are acknowledged to have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relations to the United States resemble that of a ward to his guardian.

> They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.

*Id.*

\(^{28}\) See *id.*

\(^{29}\) *Worcester*, 31 U.S. (6 Pet.) at 561. In *Worcester*, the Court ruled that a state law, requiring the appellant to obtain a license from the governor to live with the Cherokee Tribe, was invalid on the basis that Congress had the exclusive power to legislate matters of Indian Law. *Id.*

\(^{30}\) CANBY, supra note 19, at 34-39. The federal trust responsibility refers to the “special relationship” between the United States and the Indian tribes, by which the federal government resembles a trustee to its beneficiary Indians. The government’s fiduciary duty covers a broad range of legal obligations established throughout the history of the United States. *Id.; see also* Reid Peyton Chambers, *Judicial Enforcement of the Federal Trust Responsibility to Indians*, 27 Stan. L. Rev. 1213, 1220 (1975) (describing in detail the federal trust responsibility starting from its origins in the Marshall Trilogy: “[I]t recognizes a sort of ‘protectorate’ status in the
The Marshall Trilogy deemed Indian tribes independently sovereign and free from state rule, but nevertheless subject to the laws of the United States.\textsuperscript{31} At the time, the Marshall Court’s decisions marked victories for Indian tribes who were being systematically forced out of their land as a young America expanded.\textsuperscript{32} However, the President and Congress largely ignored the ideological underpinnings of the Marshall Trilogy during the subsequent Jacksonian era.\textsuperscript{33} Instead of yielding to the law established by the Marshall Court, the federal government\textsuperscript{34} and various individual states\textsuperscript{35} continued to implement a policy of removal as American frontiers claimed new lands to the West.\textsuperscript{36} The blatant disregard for the Marshall Trilogy rulings marked one of the earliest examples of the difficulties of enforcing protective Indian law in the United States and demonstrated a substantial clash between the three branches of government.\textsuperscript{37} One of the few sources of refuge from the government’s misuse of power was the federal system.\textsuperscript{38} Indian tribes often cited the federal trust responsibility established in the Marshall Trilogy as their chief argument in attempting to enjoin public and private actors from infringing upon their rights as domestic sovereigns.\textsuperscript{39}

\textsuperscript{31} See Droske, supra note 20, at 729 n.29.

\textsuperscript{32} See CANBY, supra note 19, at 18-19.

\textsuperscript{33} While not verifiable, President Jackson is notably quoted in reference to the Marshall Trilogy as saying, “John Marshall has made his decision; now let him enforce it.” Id.

\textsuperscript{34} BRUCE E. JOHANSEN, THE ENCYCLOPEDIA OF NATIVE AMERICAN LEGAL TRADITION 274 (1998). The Indian Removal Act of 1830 was passed by Congress with the purpose of removing those Indians who had not assimilated into the American way of life to Indian Territory, now Oklahoma. Indian Removal Act of 1830, ch. 148, 4 Stat. 411 (1830).

\textsuperscript{35} JOHANSEN, supra note 34, at 326-27. In response to the discovery of gold on Cherokee land, Georgia passed laws in 1829 prohibiting Indians from surveying its land or mining for gold. Id. Despite the surge of thousands of Americans onto Cherokee land, Georgia state courts dismissed any suits based on Cherokee testimony as incompetent. Id.

\textsuperscript{36} See id. at 326-30.

\textsuperscript{37} See infra Part III; see also supra note 32-33 and accompanying text.

\textsuperscript{38} CANBY, supra note 19, at 40-41.

\textsuperscript{39} See id. at 40-51. For instance, in Lane v. Pueblo of Santa Rosa, the Supreme Court enjoined the Secretary of the Interior from selling tribal lands on the basis that such an action “would not be an exercise of guardianship, but an act of confiscation.” See Lane v. Pueblo of Santa Rosa, 249 U.S. 110, 113 (1919).
B. Criminal Jurisdiction Over Indians; Statutory Changes

Crimes committed within Indian Territory, whether by Indians or non-Indians, are subject to an overlapping jurisdictional matrix of federal, state, and tribal law created largely by statute over the past 200 years.\(^\text{40}\) The first of these statutes, the General Crimes Act of 1817, was passed by Congress to establish a legal framework for prosecuting crimes committed in Indian country.\(^\text{41}\) The General Crimes Act relinquished the power of the states in prosecuting crimes committed on Indian lands, and instead bestowed exclusive criminal jurisdiction to the federal government.\(^\text{42}\) An exception to this federal jurisdiction was created for crimes committed by Indians against other Indians, which Congress left to be governed by tribal law and tried in tribal courts.\(^\text{43}\)

While the General Crimes Act was pivotal in establishing federal criminal jurisdiction over Indian country, at this point in history there was not an extensive body of federal criminal law from which to prosecute criminals in federal lands.\(^\text{44}\) In addition, while federal criminal statutes governing Indians did exist,\(^\text{45}\) comprehensive criminal codes

\(^{40}\) See infra Part II.C; see also CANBY, supra note 19, at 200.

\(^{41}\) CANBY, supra note 19, at 148; see General Crimes Act of 1817, ch. 92, 3 Stat. 383 (1817) (current version at 18 U.S.C. § 1152 (2006)).

\(^{42}\) See General Crimes Act, 18 U.S.C. § 1152. The original General Crimes Act established that any person who commits a crime, Indian or non-Indian, within Indian Country, shall be subject to the laws of the United States if in its exclusive jurisdiction, and shall be tried in the courts of the United States. Id. The current statute reads:

Except as otherwise expressly provided by law, the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

This section shall not extend to offenses committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively.

Id.

\(^{43}\) See CANBY, supra note 19, at 148; see General Crimes Act, 18 U.S.C. § 1152.

\(^{44}\) See Droske, supra note 20, at 730-31.

\(^{45}\) See CANBY, supra note 19, at 174. In the case of murder, the first federal statute came out of the First Congress of the United States in 1790. See Act of Apr. 30, 1790, ch. 9, § 3, 1 Stat. 112-13 (1790). The statute provided that any person in a place “under the sole and exclusive jurisdiction of the United States, [who] commit[s] the crime of wilful murder . . . shall suffer death.” See id. The earliest murder statute meant to specifically protect Indians came from the Fourth Congress and similarly
were traditionally created by the states and not the federal
government.\[^{46}\] “In order to fill the . . . gaps [in federal criminal
law at the time], Congress passed the Assimilative Crimes Act
in 1825.”\[^{47}\] This Act required that crimes committed in Indian
country, which were not federally codified, were to be
prosecuted according to the criminal laws of the state in which
the crime took place.\[^{48}\] For instance, if an Indian or non-Indian
commits a traffic-related offense within Indian land and there
is no federally codified statute prohibiting such an offense, that
individual may still be prosecuted under the Assimilative
Crimes Act for violating the laws of the state in which the
Indian land is located.\[^{49}\]

The next development in an already complex
jurisdictional scheme occurred in 1883 with the Supreme
Court’s decision in \textit{Ex Parte Crow Dog}.\[^{50}\] On August 5, 1881, an
Indian named Crow Dog fatally shot another Indian on the
Great Sioux Reservation in what is now South Dakota.\[^{51}\] Local
Indian police arrested Crow Dog and held him in jail in a
military cell at Fort Niobrara, Nebraska.\[^{52}\] In accordance with
tribal law, members of the victim’s family met with Crow Dog’s
family and resolved the matter for “$600 in cash, eight horses,
and one blanket.”\[^{53}\] The following year, murder charges were
brought against Crow Dog in the Dakota territorial court under

\[^{46}\] \textsc{Canby}, supra note 19, at 174; see also \textsc{Droske}, supra note 20, at 730-31.

\[^{47}\] \textsc{Droske}, supra note 20, at 731; see also 18 U.S.C. § 13(a).

\[^{48}\] 18 U.S.C. § 13(a); see also \textsc{Droske}, supra note 20, at 731.

\[^{49}\] Such was the case in \textit{United States v. Billadeau}, where the Eighth Circuit
Court of Appeals held that a non-Indian motorist traveling within Indian country was
subject to the traffic laws of North Dakota via the Assimilative Crimes Act. \textsc{See United
States v. Billadeau, 275 F.3d 692, 694 (8th Cir. 2001)} (“A BIA officer has a statutory
duty to arrest a suspect who commits an offense in Indian country in the officer’s
presence. The General Crimes Act, 18 U.S.C. § 1152, creates federal jurisdiction over
crimes committed by non-Indians against Indians in Indian country. It incorporates the
Assimilative Crimes Act (ACA), 18 U.S.C. § 13, which provides that when conduct
which would violate state law occurs on federal land, the relevant state law is
assimilated into federal law unless there is already applicable federal law.” (citation
omitted)); see also \textsc{United States v. Ashley}, 255 F.3d 907, 909-10 n.3 (8th Cir. 2001).

\[^{50}\] \textit{Ex Parte Crow Dog}, 109 U.S. 556, 557-58 (1883). The Indian named Kan-
gi-shun-ca was commonly known as Crow Dog and is referred to as Crow Dog by the
Supreme Court in \textit{Crow Dog}. \textsc{See Siddey L. Harring, Crow Dog’s Case: American

\[^{51}\] \textit{Crow Dog}, 109 U.S. at 557; see \textsc{Harring, supra note 50}, at 1.

\[^{52}\] \textsc{Harring, supra note 50}, at 1.

\[^{53}\] \textit{Id.}
the General Crimes Act. At trial, Crow Dog was convicted of murder and sentenced to death under a federal murder statute.

In 1883, the U.S. Supreme Court reversed Crow Dog’s conviction, finding that under the tribal law exception of the General Crimes Act, the Dakota Court did not possess criminal jurisdiction over a matter involving two Indian participants. In Justice Matthews’ compassionate, yet condescending opinion, the court noted the importance of maintaining the tribal way of governing criminal activity within Indian country in accordance with the General Crimes Act.

_Crow Dog_ appeared to stand for the preservation of tribal sovereignty as articulated by the Marshall Court. However, the Supreme Court’s decision in _Crow Dog_ did not fit well with congressional Indian policy. In order to resolve this discrepancy, Congress passed the Major Crimes Act in 1885,

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54 Id.
55 Id.; _Crow Dog_, 109 U.S. at 557.
56 See General Crimes Act § 2, 3 Stat. at 383, 18 U.S.C. § 1152 (2006) (“[N]othing in this act shall be so construed as to affect any treaty now in force between the United States and any Indian nation, or to extend to any offence committed by one Indian against another, within any Indian boundary.”).
57 See _Crow Dog_, 109 U.S. at 569-72.
58 The Court noted:

[This] is a case involving the judgment of a court of special and limited jurisdiction, not to be assumed without clear warrant of law. It is a case of life and death. It is a case where, against an express exception in the law itself, that law, by argument and inference only, is sought to be extended over aliens and strangers; over the members of a community separated by race, by tradition, by the instincts of a free though savage life, from the authority and power which seeks to impose upon them the restraints of an external and unknown code, and to subject them to the responsibilities of civil conduct, according to rules and penalties of which they could have no previous warning; which judges them by a standard made by others and not for them, which takes no account of the conditions which should except them from its exactions, and makes no allowance for their inability to understand it. It tries them, not by their peers, nor by the customs of their people, nor the law of their land, but by superiors of a different race, according to the law of a social state of which they have an imperfect conception, and which is opposed to the traditions of their history, to the habits of their lives, to the strongest prejudices of their savage nature; one which measures the red man’s revenge by the maxims of the white man’s morality.

_Id._ at 571.
59 See _supra_ notes 21-39 and accompanying text.
60 See HARRING, _supra_ note 50, at 3-4 (“[T]he United States was rapidly proceeding with a policy of forced [Indian] assimilation, destroying the tribes as political units and incorporating individual Indians into the states as small farmers . . .”).
which extended federal jurisdiction to seven “major crimes” committed in Indian country, regardless of the actor’s or the victim’s ethnicity.\textsuperscript{61} The immediate impact of the Major Crimes Act after \textit{Crow Dog} was a large influx of Indian-criminal cases in federal courts.\textsuperscript{62} Close to one hundred of these cases were heard by the U.S. Supreme Court, creating the first set of unified Indian criminal law.\textsuperscript{63} In the long-run, however, the spirit of \textit{Crow Dog} was ultimately lost with the passage of the Major Crimes Act and subsequent legislation, and the force of tribal governments over the next hundred years continued to diminish.\textsuperscript{64}

\textbf{C. Post-\textit{Crow Dog}; Additional Legal Complexities}

By the mid-1900s, several problems had arisen due to flaws in the federally established legal framework over crimes


\begin{quote}
[All Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes, and shall be tried therefor in the same courts and in the same manner and shall be subject to the same penalties as are all other persons charged with the commission of said crimes, respectively; and the said courts are hereby given jurisdiction in all such cases; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.]
\end{quote}

\textit{Id.} at 385 (emphasis added). The modern statute, codified as 18 U.S.C. § 1153, adds eight crimes to the original list,

\begin{quote}
kidnapping, maiming . . . incest, . . . assault with a dangerous weapon, assault resulting in serious bodily injury (as defined in section 1365 of this title), an assault against an individual who has not attained the age of 16 years, felony child abuse or neglect . . . and [theft] under section 661 of this title within the Indian country.
\end{quote}

The modern statute also mandates that where any of these crimes are not federally defined, they “shall be defined and punished in accordance with the laws of the State in which such offense was committed as are in force at the time of such offense.” \textit{Id.}

\textsuperscript{62} See \textit{Harrington}, supra note 50, at 5.

\textsuperscript{63} \textit{Id.}

\textsuperscript{64} For an interesting discussion of the effect of the \textit{Crow Dog} decision on modern Indian Law, see \textit{Harrington}, supra note 50.
committed in Indian country. The largest problem was the apparent "lawlessness" on Indian reservations. Both federal and tribal law enforcement agencies had the responsibility of controlling the overlapping jurisdictional systems. However, instead of this dual-responsibility resulting in double-coverage within Indian country, tribes were left with "a hiatus in law-enforcement authority."  

The federal government's opinion of the Indian "situation" was equally depressing. In stark contrast to the national prosperity that followed World War II, Indians continued to live in sub-standard conditions. Congress was not pleased with the state of affairs given the amount of money it was allocating to Indian programs at the time; in 1951, the federal government spent close to $75 million to implement the system of Indian-law it had created. 

As a result, the nation ushered in a period, now known as the "Termination Period," of forced assimilation, and attempted to end federal responsibilities in Indian country. This period included commissioned reports on the apparent "Indian Problem" and the passage of Congressional

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66 Id. at 1659.
67 See CANBY, supra note 19, at 200-01.
68 See S. REP. NO. 83-699, at 5 (1953), as reprinted in 1953 U.S.C.C.A.N. 2409, 2411-12 ("As a practical matter, the enforcement of law and order among the Indians in the Indian country has been left largely to the Indian groups themselves. In many States, tribes are not adequately organized to perform that function. . . . [This gap] could best be remedied by conferring criminal jurisdiction on States indicating an ability and willingness to accept such responsibility."); see also Jiménez & Song, supra note 65, at 1659.
69 See id. at 1662 n.200.
70 See id. at 1661. In the hearings prior to Public Law 280's enactment, one representative noted that this budget had "expanded tremendously" in comparison to the $31 spent on Indian Affairs in 1800. See 99 CONG. REC. 9263 (1953) (statement of Rep. Harrison). Using a comparison to the consumer price index of a given year, $31 from 1800 is approximately the equivalent to $548 in today's dollars, and $75 million is approximately the equivalent to $1.33 billion in today's dollars. See Measuring Worth, http://www.measuringworth.com/uscompare/ (last visited Oct. 1, 2009).
72 See COMM’N ON ORG. OF THE EXECUTIVE BRANCH OF THE GOV’T, INDIAN AFFAIRS, H.R. DOC. NO. 81-129, at 63 (1949); see also Jiménez & Song, supra note 65, at 1663.
resolutions74 aimed at codifying the Termination Period’s purposes.75 The most significant of these government actions was Public Law 280, enacted in 1953, which “delegated criminal jurisdiction” in Indian country to five states: California, Minnesota, Nebraska, Oregon, and Wisconsin.76

The effect of Public Law 280 was that the five states would now have exclusive criminal jurisdiction over crimes committed in Indian country, regardless of the race of the actor or the victim.77 Not surprisingly, state and tribal governments took offense to the new legislation.78 States were now tasked with ruling over territory that was previously the exclusive province of the federal government.79 These states were not provided any additional funds from the federal government or the ability to tax Indian lands.80 Likewise, tribes were now subject to a body of criminal law that they neither consented to nor were familiar with.81

74 H.R. Con. Res. 108, 83d Cong. (1953) ("Whereas it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States . . . . [I]t is declared to be the sense of Congress that, at the earliest possible time, all of the Indian tribes . . . should be freed from Federal supervision and control and from all disabilities and limitations specially applicable to Indians . . . .").
75 See Jiménez & Song, supra note 65, at 1663.
76 Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 (2006) and 28 U.S.C. § 1360 (2006)). When Alaska became a state, it was added to the list of “mandatory” states under Public Law 280, bringing the total to six states. See 28 U.S.C. § 1360. The act also expanded civil jurisdiction, however, for the purposes of this Note, this expansion will not be discussed. In addition, some exceptions were made to territories within the states. See CANBY, supra note 19, at 258-63; Droske, supra note 21, at 734. Public Law 280 now reads:

(a) [Alaska, California, Minnesota, Nebraska, Oregon and Wisconsin] shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory . . .

(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section . . .

77 See Droske, supra note 21, at 734-37.
78 See CANBY, supra note 19, at 259.
79 Id.
80 Id.
81 Id.
As a result of the complete dissolution of tribal sovereignty\textsuperscript{82} and the elimination of the federal government's "guardianship" over the tribes,\textsuperscript{83} Public Law 280 faced heavy criticism.\textsuperscript{84} Even as it was being signed into law, President Eisenhower articulated "grave doubts as to the wisdom of certain provisions,"\textsuperscript{85} specifically a lack of tribal consent to the transfer of criminal jurisdiction.\textsuperscript{86} The passage of the Indian Civil Rights Act of 1968 eventually addressed these concerns by inserting a tribal consent requirement before any new states could assume criminal jurisdiction in Indian country.\textsuperscript{87}

In addition to the consent amendment, the Indian Civil Rights Act also incorporated many of the provisions of the Bill of Rights into tribal law.\textsuperscript{88} However, while this Act was likely intended to improve the lives of Indians by limiting the potential for abuse by tribal governments, it ultimately took away one of the most important pieces of tribal sovereignty.

\textsuperscript{82} Cf. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832) ("The Cherokee nation, then, is a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force, and which the citizens of Georgia have no right to enter, but with the assent of the Cherokees themselves, or in conformity with treaties, and with the acts of congress. The whole intercourse between the United States and this nation, is, by our constitution and laws, vested in the government of the United States.").

\textsuperscript{83} Cf. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

\textsuperscript{84} See Droske, supra note 21, at 734.

\textsuperscript{85} See Statement by the President upon Signing Bill Relating to State Jurisdiction over Cases Arising on Indian Reservations, 166 PUB. PAPERS 564, 564 (Aug. 15, 1953).

\textsuperscript{86} See Droske, supra note 21, at 734-35; Jiménez & Song, supra note 65, at 1657-58; see also Statement, supra note 85, at 565 ("The failure to include in these provisions a requirement of full consultation in order to ascertain the wishes and desires of the Indians and of final Federal approval, was unfortunate.").


The nine states were Nevada in 1955, South Dakota in 1957 (jurisdiction over highways), Washington in 1957 (jurisdiction in eight subject areas), Florida in 1961, Idaho in 1963 (civil and criminal jurisdiction over seven subject matters, which can be expanded with tribal consent), Montana in 1963 (jurisdiction over the Flathead Reservation), North Dakota in 1963 (assuming civil jurisdiction, by tribal consent), Arizona in 1967 (jurisdiction over water quality, repealed in 2003, and jurisdiction over air quality, repealed in 1986), and Iowa in 1967 (civil jurisdiction over the Sac and Fox Tribe). After the 1968 Amendment, in 1971, Utah became the last state to accept Public Law 280 jurisdiction.

Droske, supra note 21, at 735 n.69 (citations omitted).

\textsuperscript{88} 25 U.S.C. § 1302. The Indian Civil Rights act in theory grants rights to Indians by prohibiting their ability to "exercis[e] powers of self-government." For instance, "[n]o Indian tribe . . . shall . . . subject any person for the same offense to be twice put in jeopardy." Id.
that Indians still retained: the ability to punish native criminals according to tribal law. Under the Act, Indians were given the “right” against “cruel and unusual punishments” by preventing tribal courts from imprisoning convicted criminals for more than one year or imposing fines over $5000. This effectively limited tribal governments’ criminal jurisdiction to misdemeanors, leaving all felonies in the hands of either the states or the federal government.

As for the remaining power that Indian tribes maintained over criminal matters, the Supreme Court severely diminished the already limited scope of tribal authority in Oliphant v. Suquamish Indian Tribe, holding that tribal governments do not possess inherent criminal jurisdiction over non-Indians. In Oliphant, a tribal police officer from the Suquamish Indian Tribe arrested non-Indian Mark David Oliphant for assaulting a tribal officer and resisting arrest during an annual tribal celebration. After Oliphant twice unsuccessfully sought habeas corpus relief, the Supreme Court found that affording Indian tribes the right to try non-Indians in tribal courts would be inconsistent with the Indian tribes’ role as “domestic dependent nations,” and reversed the lower courts’ decision upholding the arrest.

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89 Prior to the enactment of the Indians Civil Rights Act of 1968, and under the power of the General Crimes Act and Major Crimes Act, Indians had the ability to prosecute criminals for non-“major” crimes according to tribal law. See generally supra Part II.B.
90 See 25 U.S.C. § 1302(7) (“No Indian tribe in exercising powers of self-government shall . . . (7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of one year and a fine of $5,000, or both.”).
92 See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 195 (1978). This limitation in jurisdiction applied even to those non-Indians living within Indian Country. Id.
93 Id. at 194-95. After being arraigned and charged under Tribal Code, Oliphant applied for a writ of habeas corpus in the Western District of Washington, which was denied. He appealed this denial in the Ninth Circuit Court of Appeals, but the denial was upheld. The Supreme Court granted certiorari to determine whether tribal courts had inherent criminal jurisdiction over non-Indians, and the tribal court proceedings were halted, pending the Court’s decision. See id. At the time of the case, the Suquamish Tribe was not alone in asserting criminal jurisdiction over non-Indians through its Tribal Code of Law. 33 out of 127 Indian tribes claimed to extend criminal jurisdiction to non-Indians and twelve others had enacted ordinances that established the assumption of criminal jurisdiction over non-Indians. See id. at 196.
94 See id. at 210-12.
presumption” against criminal jurisdiction over non-Indians was strongly based on the federal common law principles established in the Marshall Trilogy, and not on prior treaties or statutes.\textsuperscript{95} Nevertheless, the Court noted that, in light of the prevalence of crime on Indian reservations, Congress retained the power to grant Indian tribes criminal jurisdiction over non-Indians.\textsuperscript{96} Oliphant effectively eliminated the Indians’ ability to protect themselves from crimes committed by non-Indians, thus reaffirming the United States’ role as “guardian” over the Indian tribes.\textsuperscript{97}

With the enactment of Public Law 280 in 1953 and the Supreme Court’s decision in Oliphant, the scheme of criminal jurisdiction within Indian country is substantially up-to-date.\textsuperscript{98} To summarize, the following chart sets forth who has criminal jurisdiction for crimes committed within Indian territory based on offender, victim, and crime:

\textsuperscript{95} See id. at 203-12 (“By submitting to the overriding sovereignty of the United States, Indian tribes therefore necessarily give up their power to try non-Indian citizens of the United States except in a manner acceptable to Congress.”).

\textsuperscript{96} See id. at 212. At the end of Justice Rehnquist’s majority opinion, he noted that some Indian court systems had become “increasingly sophisticated.” In addition, Rehnquist acknowledged that the protections of the Indian Civil Rights Act of 1968 extended to both Indians and non-Indians being tried in Tribal Court. These advances to the tribal justice system have, according to Rehnquist, eliminated many of the perceived dangers inherent with Indian tribes exercising criminal jurisdiction over non-Indians. Id. Thus, Rehnquist’s acquiescence demonstrates the Court’s deference to the legislature on the question of whether tribal authorities may possess criminal jurisdiction over non-Indians.

\textsuperscript{97} Id. at 209-12. Justice Marshall, with whom Chief Justice Burger joined, dissented, noting the lack of any treaty or statute limiting the Indian’s criminal jurisdiction over non-Indians. Id. at 212; see also Duro v. Reina, 495 U.S. 676, 685 (1990) (restating that in criminal matters, tribal sovereignty extends to other tribal members and not to “outsiders.”); United States v. Weaselhead, 156 F.3d 818, 825 (8th Cir. 1998) (Arnold, J., dissenting) (“Congress has the power to expand and contract the inherent sovereignty that Indian tribes possess because it has legislative authority over federal common law.”). See generally supra notes 21-31 and accompanying text.

\textsuperscript{98} See generally CANBY, supra note 19, at 200.
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<tr>
<th>Offender</th>
<th>Victim</th>
<th>Crime</th>
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<th>Substantive Law*</th>
<th>Statutory Authority</th>
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<tr>
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<td>Any crime</td>
<td>State</td>
<td>State</td>
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* This chart assumes that the crime is not committed within a Public Law 280 state.

** While Tribal courts may technically have jurisdiction over these matters, they cannot imprison convicted offenders for more than one year or fine them more than $5000, largely rendering these courts’ jurisdiction obsolete in cases of “Major” crimes.

+ Burglary and incest have not been federally codified by criminal statute and thus are governed by state substantive law via the Assimilative Crimes Act.

# Non-“Major” crimes are largely misdemeanors. Thus, where these crimes are not federally defined, they are governed by state substantive law via the Assimilative Crimes Act.

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99 See 25 U.S.C. § 1311 (2006); Wetsit v. Stafne, 44 F.3d 823, 825 (9th Cir. 1995) (“That the tribes retain jurisdiction over crimes within the Major Crimes Act is the conclusion already reached by distinguished authorities on the subject.”); Canby, supra note 19, at 190 (“Even before the passage of the [Indian] Civil Rights Act, most tribes had left major crimes other than larceny entirely to the federal government; with the Act’s sentencing limit they have little incentive to change that pattern. Here as elsewhere tribes may choose to exercise less than their maximum jurisdiction.”).

100 See Droske, supra note 21, at 738-39.

101 Id.
III. **Procedural Problems Under Modern Indian Criminal Law**

A. *The Arrest and Investigation*

Since 1824, the “primary instrument” for implementing the federal government’s fiduciary obligations to the Indian tribes has been the Bureau of Indian Affairs (“BIA”), located within the United States Department of Interior. In accordance with the tenets of the federal trust responsibility established in the Marshall Trilogy, the Bureau’s current mission is to “enhance the quality of life, to promote economic opportunity, and to carry out the responsibility to protect and improve the trust assets of American Indians, Indian tribes, and Alaska Natives.”

In terms of criminal jurisdiction, the BIA operates a law enforcement division in accordance with the Indian Law Enforcement Reform Act of 1990. Under this Act, the BIA is responsible for policing Indian country according to federal law, and, with an Indian tribe’s consent, tribal law as well. However, the arrest and investigative duties of the BIA are not exclusive. Tribal, state, and other federal agencies play different roles in policing Indian country depending on a number of circumstances.

1. **Tribal Authority**

Despite the limits imposed on tribes in ruling over non-Indians, Indian tribes have gained general police powers over both Indians and non-Indians in several ways. In 1975,
Congress enacted the Indian Self-Determination and Education Assistance Act, also known as Public Law 93-638, which provided tribes with the opportunity to administer federal programs by making arrangements with the BIA.\(^{111}\) Under this Act, Indian tribes have contracted with the BIA to establish tribal police departments maintaining the “organizational framework and performance standards” of the Bureau’s Division of Law Enforcement Services.\(^{112}\) These federally funded “638 contracts” are administered by tribal governments and employ tribal officers.\(^{113}\) According to the U.S. Department of the Interior, this type of law enforcement arrangement is the most common form of police presence within Indian country.\(^{114}\)

A second way that Indian tribes have gained arrest and investigative powers is through “self-governance compacts” with the BIA.\(^{115}\) Unlike “638 contracts,” “self-governance

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\(^{112}\) See WAKELING, supra note 108, at 7. These types of arrangements, under the Indian Self-Determination and Education Assistance Act are known as “638 contracts.” See Washburn, supra note 107, at 719-20. Several agencies offer programs to acquaint tribal police officers with federal law enforcement standards. These programs are described by Lawrence Armand French, a Psychology Professor and Chair of the Department of Social Sciences at Western New Mexico University, in his book, NATIVE AMERICAN JUSTICE:

The Indian Police Academy offers a fourteen-week Basic Police Training Program as well as four weeks of Basic Detention Training; one week of Basic Radio Dispatcher Training; ten weeks of Basic Criminal Investigator Training; one week of Criminal Investigation and Police Officer In-service Training; one week of Chiefs of Police In-service Training as well as Outreach Training (Indian country criminal jurisdiction; community policing, gangs, and domestic violence; use of force; patrol tactics and procedures; investigative techniques; and range officer safety and survival); and multiple advanced training programs. A twelve-week training program at the FBI National Academy is also available, as is one week of training at the Law Enforcement Executive Command College. The U.S. Attorney’s Office and the Office of Victims of Crime (OVC) also provide five one-week Regional Training Conferences yearly. Graduation data indicate that 23 percent of the officers trained at the IPA come from the Great Plains; 31 percent from the Southwest; 20 percent from the Northeast; 7 percent from Oklahoma tribes; and 6 percent from the southeastern tribes.

FRENCH, supra note 104, at 133.

\(^{113}\) See WAKELING, supra note 108, at 7. Funding for “638 contracts” often includes a tribal contribution. Id.

\(^{114}\) Id. at 8; see Washburn, supra note 107, at 719-20.
“compacts” are based on several amendments to the Indian Self-Determination and Education Assistance Act of 1975\(^{116}\) and provide a much broader degree of Indian control over an adopted federal program such as federal law enforcement.\(^{117}\) Tribal police departments operating under “self-governance compacts” receive block grant financing as opposed to itemized budgets, allowing them to disperse funds efficiently and operate independently.\(^{118}\)

A third method by which tribal police are able to participate in law enforcement within Indian country is by grant or agreement with states that have criminal jurisdiction under Public Law 280.\(^{119}\) However, unlike “638 contracts” or “self-governance compacts,” tribal/state agreements vary greatly in scope and force, and are not governed by a single statutory body.\(^{120}\)

Lastly, some tribal police departments are wholly funded and operated by Indian tribes, without state or federal


\(^{117}\) See WAKELING, supra note 108, at 8.

\(^{118}\) Under section 403 of the Tribal Self-Governance Act of 1994, funding agreements:

[A]uthorize the tribe to plan, conduct, consolidate, and administer programs, services, functions, and activities, or portions thereof, administered by the Department of the Interior through the Bureau of Indian Affairs, without regard to the agency or office of the Bureau of Indian Affairs within which the program, service, function, and activity, or portion thereof, is performed, including funding for agency, area, and central office functions in accordance with subsection (g)(3) of this section, and including any program, service, function, and activity, or portion thereof, administered under the authority of...


\(^{120}\) Id. at 4 n.10 (“Depending on the particular state, tribal police may have full arrest authority over non-Indian individuals. For example, the State of Arizona recognizes tribal police and has through legislation commissioned them with State Peace Officer authority once a tribal police officer completes a State Police Academy. At the other end of the spectrum the State of California does not recognize tribal police officers at all. Throughout the USA tribal police authority to make arrests of non-Indian perpetrators often depends on the whim of a county sheriff and or other delegating authority.”).
assistance. However, due to restraints in criminal jurisdiction over non-Indians and the limited resources in Indian country, tribally funded departments remain the least common and least robust form of law enforcement within tribal lands.

2. State Authority

Under Public Law 280, a number of states exercise criminal jurisdiction over Indian tribes located within the states’ borders. As a result, a large number of tribes depend on state and local authorities for their law enforcement needs. These departments are funded by state and local taxes and are usually subsidized by the state’s non-Indian community. While Public Law 280 states often provide services in areas where tribal policing is difficult due to limited tribal resources, critics believe that the tribal governments themselves should choose the method of law enforcement that serves them best. In addition, state law enforcement often fails to meet the demands of the tribes, resulting in overwhelming dissatisfaction with state policing under Public Law 280.

3. Federal Authority

Along with the BIA’s Division of Law Enforcement Services, the other major federal agency responsible for enforcing and investigating criminal law within Indian country

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121 WAKELING, supra note 108, at 8.
122 Id. at 7-8.
123 See 18 U.S.C. § 1162 (2006); see also supra notes 76-81 and accompanying text.
124 See WAKELING, supra note 108, at 8.
125 Id.
126 Id.
127 See Ada Pecos Melton & Jerry Gardner, Public Law 280: Issues and Concerns for Victims of Crime in Indian Country (2004), http://www.aidainc.net/Publications/pl280.htm (last visited Dec. 1, 2008); see also CAROLE GOLDBERG-AMBROSE & TIMOTHY CARR SEWARD, PLANTING TAIL FEATHERS: TRIBAL SURVIVAL AND PUBLIC LAW 280, at 12 (1997) (noting the dissatisfaction that tribes have with Public Law 280 states’ policing powers in tribal lands and the two main sources of Indians’ frustrations: “First, jurisdictional vacuums or gaps have been created, often precipitating the use of self-help remedies that border on or erupt into violence. Sometimes these gaps exist because no government has authority. Sometimes they arise because the government(s) that may have authority in theory have no institutional support or incentive for the exercise of that authority. I will call this kind of lawlessness the ‘legal vacuum’ type. Second, where state law enforcement does intervene, gross abuses of authority are not uncommon. In other words, power is uncabined by the law that it is supposed to constrain it. I will call this kind of lawlessness the ‘abuse of authority’ type.”).
is the FBI. Under a “Memorandum of Understanding” between the Department of Justice and the Department of the Interior, the FBI and BIA share investigative jurisdiction according to guidelines set out in the United States Attorney’s Manual. A major difference between the FBI and BIA is in the BIA’s preference for utilizing tribal policing through “638 contracts” and “self-governance compacts.” These contracts are exclusively the province of the BIA. Hence, because tribes are not permitted to exercise criminal jurisdiction over felonies, the BIA (including contracted tribal police departments) has largely taken the role of investigating misdemeanors, while the FBI generally handles more serious offenses such as felonies under the Major Crimes Act.

128 See Washburn, supra note 107, at 718-19.
129 See U.S. DEP’T OF JUSTICE, UNITED STATES ATTORNEY MANUAL § 9-20.220 (1997) [hereinafter ATTORNEY MANUAL] (“In 1993, the Department of Justice and the Department of the Interior entered into a memorandum of understanding (MOU) that established guidelines regarding the respective jurisdictions of the Bureau of Indian Affairs (BIA) and the Federal Bureau of Investigation (FBI). See the Criminal Resource Manual at 675. Part IV of the MOU requires each United States Attorney whose criminal jurisdiction includes Indian country to develop local written guidelines outlining the responsibilities of the BIA, FBI, and the Tribal Criminal Investigators, if applicable. See the Criminal Resource Manual at 676, for the full text of MOU.”).
130 See Washburn, supra note 107, at 719-20.
131 Id.
132 Id.; see also ATTORNEY MANUAL, supra § 9-675 (“The FBI has investigative jurisdiction over violations of 18 U.S.C. §§ 1152 and 1153 as well as most other crimes in the Indian country. Frequently, by the time the FBI arrives on the reservation, some investigation will have been undertaken by tribal or Bureau of Indian Affairs (BIA) police. It is recognized that the ability of the tribal and BIA police can vary from reservation to reservation, and United States Attorneys are free to ask for FBI investigation in all cases where it is felt that this is required. However, United States Attorneys are encouraged and authorized to accept investigative reports directly from tribal or BIA police and prepare a case for prosecution without FBI investigation in all cases where it is felt a sufficient investigation can be undertaken by BIA or tribal law enforcement officers. The Indian Law Enforcement Reform Act (ILERA), Pub. L. 101-379, August 18, 1990, codified at 25 U.S.C. §§ 2801-2809, established within the BIA of the Department of the Interior, a Division of Law Enforcement Services (DLES) to carry out the Secretary’s responsibility to provide and assist in the provision of law enforcement services in Indian country. The ILERA directed the Secretary to establish a Branch of Criminal Investigations within the DLES with responsibility for the investigation and presentation for prosecution of violations of 18 U.S.C. §§ 1152 and 1153, under agreement with the Department of Justice, and subject to guidelines to be adopted by the United States Attorneys. A Memorandum of Understanding (MOU) has been signed by the Attorney General and the Secretary of the Interior. United States Attorneys are free to assign investigative responsibilities in accordance with guidelines previously issued, or which they now care to issue. The ILERA also authorizes the Secretary of the Interior, after consultation with the Attorney General, to promulgate regulations relating to the exercise of this law enforcement authority and relating to the consideration of applications for law enforcement contracts under the Indian Self Determination Act, P.L. 93-638, 25 U.S.C. § 450 et seq.”).
For example, under the current scheme, if a non-Indian male were to commit an act of sexual violence against an Indian female, the matter would be exclusively federal per the Major Crimes Act.\(^{133}\) As a result, the FBI would likely commence an investigation, assuming tribal, state, or federal authorities had not already apprehended the perpetrator.\(^{134}\) However, unlike most cases in which the FBI holds jurisdiction, crimes committed in Indian country are unique in several ways, making them problematic to deal with.\(^{135}\)

Most investigations of criminal activity in Indian country are commenced after a particular crime has occurred.\(^{136}\) While this may seem relatively common for state law enforcement, the FBI specializes in prolonged investigations of criminal enterprises as opposed to quick responses to individual crimes.\(^{137}\) Additionally, investigations within Indian country usually do not command the specialized training that FBI agents receive.\(^{138}\)

Crimes committed within Indian country are also considered relatively minor in comparison to the class of criminal matters with which the FBI is familiar.\(^{139}\) The FBI concentrates on “terrorism prevention,” “organized crime,” drug trafficking, and “counterintelligence.”\(^{140}\) Thus, while a “major

\(^{133}\) See N. Bruce Duthu, Op-Ed, Broken Justice in Indian Country, N.Y. TIMES, Aug. 11, 2008, at A17 (author is a professor of Native American studies at Dartmouth and published author on Indian law). See generally supra Parts II.B-C.

\(^{134}\) See Washburn, supra note 107, at 718. American Indians, Crime, and the Law is a Michigan Law Review article written by Kevin K. Washburn, an associate professor at the University of Minnesota Law School and former federal prosecutor in an Indian country district. Much of the information described in his section on federal investigations and prosecutions is taken from his own experience in combination with a long list of “former and current Indian country federal prosecutors,” “federal public defenders,” and “FBI agents.” Id. While Washburn admits his own subjectivity based on his personal experience, he also stresses the numerous sources from which he has gathered his information. All in all, Washburn’s account offers a uniquely personal look into the world of federal law enforcement within Indian country. Id. at 718 n.30.

\(^{135}\) Id. at 718.

\(^{136}\) Id. These investigations are referred to as “reactive,” meaning in response to a singular event such as a rape or murder. This is in contrast to the bulk of the FBI’s investigative work on “proactive” cases, in which an ongoing investigation leads to arrests prior to a particular crime. Id.

\(^{137}\) Id.

\(^{138}\) Id. The FBI is well-known for its “sophisticated law enforcement tools” used in investigating criminal activity. These tools include using “wiretaps, . . . [executing] trap and trace or pen register subpoenas on phone companies, or . . . [working] with informants who have infiltrated a criminal organization.” Id. The relative simplicity of the criminal cases committed in Indian country do not require the use of these investigative tools. Id.

\(^{139}\) Id.

\(^{140}\) Id.
crime” committed in Indian country may have a significant local impact, it carries little relative weight in the eyes of the Bureau and is not typically the province of federal law enforcement agencies such as the FBI.\(^\text{141}\)

FBI agents may also feel overworked and under-motivated due to the unique circumstances presented by investigating crimes within Indian country.\(^\text{142}\) Not only do agents deal largely with cases that are repetitive and relatively simple in character, but also often work alone in “rural settings,” requiring large driving commitments.\(^\text{143}\) Further, federal agents endure unusually high caseloads due to the high crime rates in Indian country.\(^\text{144}\) The combination of these circumstances has inevitably lessened the desirability of working in the Indian Law division of the FBI.\(^\text{145}\)

B. The Prosecution

In contrast to the diverse bodies of law enforcement that police Indian country, the “single most important” prosecutor is

\(^\text{141}\) Id. Washburn notes the irony in semantics of the term “Major Crimes” from a federal law enforcement perspective:

[Though the offenses are “major” and often tremendously important in the communities where these crimes occur, almost all of the crimes are routine, local and simple cases involving violent crimes that, in another context, would be characterized as “common street crimes” and that would not be investigated by federal officials but for the Indian country nexus. . . . As a result, the moniker “major” is somewhat misleading as an expression of FBI interest and prioritization.]

\(^\text{142}\) Id. at 718-19.

\(^\text{143}\) Id. (noting that agents “may travel hundreds of miles of reservation roads in the course of a week’s work”). To address this and the other problems of the FBI in governing criminal law within Indian country mentioned, the FBI developed the “Safe Trails Task Force” in 1994 to promote collaboration between various government agencies on the federal, state, and tribal level. See FBI, Safe Trails Task Force, http://www.fbi.gov/hq/cid/indian/safetrails.htm (last visited Oct. 1, 2009).

\(^\text{144}\) See Washburn, supra note 107, at 719 n.33; Remarks Prepared for Delivery by Grant D. Ashley, http://www.fbi.gov/pressrel/speeches/ashley102804.htm (last visited Jan. 30, 2009) (“Over 100 Special Agents are currently working full-time in support of Indian Country investigative matters. In 2004, those agents initiated nearly 1,900 cases.”).

\(^\text{145}\) See Washburn, supra note 107, at 719 (“Because Indian country tends not to be a prestigious posting, the agents in the RAs are often rookies or ‘first office agents’ who seek transfer as soon as they are eligible, leading to sometimes high turnover among the FBI personnel dealing with Indian country offenses.”). In addition, “[a]ccording to federal law enforcement lore, Indian country RAs once served a punitive role as places to exile FBI agents that fouled up important cases or were otherwise the subject of disfavor within the Bureau.” Id. at 719 n.36.
the United States Attorney. In order to evaluate the consequences of having a sole federal entity responsible for prosecuting crimes within Indian country, it is important to examine the balance between the tremendous power that federal prosecutors have over the administration of criminal justice, and the lack of accountability that they have for their decisions.

1. Prosecutorial Discretion

When it comes to prosecutorial accountability for an unwarranted indictment, the reviewing power of a grand jury is constitutionally protected. A declination to prosecute, on the other hand, is “entirely unreviewable.” Nevertheless,

146 See id. at 725; AMERICAN INDIANS AND CRIME, supra note 10, at vii (“The U.S. attorney’s office is the principal prosecutor of criminal cases for violation of Federal laws in Indian country.”). The United States Attorney acts as the “sole” prosecutor in non-Public Law 280 states for major crimes committed by Indians against Indians, and all crimes committed by non-Indians against Indians within Indian country. While tribal courts also play a role in prosecuting minor crimes committed by Indians against other Indians and state attorneys prosecute state offenses in Public Law 280 states, for the purposes of this note, it is unnecessary to discuss the role of tribal and state prosecutors within Indian country. See generally supra Part II.

147 An argument can be made that the prosecutor has a larger influence on the administration of criminal justice than that of a judge or jury. See Washburn, supra note 107, at 725 n.59 (noting that since ninety-one percent of adjudicated felons plea bargain and judges follow mandatory minimum sentence guidelines, the discretion of a prosecutor in deciding what charge to bring leaves very little flexibility in the hands of the judge or potential jury).

148 In Wayte v. United States, the Court described the unchecked powers of federal prosecutors:

In our criminal justice system, the Government retains “broad discretion” as to whom to prosecute. United States v. Goodwin, 457 U.S. 368, 380, n. 11, 102 S. Ct. 2485, 2492, n. 11, 73 L.Ed.2d 74 (1982); accord, Marshall v. Jerrico, Inc., 446 U.S. 238, 248, 100 S. Ct. 1610, 1616, 64 L.Ed.2d 182 (1980). “[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion.” Bordenkircher v. Hayes, 434 U.S. 357, 364, 98 S. Ct. 683, 688, 54 L.Ed.2d 604 (1978). This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review.


149 Under the Fifth Amendment, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury.” U.S. CONST. art. V. A criminal defendant does, however, have the option to waive this indictment and move forward by means of an information. Fed. R. CRIM. P. 7(b); see also Washburn, supra note 107, at 722-24.

150 Washburn, supra note 107, at 726.
before a declination is made, prosecutors are guided by the standards of the United States Attorney’s Manual.\footnote{151} Under section 9-27.220 of the United States Attorney’s Manual, prosecutors are to seek an indictment if a potential offender’s “conduct constitutes a Federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction.”\footnote{152} Further, a United States Attorney may decline to prosecute a federal offense if it is against a federal interest, the alleged offender would be more appropriately tried in a different jurisdiction, or there is an alternative non-criminal means to resolve the case.\footnote{153} Despite these guidelines, the federal prosecutor still has “tremendous latitude” in deciding whether to pursue an indictment.\footnote{154} United States Attorneys independently and subjectively weigh numerous factors such as the federal priority of enforcing a given crime, the type and gravity of the crime, and the likely sentence upon conviction, without any form of mandated review.\footnote{155} This broad range of discretion presents problems when a federal prosecutor does not act in accordance with the values of a given tribal community.\footnote{156}

In order to best prosecute a crime committed within Indian country, a United States Attorney needs both local knowledge of the Indian communities and their values, and the trust of the people whom the prosecutor protects.\footnote{157} This knowledge and trust is difficult to obtain if a federal prosecutor is detached from the community she represents.\footnote{158} Indian communities are typically closed and suspicious of outsiders,
and federal prosecutors often do not speak the native language and live several hundred miles from tribal villages. This detachment may impair the ability of United States Attorneys to perform tasks essential to successful prosecutions, such as deposing key Indian witnesses, conducting additional investigations, or deciding whether to commence or decline a prosecution based on community prerogative. Further, this detachment may also discourage Indian victims from coming forward with criminal charges altogether.

A prosecutor’s detachment from her respective tribes is additionally frustrating to Indians due to the lack of accountability over a United States Attorney’s actions. Unlike many state prosecutors, United States Attorneys are appointed by the President, and are thus free from political pressure to act in accordance with the community’s will. Moreover, when a United States Attorney decides to decline a prosecution, that prosecutor, while authorized, is not required to submit reports to the tribes stating the reasons for the declination.

159 Id. at 729-30.
160 Id. at 732-33; see also Christopher Chaney, Victim Rights in Indian Country-An Assistant United States Attorney Perspective, 51 U.S. ATTY’S BULL. 36, 38-39 (2003), available at http://www.tribal-institute.org/download/Chaney.pdf. These difficulties are highlighted by the risks of being unfamiliar with a tribe’s culture, which may lead to offending a victim or potential key witness:

In most American cultures, looking someone in the eye is a sign of confidence, sincerity, and honesty. However, among traditional Navajo people, looking someone in the eye is considered to be offensive, an affront, even a challenge to the other person. . . . An AUSA can unwittingly damage a prosecution by innocently offending a victim or witness. . . . [I]t is . . . important to know your witness so that you can tailor your approach to their beliefs, needs, and practices. By showing respect to native people and their unique sensibilities, an AUSA may be able to gain, not lose, and important witness.

161 See Ralph Blumenthal, For Indian Victims of Sexual Assault, a Tangled Path, N.Y. TIMES, April 25, 2007 (noting that since women cannot seek the help of tribal courts, they often feel discouraged from approaching outside prosecutors). Jami Rozell, a “Cherokee woman charging rape by a non-Indian,” describes her preliminary hearing in front of a district attorney in Oklahoma as “the hardest thing I’ve ever done.” In addition, this discouragement is intensified by a cultural stigma against reporting crimes. “Culturally, some advocates said, Indians, fearing humiliation, are often reluctant to press a complaint, seeing it as a test of faith or preferring to ‘let the creator take care of it,’ as one said.” Id.

162 See Washburn, supra note 107, at 730-31.
163 See id.
164 Indian Law Enforcement Reform Act, 25 U.S.C. § 2809(b) (2008). In addition, federal prosecutors are not required to “transfer or disclose any confidential or privileged communication, information, or sources to the officials of any Indian tribe. Federal agencies authorized to make reports pursuant to this section shall, by
2. Lack of Resources in Indian Country

Many of the practical problems involved with the administration of criminal justice in Indian country may be attributed to a lack of adequate resources.\textsuperscript{165} From a policing standpoint, typical departments are considerably underfunded.\textsuperscript{166} This lack of financial assistance has resulted in a shortage of officers, paucity of twenty-four hour patrolling capabilities, outdated equipment and facilities, and reliance on a limited operating budget.\textsuperscript{167} In addition, these problems are exacerbated by the vastness of tribal lands compared to the relatively small resident populations.\textsuperscript{168} For example, the tribally operated San Carlos Tribal Police Department in Arizona employs twenty-five full-time sworn personnel, and polices a population of 10,834 living on a 2911 square mile reservation.\textsuperscript{169} This equates to an assignment of only two full-time sworn officers for every 1000 residents, and only one full-time sworn officer for every 100 square miles.\textsuperscript{170}

However, these ratios alone may not explain the full extent of the policing problem, nor the resources required.\textsuperscript{171} The Department of Justice, in a 2001 report to the National Institute of Justice, explained that statistics based on ratios of police for a given population and area must be adjusted to reflect the level of crime in that location.\textsuperscript{172} Thus, areas of low crime may only require one or two officers for every 1000

\begin{footnotesize}
\begin{enumerate}
\item[166] See Wakeling, supra note 108, at vii (noting that “tribes have between 55 and 75 percent of the resource base available to non-Indian communities”); see also Hart & Lowther, supra note 111, at 210.
\item[167] See Wakeling, supra note 108, at 9-10; see also Hart & Lowther, supra note 111, at 210-11.
\item[168] See WAKELING, supra note 108, at vii.
\item[170] See Hickman, supra note 169, at 2. This problem in coverage is not limited to policing Indian Country. In some districts, the nearest United States Attorney is several hundred miles away. See Troy A. Eid, Point: Beyond Oliphant: Strengthening Criminal Justice In Indian Country, 54 FED. LAW., Mar-Apr. 2007, at 40, 42.
\item[171] See Wakeling, supra note 108, at vii.
\item[172] Id.
\end{enumerate}
\end{footnotesize}
residents, while places of high crime, such as Indian country, may require a significantly larger police presence.\footnote{173}

IV. THE TRIBAL LAW AND ORDER ACT OF 2008; ALTERNATIVE STATUTORY PROPOSALS

In order to combat overwhelming levels of crime in Indian country, Senator Byron Dorgan introduced the Tribal Law and Order Act of 2008, which aims to boost policing efforts, develop more comprehensive systems of communication and data collection, and raise prosecutorial accountability standards.\footnote{174}

A. Declination Reports; Taking Steps to Foster Prosecutorial Accountability

The first problem that the Bill attempts to remedy is the high percentage of criminal cases declined by United States Attorneys every year.\footnote{175} Section 102 of the Bill proposes that enforcement officials and United States Attorneys submit

\footnotetext[173]{Id. Wakeling explains how police-to-citizen ratios may vary:

The appropriate police coverage (police officers per thousand residents) comparison may not be between Indian departments and departments serving communities of similar size, but between Indian departments and communities with similar crime problems. Given that the violent crime rate in Indian Country is between double and triple the national average comparable communities would be large urban areas with high violent crime rates. For example, Baltimore, Detroit, New York City, and Washington, D.C., feature high police-to-citizen ratios, from 3.9 to 6.6 officers per thousand residents. Few, if any, departments in Indian Country have ratios of more than 2 officers per thousand residents.

Id. (citations omitted). Academics also attribute the “lack of enthusiasm” by federal law enforcement agencies and prosecutors as a leading cause of high crime rates within Indian country. See Washburn, supra note 107, at 714. According to N. Bruce Duthu, a professor of Native American studies at Dartmouth and published author in the field of Indian law, this situation presents a problem based on prosecutorial declinations for rape cases. N. Bruce Duthu, Broken Justice in Indian Country, N.Y. TIMES, Aug. 1, 2008, at A17 (“[L]aw enforcement in sexual violence cases in Indian country is haphazard at best, recent studies show, and it rarely leads to prosecution and conviction of non-Indian offenders . . . . The Department of Justice’s own records show that in 2006, prosecutors filed only 606 criminal cases in all of Indian country. With more than 560 federally recognized tribes, that works out to a little more than one criminal prosecution for each tribe.”).}


\footnotetext[175]{Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 102, 2(a)(10) (2008).}
detailed reports to both tribal justice officials and the Office of Indian County Crime when a case is declined or terminated. These declination reports must include the type of crime alleged, the ethnicity of the victim and the accused (Indian/non-Indian), and the reasons for declining the investigation or prosecution. United States Attorneys who decline cases are also required to communicate with tribal officials, in a timely fashion to avoid running a tribal statute of limitations, the details of a declined case to allow for tribal prosecution in tribal court. Lastly, under the Bill, the Director of the newly created Office of Indian Country Crime is responsible for collecting information on these declination reports and submitting an annual report to Congress.

This section is particularly effective in two ways. First, the mandatory coordination between United States Attorneys and Tribal officials occurring after federal cases are declined greatly increases the chances that tribal prosecutors will be able to subsequently bring a successful case in tribal court. The requirement of timely coordination between federal and tribal officials also significantly diminishes the likelihood that cases will be brought after the statute of limitations has run. In cases involving serious offenses, delays in prosecution can result in grave consequences. Increased communication under

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176 A “tribal justice official” is a defined term in the Bill meaning either a tribal prosecutor, tribal law enforcement officer, or any other person responsible for investigating or prosecuting an alleged criminal offense in tribal court. Id. § 3(b)(10).
177 The Office of Indian Country Crime would be a new criminal division of the Department of Justice. See id. § 12.
178 See id. § 102. The Indian Law Enforcement Reform Act of 1990 previously “authorized” law enforcement officials or United States Attorneys to submit declination reports, but did not require them to do so nor did it establish any standards as to what information should be included in such reports. Indian Law Enforcement Act of 1990, 25 U.S.C. § 2809 (1990).
180 In addition, the declination report may include a case file, “including evidence collected and statements taken that could support an investigation or prosecution by the appropriate tribal justice officials.” Id. § 102(c).
181 Id. § 102(a)(2).
182 Id. § 102(b).
184 For example, on Montana’s Crow reservation, in the case of the alleged rape of a 6-year-old girl by a family member, the FBI had taken up an investigation that lasted over three years. When a tribal prosecutor eventually tried to bring the case to tribal court, he was unable to move forward due to the FBI’s delay, which had
Section 102 of the Bill also requires that United States Attorney’s share case details, work-product, and evidence with tribal justice officials.\(^{185}\) This coordination is essential to ensure that tribal prosecutors are able to bring the most effective prosecution in a case that has been declined by a United States Attorney.\(^{186}\)

Second, the mandatory submission of declination reports to tribal justice officials and the Office of Indian Country Crime expands the collection of data and flow of information between various law enforcement agencies, greatly increasing the accountability of United States Attorneys.\(^{187}\) Ideally, these reports will identify the reasons why cases are being declined and prompt a more efficient allocation of resources.\(^{188}\) However, Indian tribes might benefit if several changes were made to Section 102.

With regard to the declination reports, it would be advantageous if each case were at least referred to a federal prosecutor for evaluation on the merits.\(^{189}\) By doing so, officers would gain legal insight that would be used to combat crime in Indian country more efficiently.\(^{190}\) In addition, the Bill does not explicitly take into consideration the confidential nature of these declination reports and their potential discoverability in

\(^{185}\) Id.; see Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 102.

\(^{186}\) See Federal Declinations Hearings, supra note 182, at 43 (statement of M. Brent Leonard).

\(^{187}\) See Federal Declinations Hearings, supra note 182, at 37, 39 (statement of Thomas B. Heffelfinger, Partner, Best and Flanagan, LLP).

\(^{188}\) See id. at 35-36.

\(^{189}\) This and the subsequent proposals were discussed in a number of testimonies made during the Senate Committee on Indian Affairs hearing on the Tribal Law and Order Act on September 18, 2008. See id. at 35.

\(^{190}\) Id. at 9 (statement of Drew H. Wrigley, U.S. Att’y for the District of North Dakota).
By making declination reports available to the public, not only would private information regarding victims and witnesses be available to the sometimes very small Indian communities, but the reasons for declining a case against a particular defendant may be used against the prosecution in subsequent cases involving the same defendant. In order to avoid these potential problems, Section 102 should be amended to make all declination reports confidential, and include an indemnification clause to prohibit federal officials’ civil liability based on the information contained in these reports.

Even though declination reports would likely provide a wealth of information that could be used in the future to improve criminal justice in Indian country, some worry that these reports may be misconstrued if taken out of context, suggesting that United States Attorneys are not working hard enough. In reality, there are many reasons why a case may be

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191 Id. at 36 (statement of Thomas B. Heffelfinger); id. at 9 (statement of Drew H. Wrigley).
192 Id. at 9-10. Drew Wrigley, the United States Attorney for the District of North Dakota, testified as to a case out of the District of South Dakota that was compromised due to the discovery of a declination letter. According to Mr. Wrigley, the District of South Dakota declined to prosecute a case based on “weak or insufficient admissible evidence and a potential witness problem.” Id. at 9. In a subsequent case involving the same accused individual, the victim from the declined case was called as a witness and the defense entered the declination letter into evidence. During summation, the defense attorney suggested that the witness’s testimony was not credible based on the reasons stated in the previous case’s declination letter. Mr. Wrigley did not state the ultimate outcome of the case in his example. See id.
193 See id. at 36 (testimony of Thomas B. Heffelfinger). In terms of confidentiality, while such an amendment would prevent public disclosure, there is no explicit requirement that declination reports be made publicly available. To the contrary, under Section 102, declination reports are only required to be sent to the Office of Indian Country Crime (a proposed division of the Department of Justice), a tribal justice official, and as an annual report to Congress. While tribal justice officials may disclose these reports to a tribe, there is no requirement that they do so. See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 102 (2008); see Federal Declinations Hearings, supra note 182, at 42 (testimony of M. Brent Leonard). In addition, under the Freedom of Information Act, declination reports may be exempt from public disclosure if “compiled for law enforcement purposes . . . [and if they] could reasonably be expected to interfere with enforcement proceedings.” See 5 U.S.C. § 552(b)(7)(A) (2006); see Federal Declinations Hearings, supra note 182, at 42 (testimony of M. Brent Leonard). Lastly, the annual submission of declination reports to Congress does not waive any disclosure exemptions under the Freedom of Information Act. See Kanter v. Internal Revenue Service, 433 F. Supp. 812, 825 n.22 (N.D. Ill. 1977).
194 See Federal Declinations Hearings, supra note 182, at 37 (testimony of Thomas B. Heffelfinger). In his testimony in front of the Senate Committee on Indian Affairs, former United States Attorney for the District of Minnesota Thomas B. Heffelfinger described how misconceptions regarding declination rates in Indian Country could not be farther from the truth:
declined irrespective of individual job performance. The most common of these reasons being that there is insufficient evidence to prosecute.\footnote{195} In light of this misconception, it is important to next look at how the Bill addresses the problems that law enforcement officials have with obtaining sufficient evidence to prosecute a criminal case in Indian country.

B. Insufficient Evidence to Prosecute; Fixing Investigative and Policing Systems

Declining a case for a lack of sufficient evidence stems from problems with the infrastructure or the implementation of policing systems in Indian country.\footnote{196} One way the Bill attempts to remedy these problems is by improving the overall communication between federal and tribal officials.\footnote{197} Section I am concerned that the requirement for declination reports could create the incorrect implication that declinations in the United States Attorneys’ Offices are due to a lack of commitment and effort by federal law enforcement and prosecutors working in Indian Country. In reality, federal agents and prosecutors who address crimes in Indian Country are among the most dedicated and hard-working prosecutors and agents in the federal law enforcement system. These men and women work under difficult conditions with extremely large case loads and deal with some of the most emotionally-charged cases that federal prosecutors and agents can face. It is my experience, based upon approximately 13 years as a federal prosecutor, that cases are not declined because the agents and the Assistant United States Attorneys lack commitment to justice in Indian Country.

\textit{Id}.\footnote{195} \textit{Id.} While the most common reason that cases are declined is due to a lack of sufficient evidence to prove beyond a reasonable doubt a violation of the law, there are a number of other reasons that have no relation to a prosecutor’s job performance. These reasons include jurisdictional barriers, limited resources, and a lack of confidence in obtaining a conviction. \textit{See id.} at 37-38 (testimony of Thomas B. Heffelfinger); \textit{id.} at 42 (testimony of M. Brent Leonard); \textit{see also} Broken Justice, \textit{supra} note 1 (“You gotta look at what is actually brought to the prosecutor in terms of a case that provides a viable prosecution. We, ethically, can’t do anything that is not brought to us that establishes probable cause in a court. So, if we don’t get a quality investigation, you know we’re not gonna be able to do anything.”).

\textit{Id.}\footnote{196} \textit{See Federal Declinations Hearings, supra} note 182, at 37-39 (testimony of Thomas B. Heffelfinger).

\textit{Id.}\footnote{197} \textit{See Tribal Law and Order Act of 2008, supra} note 1, 303 (2008). Section 101 of the Bill adds to the list of duties of the Bureau of Indian Affairs’ Division of Law Enforcement Services:

(10) communicating with tribal leaders, tribal community advocates, tribal justice officials, and residents of Indian land on a regular basis regarding public safety and justice concerns facing tribal communities; (11) conducting meaningful and timely consultation with tribal leaders and tribal justice officials in the development of regulatory policies and other actions that affect public safety and justice in Indian country.

\textit{See id.} § 101.
104 of the Bill expands the duties of the Office of Tribal Justice, deeming it the chief “point of contact” for tribal/federal correspondence regarding “public safety and justice” in Indian country.\(^{196}\) In addition, Section 303 allows Indian law enforcement agencies to “directly access” national criminal information databases.\(^{199}\)

The Bill also increases investigative efforts in Indian country by empowering tribal law enforcement agencies.\(^{200}\) One way the Bill does this is by permitting tribal law enforcement officials to obtain training at available state and local police academies, so long as those training facilities meet the standards established by the Secretary of the Interior.\(^{201}\) Another way the Bill empowers tribal officials is by encouraging the use of cooperative teams of federal, state, and tribal officials to work together in the policing of Indian country.\(^{202}\) In order to promote cooperation between the various agencies, the Bill offers incentives such as federal grants, technical assistance, and regional training.\(^{203}\) This team-based method of policing will likely reduce investigative delays\(^{204}\) and increase law enforcement enthusiasm by including officials

\(^{196}\) See id. § 104. The Office of Tribal Justice exists as part of the Department of Justice and serves as the “primary channel of communication for Native Americans with the Department of Justice.” See Office of Tribal Justice, http://www.usdoj.gov/otj/ (last visited Jan. 30, 2009). The Tribal Law and Order Act would make this office a “permanent division of the Department” by providing “such personnel and funds as are necessary.” See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 104(a) (2008). Further, the Bill provides that the Office of Tribal Justice coordinate with federal agencies within the Department of Justice to oversee that tribal leaders have a role in developing law enforcement policies. See id.


\(^{200}\) Id. §§ 301-305.

\(^{201}\) Id. § 301(a).

\(^{202}\) The Bill includes three main sources of these cooperative teams: Under Section 202, State, tribal, and local governments are encouraged to enter into “Cooperative Assistance Programs,” which relate to “mutual aid, hot pursuit of suspects, and cross-deputization.” See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 202 (2008). Secondly, under Section 301(b), the Secretary of the Interior is responsible for overseeing the implementation of “Special Law Enforcement Commissions,” which involve federal, state, and tribal officials working together to police Indian Country. See id. § 301(b). Lastly, Sections 302(c) and (d) amend the Controlled Substance Act (21 U.S.C. § 873) to allow tribal officials to enter into cooperative arrangements with state and federal drug enforcement agents. See id. § 302(c)-(d).

\(^{203}\) See id. §§ 202, 301.

\(^{204}\) See Federal Declinations Hearings, supra note 182, at 38 (testimony of Thomas B. Heffelfinger) (“Delay is, unfortunately, a frequent factor in Indian Country investigations and prosecutions. This delay may be attributable to jurisdictional considerations, lack of resources, remote location or difficulties in obtaining witnesses or witness cooperation.”).
from local tribal communities. Similar programs have been successfully implemented in areas of rural America to provide better policing coverage.

These cooperative programs may greatly help to close some of the law enforcement gaps in Indian country, but would only be effective if utilized extensively. Further, the use of incentives such as “technical assistance” and federal “grants” to encourage these programs do not sufficiently ensure that these programs will be implemented. If the Bill were able to provide for concrete monetary funding commitments, these programs would have the resources they need in order to expand the total police presence in Indian country. As the situation stands today, the BIA would have to triple its current working force in order to police Indian country with coverage and efficiency comparable to other rural communities.

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205 See WAKELING, supra note 108. When Indian reservations receive inadequate federal policing, and tribal governments are legally unable to participate, communities are left with poor expectations and low morale. See Riley, supra note 16 (“Many people on reservations no longer expect justice.”). Thus, by encouraging the use of special law enforcement commissions, tribal governments will be able to become more involved with federal investigative efforts while simultaneously improving law enforcement coverage in Indian Country. Such commissions would be valuable by unifying policing efforts instead of promoting separate overlapping agencies like many current criminal jurisdictions in Indian Country.

206 See Federal Declinations Hearings, supra note 182, at 39 (testimony of Thomas B. Heffelfinger) (“Cooperative law enforcement services, such as Child Advocacy Centers, drug task forces and crime labs . . . can effectively enhance law enforcement in both Indian Country and non-Indian Country. Current cooperative efforts, such as the FBI’s Safe Trails Task Forces and the Family Advocacy Center of Northern Minnesota, have proven the effectiveness of this strategy.”); see supra note 143.

207 These cooperative agreements are similar to the 638 contracts and self-governance compacts by means of their ability to empower tribal officials. See Eid, supra note 170, at 40 (“Ute Mountain has become a haven for all kinds of criminals—Indian and non-Indian alike—who confront a capable but chronically short-staffed law enforcement presence. Only five police officers—all from the U.S. Department of the Interior’s Bureau of Indian Affairs (BIA)—patrol a reservation about the size of Rhode Island. Sometimes just one BIA police officer is available on call, resulting in response times of more than one hour.”); supra notes 16-17, 19.


209 See Eid, supra note 170, at 42 (“According to the consultant’s estimate, BIA had a 69 percent unmet staffing need for law enforcement officers and a 61 percent unmet need for correctional facilities and programs. In addition, the report concluded that tribes should hire 1,059 new law enforcement officers, based on a staffing gap of 33 percent in that category, and 341 correctional officers based on a 24 percent staffing gap.”).

210 See id. at 42 (“The consultant’s report recommended that the BIA hire 1,097 new employees to achieve parity in criminal justice and corrections programs. By comparison, the BIA’s Office of Justice Services currently has about 450 total employees on its payroll.”).
C. Fundamental Problems Not Addressed by the Bill; Solutions for the Future

Notwithstanding the positive changes to Indian law, the Bill does not address some of the more fundamental problems with law enforcement in Indian country. For instance, the Bill does not address the fact that the FBI is simply not geared to deal with “reactive” cases. Reactive cases, such as rape, domestic violence, and assault, require an actively patrolling police network “on the ground” because of the problems associated with investigative delay. While the Bill successfully expands the powers of tribal and BIA police, it does not attempt to unite these groups with the FBI or other law enforcement agencies dealing with Major Crimes in Indian country. Unifying law enforcement and prosecution would

211 See Federal Declinations Hearings, supra note 182, at 53 (statement of Thomas W. Weissmuller, Chief Judge, Mashantucket Pequot Tribal Nation); Washburn, supra note 107, at 718; supra Part III.A.3; supra note 129 and accompanying text.

212 See Federal Declinations Hearings, supra note 182, at 53 (testimony of Thomas W. Weissmuller); supra Parts III.A.3, III.B.2. For most major crimes committed within Indian Country, a case changes hand several times. A case report may travel from the initial hands of tribal or Bureau of Indian Affairs police officers, to those officers’ supervisors, who refer the case to tribal prosecutors. If that case is a Major Crime, it is referred to federal investigators such as the FBI. After FBI officials conduct their own investigations, they may meet with Assistant United States Attorney Indian Law Liaisons to refer the matter to a number of other criminal divisions within the Department of Justice, such as the Organized Crime and Racketeering Division or Child Exploitation and Obscenity division. This entire exchange of information is done before the case reaches the hands of a United States Attorney for prosecution, assuming there is enough evidence to prosecute in the first place. Federal Declinations Hearings, supra note 182, at 53 (testimony of Thomas W. Weissmuller). According to Thomas W. Weissmuller, Chief Judge of the Mashantucket Pequot Tribal Nation, “[t]his system is not designed to handle reactive cases.” Id.; see also id. at 11 (testimony of Drew H. Wrigley).


214 Under the current arrangement between the BIA and the FBI, the FBI handles Major Crimes while the BIA handles less serious crimes. See Washburn, supra note 107, at 719-20; see also supra note 132 and accompanying text. Instead of consolidating the various law enforcement agencies, the Bill mandates the use of additional levels of bureaucracy, such as Assistant United States Attorney Tribal Liaisons. See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 103(b) (2008). These Tribal Liaisons would serve as a communication link between tribal leaders and United States Attorneys in a given district and coordinate federal prosecutions of Indian Country crime. Id. While Tribal Liaisons are an important means to bridge the gap in communication between United States Attorneys and tribal leaders, the Bill does not address the reasons why this gap exists in the first place. Further, in districts where the United States Attorney interacts with tribal leaders on a regular basis, this communication gap does not exist. Rather, a trust relationship is formed between federal prosecutors and tribal officials. Federal Declinations Hearings, supra note 182, at 48 (statement of Janelle F. Doughty, Director, Department of Justice and Regulatory, Southern Ute Tribe) (“It is my belief that actual personal interaction is
effectively streamline Indian country policing efforts and reduce complications associated with delay.213 Under the current dual system of investigation, federal investigators often become involved after tribal and BIA police conduct preliminary investigations.214 Due to this overlap in law enforcement duties, FBI agents may commence their investigation after outdoor evidence is destroyed, memories faded, and some witnesses became unavailable or uncooperative, thus jeopardizing the success of a given case.215 Therefore, in order to alleviate the difficulties associated with the current divide in law enforcement duties, the Bill should unify efforts in Indian country so that resources are used more efficiently and all officers are prepared to deal with the unique challenges of policing Indian country.216

Another area of Indian law that the Bill fails to adequately address is tribes’ inability to effectively punish those who commit crimes within Indian country.217 In terms of irrepeaceable in developing strong working relationships. With isolation from the prosecutorial system, we drastically limit common understanding.”); see id. at 53 (testimony of Thomas W. Weissmuller).

See generally Federal Declinations Hearings, supra note 182, at 50-55 (testimony of Thomas W. Weissmuller). In cases of rape or domestic abuse, these complications from delay can be devastating. For example, in under-funded tribal jurisdictions, while a Major Crimes case is in the process of changing hands between federal law enforcement officials, the alleged perpetrator may remain free until federal charges are brought and an arrest is made. In cases involving domestic violence or child abuse, this may result in an abusive parent continuing to live in the same home as the victim. See id. at 52 (testimony of Thomas W. Weissmuller). Michael Riley, a reporter for the Denver Post, describes how the divided system of law enforcement affects federal prosecutions:

It’s a triage situation where the FBI has a certain amount of resources, so they depend on the tribal police investigators to do a lot of the investigation, which creates some problems because the tribal investigators are not as well trained, often make mistakes. They can contaminate evidence. It creates a problem for the U. S. attorneys, who will complain that many of the cases they receive simply are poorly investigated and part of it has to do with that combination between the duties of tribal police and the FBI and how those are split.

See Broken Justice, supra note 1.

See Federal Declinations Hearings, supra note 182, at 53 (testimony of Thomas W. Weissmuller) (“When a case dove-tails into two jurisdictions, efforts are frequently duplicated and the several levels of discretion are revisited.”); id. at 8-9 (testimony of Drew H. Wrigley).

Id. (testimony of Drew H. Wrigley); see also Washburn, supra note 107, at 719-20; see also supra note 132 and accompanying text.

See supra notes 135-145, 165-175 and accompanying text.

This specifically refers to the inability of tribal governments to exercise criminal jurisdiction over non-Indians and the inability of tribal courts to punish any criminals with a sentence of over 1 year in jail or a $5000 fine. See Christopher B. Chaney, Overcoming Legal Hurdles in the War Against Meth in Indian Country, 82
the sentencing authority of tribal courts, the Bill does amend
the Indian Civil Rights Act of 1968 to increase maximum
sentencing limits from one year to three years and increase
maximum fines from $5000 to $15,000. However, while this
increase in sentencing authority is commendable, it would
serve tribes better if they were permitted to punish criminals
at comparable levels to state or federal jurisdictions.

The primary reason for increasing tribal sentencing
authority is that the current one-year limit is grossly
inadequate when compared to the average sentencing limits for
states’ lowest level felonies, let alone more serious crimes such
as rape and murder. For example, in one tribal case in which
the federal statute of limitations had run (presumably from
delay), an Indian man was successfully convicted in tribal court
for drugging and raping a thirteen-year old girl. Even though
the trial was conducted in accordance with the procedural
standards imposed in federal court, the defendant was
sentenced to only one year imprisonment and fined $5000, the
statutory maximum under the Indian Civil Rights Act of

N.D. L. Rev. 1151, 1158-1164 (2006) (“There are two types of legal hurdles to effective
law enforcement in Indian country. The first is the ban on tribal criminal jurisdiction
over non-Indians as set forth in the antiquated Oliphant decision. The second hurdle is
the sentencing restrictions imposed on tribal courts by the Indian Civil Rights Act.”);
supra notes 90, 94.

The three-year maximum sentencing authority was initially chosen based on the fact
that assault was the most common federally prosecuted crime, and the most common
sentence was 34 months. See Federal Declinations Hearings, supra note 182, at 45
(testimony of M. Brent Leonhard).

See Federal Declinations Hearings, supra note 182, at 44-45.

See id. (“[A]ccording to a memo previously submitted into the Senate
record by [M. Brent Leonhard] and Cisco Minthorn, of the states that define felonies,
the majority define their lowest level felony as having a maximum sentence of 5
years.”). This notion is particularly upsetting given that Indians lay victim to violent
crime at more than twice the rate of other racial groups and declination rates in Indian
Country are at 65%. See AMERICAN INDIANS AND CRIME, supra note 10, at 5; see also
Broken Justice, supra note 1.

See Federal Declinations Hearings, supra note 182, at 52 (testimony of
Thomas W. Weissmuller). The offender in this case was in his late twenties. After the
girl was reportedly missing, two family members went searching for her. They found
her unconscious in a bedroom of a friend’s house, “laid over a pile of blankets, face
down so her bottom was elevated.” A “team of cross-commissioned law enforcement
officers” investigated the scene using a forensic “rape kit” to collect samples from the
victim and offender’s bodies. Id.

Id. (“The trial was managed pursuant to the federal rules of evidence and
the tribal rules of procedure, which basically mirrored the federal rules. All witnesses
were cross examined by defense counsel and the defense called supporting witnesses.”).
A lack of adequate tribal sentencing authority in situations such as these is unacceptable. If tribal governments were able to punish criminals with reasonable sentences instead of the current one-year limit imposed by the Indian Civil Rights Act of 1968, communities would be able to take better charge of their own criminal prosecutions, thus boosting overall confidence in tribal justice.

The Bill also fails to address the inability of tribes to punish non-Indian offenders, as opined by the Court in *Oliphant v. Suquamish Indian Tribe*. Allowing tribal governments to prosecute non-Indian offenders would close a jurisdictional loophole that has attracted non-Indian criminals to tribal lands. One area of crime where this gap in jurisdiction has been greatly exploited in recent decades is in drug trafficking, specifically in methamphetamine. However, the consequences of prohibiting tribal governments from exercising criminal jurisdiction over non-Indian offenders

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225 Id. Had the matter been adjudicated in federal court, “the defendant might have received 18 years.” *Id.; see* Indian Civil Rights Act, PUB. L. NO. 90-284, 82 Stat. 73 (1968) (current version at 25 U.S.C. §§ 1301-1303 (1986)).

226 See *Federal Declinations Hearings, supra* note 182, at 52 (testimony of Thomas W. Weissmuller). In the current example, the offender only ended up serving nine months out of the one year sentence due to overcrowding in local prisons. *Id.* Also consider that for some offenses, such as those involving drug or alcohol abuse, longer sentences are primarily meant to rehabilitate an offender. *See* Chaney, *supra* note 219, at 1162-63. For example, in cases of convicted methamphetamine addicts, treatments usually require several months for placement and over a year of treatment to be effective. Thus, offenders’ sentences tend to expire before treatment is completed. *Id.* This problem is exacerbated by the unusually high prevalence of drug and alcohol abuse among offenders and recidivism in Indian Country. *See* AMERICAN INDIANS AND CRIME, *supra* note 10, at 10, 22-24.

227 It is important to note that the current system divides misdemeanor and felony prosecution between tribal and federal officials not by the Major Crimes Act, but by the practicality of prosecuting felonies through tribal courts with sentencing limits of only one year. The Major Crimes Act simply gives the United States concurrent jurisdiction over most felonies committed on federal lands, including Indian Country. *See supra* Part II.C; see also Wetsit v. Stafne, 44 F.3d 823, 825 (9th Cir. 1995); Eid, *supra* note 170, at 42-44.


229 *See* Eid, *supra* note 170, at 46. Due to this jurisdictional loophole and other problems with law tribal law enforcement, Indian reservations have come to be known as, “lawless lands.” *See* Riley, *supra* note 16; Michael Riley, *Principles, Politics Collide, Denver Post*, Nov. 13, 2007, available at [http://www.denverpost.com/lawlesslands/ei_7446439 (“Tribal police in Nevada, eastern Michigan and elsewhere complain that federal prosecutors consistently decline cases of employees who embezzle from tribal casinos, in some instances stealing tens of thousands of dollars. Because those employees often are non-Indian, they are beyond the jurisdiction of tribal courts, making the crime virtually risk free.”)].

230 *See* Chaney, *supra* note 219, at 1151 (“Methamphetamine is ‘public enemy number one’ for many tribes within the United States.”).
stretch beyond merely creating a jurisdictional safe haven for drug traffickers.\footnote{Id. at 1152; see also The Problem of Methamphetamine in Indian Country: Hearing Before the S. Comm. on Indian Affairs, 109th Cong. 97-98 (2006) (statement of Kathleen W. Kitcheyan, San Carlos Apache Chairwoman).} Non-Indian methamphetamine dealers have actually developed tribal “business plans” by producing drugs on Indian lands and subsequently targeting the tribes’ native population for clientele.\footnote{See Chaney, supra note 219, at 1156 (internal citation omitted). This “business plan” has become popular for two chief reasons: First, drug dealers have the perception that Indian Country is indeed a “lawless land” where they can conduct illegal activities with little worry. Second, Indians are known as having alcohol and drug addictions, making them a vulnerable population for methamphetamine dealers. These two factors make Indian Country a prime target for drug traffickers. Id. at 1155-56 (“Native Americans have the highest rate of methamphetamine abuse of any ethnicity in the United States.”); see Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 2(a)(17) (2008) (“[T]he Department of Justice has reported that drug organizations have increasingly targeted Indian country to produce and distribute methamphetamine, citing the limited law enforcement presence and jurisdictional confusion as reasons for the increased activity . . . .”).}

Methamphetamine addiction in Indian country has resulted in horrific consequences to the welfare of tribal populations.\footnote{See Chaney, supra note 219, at 1164 (“The impact of methamphetamine is devastating and has an unacceptably high cost on lives, families, and tribal cultures.”).} Aside from the well-known health problems associated with methamphetamine addiction,\footnote{See DEA Factsheet, http://www.usdoj.gov/dea/pubs/pressrel/methfact02.html (last visited Oct. 8, 2009). Methamphetamine has been associated with a large number of health dangers including increased heart rate, blood pressure, body temperature, and rate of breathing. Methamphetamine may also cause brain damage, paranoia, and psychosis like that found in schizophrenics. These psychological symptoms may result in hallucinations and self-mutilation. Further, the withdrawal process usually is accompanied by severe depression. Id.; see Chaney, supra note 219, at 1152 (“Recent testimony before the United States Senate Indian Affairs Committee noted that on the San Carlos Apache reservation, twenty-five percent of babies born on the reservation were born addicted to methamphetamine.”).} those addicted are also more likely to commit violent crimes such as assault, child abuse, and domestic violence.\footnote{See DEA Factsheet, http://www.usdoj.gov/dea/pubs/pressrel/methfact01.html (last visited Jan. 30, 2009) (“There is a direct relationship between methamphetamine abuse and increased incidents of domestic violence and child abuse.”); Chaney, supra note 219, at 1154.} One way that the Bill deals with these substance abuse problems is by expanding the use of educational programs for tribal youth and rehabilitation programs for drug abusers.\footnote{See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 401(a)(2)(E) (2008) (extending grants for tribal action substance abuse plans through 2013); see also id. § 401(b)(a)(1) (creating pilot programs to educate youth on the dangers of alcohol and substance abuse); id. § 401(c) (increasing funding for emergency shelters and halfway houses for youth substance abusers who have been arrested for drug or alcohol abuse related offenses); id. § 401(g) (extending funding for juvenile detention centers).} While these programs will likely
provide much needed assistance for tribal members seeking help and hopefully reduce tribal demand for methamphetamine, tribal governments are still left without the legal authority to confront the suppliers of these drugs themselves.\footnote{237 See Chaney, supra note 219, at 1155-60 (noting the success of drug prevention and rehabilitation programs in reducing methamphetamine demand while simultaneously addressing the legal hurdles to confronting non-Indian offenders).}

Non-Indian participation in crimes involving Indian victims is not limited to trafficking methamphetamine.\footnote{238 See AMERICAN INDIANS AND CRIME, supra note 10, at 8-9.} This problem is most pronounced in cases of rape and sexual assault, where eighty-six percent of offenders are non-Indian.\footnote{239 See id. at 9. This trend can be seen across all crimes involving Indian victims. Indian victims of violent crime reported that 66% of offenders were non-Indian. Id.} This statistic is particularly unsettling given that sexual violence committed against Indian women has reached disturbing levels.\footnote{240 See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 2(a)(13)(A) (2008); see also Amnesty International, USA: Authorities Fail to Protect Indigenous Women From Shocking Rates of Rape, http://www.amnesty.org/en/library/info/AMR51/071/2007 (follow “PDF” link) (last visited Oct. 24, 2009).} According to the Department of Justice, one in three Indian women will be raped in her lifetime, most likely by a complete stranger, as opposed to an intimate partner, family member, or acquaintance.\footnote{241 See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 2(a)(13)(B) (2008). In addition, approximately two out of five Indian women will be subject to domestic violence. Id. § 2(a)(13)(C); see also AMERICAN INDIANS AND CRIME, supra note 10, at 8; N. Bruce Duthu, Opinion, Broken Justice in Indian Country, N.Y. TIMES, Aug. 10, 2008, at A17.} Due to the gravity of the problems associated with non-Indian crime in Indian country, it is unclear why this Bill does not propose expanding tribes’ criminal jurisdiction over non-Indians.\footnote{242 This notion is also odd considering that the Bill addresses the lack of tribes to prosecute non-Indians in its “Findings” section. See Tribal Law and Order Act of 2008, S. 3320, 110th Cong. § 2(a)(9) (2008); see supra note 96 and accompanying text.}

The Supreme Court in Oliphant noted that one reason for this limitation in criminal jurisdiction was to protect the constitutional civil liberties of non-Indians in tribal court.\footnote{243 See Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 210 (1978) (“The power of the United States to try and criminally punish is an important manifestation of the power to restrict personal liberty.”); see also Eid, supra note 170, at 45-46.} However, since the Oliphant decision in 1978, many tribal governments have advanced their justice systems, protecting constitutional rights such as ensuring due process and
providing an unbiased jury pool.\textsuperscript{244} Thus, Congress should permit tribal governments to exercise criminal jurisdiction over non-Indians, so long as tribal courts are held to the same procedural standards as federal courts.\textsuperscript{245} By repealing \textit{Oliphant}, Congress would effectively close the jurisdictional loophole that has enticed non-Indian criminals to tribal lands, while simultaneously granting tribal governments the judicial independence necessary to take command over the problems caused by drug trafficking and violent crime.\textsuperscript{246}

V. \textbf{Conclusion}

If violent crime occurred in any other community at the levels at which it occurs on Indian reservations, it would be reasonable to expect a local anti-crime movement or increased enrollment in the local police academy. However, when the power to take responsibility for the problems within a community is severely weakened by federal laws that are as

\textsuperscript{244} Eid, \textit{supra} note 170, at 45-46 ("Building on President Richard M. Nixon’s Indian self-determination policy, many tribal governments are undergoing what has been compared to a renaissance, gaining substantially increased governmental sophistication and economic development."); \textit{See Chaney, supra} note 219, at 1158-59 ("Navajo Nation law used to only allow Navajo tribal members to sit on tribal court juries. In \textit{Navajo Nation v. MacDonald}, the Navajo Nation Supreme Court adopted the 'fair cross section of the community' concept. In addition, the Navajo Nation Code has been amended to no longer require tribal membership as a juror qualification. In fact, today . . . many tribal courts offer criminal defendants greater rights than the federal Indian Civil Rights Act requires."); \textit{See Federal Declinations Hearings, supra} note 182, at 49 (testimony of Janelle F. Doughty) ("I strongly support a repeal of \textit{Oliphant} as a common-sense way to strengthen public safety on our reservation."); \textit{See id.} at 50-55 (testimony of Thomas W. Weissmuller).

\textsuperscript{245} \textit{See Eid, supra} note 170, at 42 (discussing the importance of guaranteeing constitutional due process protections by providing a “full and fair forum by an independent, neutral arbiter”).

\textsuperscript{246} \textit{See Chaney, supra} note 219, at 1164 ("Congress has the power to make tribal communities safer by crafting permanent and appropriate updates to remove these unnecessary and dangerous legal hurdles. By making these adjustments, Congress would improve public safety to all Americans who live, work, travel, or recreate within or near Indian country."); \textit{See Eid, supra} note 170, at 45-46 (indicating that if non-Indians were subject to criminal proceedings in tribal court, they would have a far greater stake in the future development of Indian country). If Congress is not ready for such a drastic change, perhaps it may consider granting tribes the ability to practice criminal jurisdiction over non-Indians in the same way that tribes have been granted the ability to police non-Indians through “638 contracts” or “self-governance compacts.” Agreements such as these would effectively increase criminal prosecution of non-Indians within Indian country while maintaining congressionally imposed standards for criminal procedure. \textit{See Guedel, supra} note 10 (noting the anachronistic nature of the \textit{Oliphant} decision).
defective as they are antiquated, communities are left feeling hopeless and understandably frustrated. The problems on Indian reservations are not in any regards minor, but they often involve avoidable violent crimes. These crimes destroy lives and tear apart tribal communities. Thus, it is greatly encouraging when a bill like the Tribal Law and Order Act attempts to make real changes to the status quo by enhancing overall coordination between the various law enforcement agencies, demanding greater accountability from federal prosecutors, and investing in a number of tribal programs aimed at educating and rehabilitating affected Indian populations. Notwithstanding these positive proposals, the Bill nevertheless treats the symptoms of crime in Indian country when it should be targeting the disease. Increasing overall funding to the current system may very well solve these problems. But when this is not an option, perhaps it is time to reassess some of the legal barriers to empowering tribal governments to take charge of their own destiny. Dated legal models such as the “federal trust responsibility” and “dual sovereignty” may work well in theory, but there is no doubt that the arrangement that tribes have had with the United States over the past 200 years has not worked well in practice. By making the fundamental changes to Indian law that this Note suggests, tribal governments will be able to challenge traditional ways of fighting crime and hopefully embrace a safer and more optimistic future.

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Yearning for Zion Ranch Raid

LOWERING THE STANDARD OF PROOF FOR THE TERMINATION OF PARENTAL RIGHTS

INTRODUCTION

In April 2008, over 400 children were seized from the Yearning for Zion Ranch in Eldorado, Texas by Child Protective Services on the grounds that the children were suffering from abuse. An anonymous complaint made by a sixteen-year-old girl alleging physical and sexual abuse prompted the raid. The residents of the Ranch were members of the Fundamentalist Church of Jesus Christ of Latter-Day Saints (“FLDS”), a breakaway sect of the mainstream Mormon community. The state sought to remove the children from their parents' custody on the premise that the sect’s belief in polygamy and underage marriage created an imminent danger to the children’s physical health and safety.

This incident escalated the conflict between parental rights and religious rights. Currently, the state’s burden of proof to remove children from parental custody is the “clear and convincing” standard as outlined in the landmark Supreme Court case.

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3 The Fundamentalist Church of Jesus Christ of Latter-Day Saints (“FLDS”) is a splinter sect of the Church of Jesus Christ of Latter Day Saints, the mainstream Mormon religion. Mormonism began in 1830 as a religion that believed in polygamy but such belief was abandoned by the Church of Mormon in 1890. Since then many splinter groups have been created such as FLDS. These splinter groups, including FLDS, continue to preach the validity of polygamy despite its illegal nature. Additionally, as with most fundamental religions, FLDS and other splinter groups maintain a rigorous lifestyle devoted to the doctrine of their religion. See D. Michael Quinn, Plural Marriage and Mormon Fundamentalism, in FUNDAMENTALISMS AND SOCIETY 240, 252 (Martin E. Marty & Scott Appleby eds., 1993).
5 See Sreenivasan, supra note 1.
Court case, *Santosky v. Kramer.* This heightened standard requires the evidence to be more persuasive than the common civil standard of a preponderance of the evidence, i.e., more likely than not. Consequently, states like Texas have statutes that require proof of imminent danger to a child’s physical health or safety for even temporary removal of children from the custody of their parents. However, following the Yearning for Zion Ranch raid, the question remains whether the nature of these religious beliefs creates the type of imminent danger to physical health and safety required by statute.

Affirming the Court of Appeals of Texas, the Texas Supreme Court held that there was no evidence that the physical health or safety of the children from the Yearning for Zion Ranch were in danger. Nor did the court find that the FLDS belief system constituted sufficient evidence of imminent abuse to warrant removal of the children from their parents. Furthermore, although it noted that the case involved “important fundamental issues concerning parental rights and the State’s interest in protecting children,” it declined to further elaborate on these issues.

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7 See infra notes 45-57 and accompanying text.
8 TEX. FAM. CODE ANN. § 262.201 (Vernon 2008). The relevant Texas statute regarding removal pending a final termination hearing states in part:

(b) At the conclusion of the full adversary hearing, the court shall order the return of the child to the parent . . . or custodian entitled to possession unless the court finds sufficient evidence to satisfy a person of ordinary prudence and caution that: (1) there was a danger to the physical health or safety of the child which was caused by an act or failure to act of the person entitled to possession and for the child to remain in the home is contrary to the welfare of the child;

(d) In determining whether there is a continuing danger to the physical health or safety of the child, the court may consider whether the household to which the child would be returned includes a person who: (1) has abused or neglected another child in a manner that caused serious injury to or the death of the other child; or (2) has sexually abused another child.

*Id.; see also In re Steed, No. 03-08-00235-CV, 2008 WL 2132014, at *1 (Tex. App. May 22, 2008), aff’d sub nom. In re Tex. Dep’t of Family and Protective Servs., 255 S.W.3d 613 (Tex. 2008).*

8 See *In re Steed, 2008 WL 2132014, at *1-3; Sreenivasan,* supra note 1.
10 *In re Tex. Dep’t of Family & Protective Servs., 255 S.W.3d. 613, 615 (Tex. 2008).*

11 See *id.* Although the Court affirmed the ruling, it did so on the condition that appropriate relief still be granted to protect the children, although the court did not specify what type of relief would be appropriate. *Id.*
12 *Id. (O’Neill, J., concurring in part and dissenting in part).*
The state intervention at the Yearning for Zion Ranch is not the first raid on a Mormon fundamentalist community. In 1953, over 120 Arizona officers arrested thirty-six men and eighty-six women, and took into custody 263 children from a fundamentalist community in Short Creek, Arizona.\textsuperscript{13} The purpose of the raid\textsuperscript{14} was to protect the children from ""the foulest conspiracy [one] could imagine . . . dedicated to the production of white slaves.""\textsuperscript{15} However, similar to the Yearning for Zion Ranch case, the Supreme Court of Arizona ordered that the children be returned home to their families.\textsuperscript{16} The Arizona court held that the parents of the children seized in the Short Creek raid had been denied participation by their attorneys during the custody hearing, thereby resulting in a violation of the due process of law and rendering a decision to deprive the parents of custody of their children invalid.\textsuperscript{17} Furthermore, the Arizona court found that neither party had presented evidence as to whether the children's safety and welfare would best be protected by depriving the parents the right to custody.\textsuperscript{18} As a result, the presumption that the child's interests are best served by allowing custody to remain with the child's parents was not rebutted, and therefore, it was in the interest of the children of Short Creek to remain with their parents.\textsuperscript{19}

Given the history of clashes between the state and Mormon fundamentalists, the Yearning for Zion Ranch case revived important issues dealing with a parent's fundamental rights in conflict with the interests of the State. This Note argues that a parent's religious beliefs can be evidence of physical abuse and thus a danger to a child's safety, prompting the need for removal. Part I discusses a parent's rights to the upbringing of his or her child under the Fourteenth Amendment, as well as the current burden of proof required to terminate these parental rights under the Fourteenth Amendment. Part I also examines a parent's right to control the religious upbringing of his or her child and contends that these rights are not absolute and can be a factor in a custody

\textsuperscript{13} Michael Homer, Children in New Religious Movements: The Mormon Experience, in INTRODUCTION TO NEW AND ALTERNATIVE RELIGIONS IN AMERICA 224, 234 (Eugene V. Gallagher & W. Michael Ashcroft eds., 2006).
\textsuperscript{14} As advocated by then-Governor of Arizona, J. Howard Pyle. Id.
\textsuperscript{15} Id.
\textsuperscript{16} Id.
\textsuperscript{18} Id. at 301.
\textsuperscript{19} Id.
determination. Next, Part II argues that religious beliefs normally protected under the First Amendment can be considered as evidence in parental termination cases and suggests that termination is appropriate where these religious beliefs are abusive. Furthermore, Part II contends that because the Yearning for Zion Ranch community resembles one large family and, in general, the presence of abuse in one child is sufficient for the removal of the other children in the family, the remainder of the Yearning for Zion Ranch children should also be removed. Part III examines the policy arguments in support of lowering the evidentiary standard. Part III asserts that the current evidentiary standard leaves the child’s interest to remain free from abuse not as protected as the parent’s interest in custody of his or her child. Therefore, further protection is warranted and can be achieved by lowering the standard of proof. Finally, Part IV concludes that when religion is considered abusive and pervasive throughout a close community, like the Yearning for Zion Ranch, then the standard of proof to remove the children from their parents in the community should be lowered from the clear and convincing standard to the preponderance of the evidence standard.

I. BACKGROUND

The current burden of proof for termination of parental rights should be lowered to a preponderance of the evidence standard in cases where a pervasive religious belief system throughout a community promotes abuse in at least some of the children within that community. In order to understand the rationale behind this argument, it is first necessary to understand the current law in regards to parental rights termination, as well as the role of religion in child custody cases.

A. Termination of Child Custody Rights

1. The Fourteenth Amendment Due Process Rights in Child Custody Proceedings

The Fourteenth Amendment of the United States Constitution requires that no state "deprive any person of life,
liberty, or property, without due process of law."\(^{20}\) Pursuant to the Fourteenth Amendment, parents inherently have a fundamental right to the care and custody of their children unencumbered by the state.\(^{21}\) The right to marry, procreate, and raise one’s children is considered “one of the basic civil rights of man.”\(^{22}\) The Supreme Court first recognized the right of parents to rear their children in *Meyer v. Nebraska*,\(^{23}\) holding that the Fourteenth Amendment’s protection of life, liberty, and property also included the protection of the individual’s right to raise children.\(^{24}\) Specifically, the State could not interfere with a parent’s choice to teach her children a foreign language because this would be an undue interference with the parent’s right to raise her children.\(^{25}\) Similarly, in *Prince v. Massachusetts*, the Court recognized that a parent has the authority to raise his or her child as part of “the private realm of family life which the state cannot enter.”\(^{26}\) However, the Court recognized that this private right could not conflict with the state’s interest to protect the welfare of children.\(^{27}\) The court stated that the rights of parenthood are not beyond limitation and that the state may proscribe or compel certain activity that is in the best interest of the child’s welfare.\(^{28}\)

\(^{20}\) U.S. Const. amend. XIV, § 1. The purpose of this provision is to provide individuals with substantive and procedural protections when individual’s fundamental rights are at risk of being compromised or terminated. See Ann E. Ward, *Standards of Proof in Parental Rights Termination*: Santosky v. Kramer, 36 Sw. L.J. 1069, 1070 (1982); see also Erwin Chemerinsky, *Constitutional Law: Principles and Policies* 523 (2d ed. 2002). Procedural due process refers to the procedures the government must undertake when seeking to deprive a person of their life, liberty, or property. Id. This process usually means that an individual is entitled to notice and a hearing before these rights are terminated. Id. Substantive due process refers to the reasoning behind the deprivation of an individual’s life, liberty, or property. Id. The level of substantive due process afforded depends upon the inherent nature of the fundamental right at stake. Id. at 524. Generally, for an interest that is deemed important to the individual, the government needs to show a compelling reason to deprive the individual of this interest. Id. Parental custody rights are interests that are deemed to be fundamental and, thus, required to be afforded both procedural and substantive due process. Id.

\(^{21}\) Prince v. Massachusetts, 321 U.S. 158, 166 (1944).


\(^{23}\) 262 U.S. 390 (1923).

\(^{24}\) Id. at 399.

\(^{25}\) See generally Meyer, 262 U.S. 390.

\(^{26}\) Prince, 321 U.S. at 165-66.

\(^{27}\) Id. at 165.

\(^{28}\) Id. at 166-68 (holding that the state may limit a parent’s insistence that a child hand out religious literature as part of child employment laws).
Given that parents have a fundamental right under the Fourteenth Amendment to the care and custody of their children, due process protections are necessary when the state seeks to limit or terminate this fundamental right. As such, the government may only terminate custody if the parents are afforded some minimal level of procedural protection through which they can argue their case. Furthermore, terminating the parent’s custody must be necessary to achieve the State’s compelling interest.

To determine whether due process was met, the following three factors, originally articulated in Matthews v. Eldridge, must be considered: 1) the private interest affected by government action; 2) the government’s countervailing interest including “fiscal and administrative burdens;” and 3) the risk of an erroneous decision. In a parental custody case, the private interest affected is the parent’s right to care for and have custody of his or her children. Additionally, unique to custody cases, the child has a private interest at stake, specifically the interest to be “free from abuse or neglect.” However, the child’s interest is not given the same weight as the parent’s interest. The government’s interest is the health, safety, and welfare of the children involved. In this respect, the government’s interest is presumably aligned with the parent’s interest in that the state and the parents are generally concerned with preserving a child’s well-being, and this is usually best achieved when a child is cared for by his or her parents. However, the government’s interest will diverge from that of the parents when the government has decided that

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29 See Ward, supra note 20, at 1070-71.
30 CHEMERINSKY, supra note 20, at 772. Although procedures will vary from state to state, courts will determine the sufficiency of the procedural protection by analyzing the process using the Eldridge factors. See infra note 32 and accompanying text.
31 Id.
33 Parents have an interest in “the companionship, care, custody and management of his or her children” that “undeniably warrants deference and, absent a powerful countervailing interest, protection.” Lassiter v. Dep’t of Soc. Servs. of Durham County, N.C., 452 U.S. 18, 27 (1981) (internal quotation marks omitted) (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).
34 Ward, supra note 20, at 1070.
35 Id. at 1072.
36 Lassiter, 452 U.S. at 27.
37 See id.
remaining in the care and custody of the parent is no longer in the best interest of the child.\textsuperscript{38}

Additionally, the government must be concerned with the fiscal and administrative costs of conducting a hearing to determine the custody rights of parents.\textsuperscript{39} An increase in the number of hearings required to comport with due process standards undoubtedly increases the cost to the public.\textsuperscript{40} However, conserving administrative resources and lowering costs are not controlling factors in determining whether procedural safeguards are met.\textsuperscript{41} In parental custody cases, the child’s welfare will outweigh these fiscal and administrative factors.\textsuperscript{42} Finally, the court must consider the possibility of an erroneous decision leading to a wrongful termination of the parent’s custodial rights, which would not be in the best interest of the parent, child, or the government. Thus, given the importance of the interests at stake, the Supreme Court has concluded that a hearing is necessary in order to decide whether or not termination of parental rights is appropriate.\textsuperscript{43}


In conducting a hearing, an individual’s due process rights are protected by the standard of proof required to establish that the individual is no longer entitled to his or her liberty or property rights.\textsuperscript{44} There are three evidentiary standards: beyond a reasonable doubt, clear and convincing, and preponderance of the evidence.\textsuperscript{45} The beyond a reasonable doubt standard, the highest level of proof, is applied to criminal cases in which an individual risks losing his freedom.\textsuperscript{46} The burden is on the prosecutor to convince a jury of a “subjective state of near certitude” that the defendant is guilty.\textsuperscript{47} This

\textsuperscript{38} See id.; Ward, supra note 20, at 1071-72.
\textsuperscript{40} Id. at 348.
\textsuperscript{41} Id. at 348.
\textsuperscript{43} Id.
\textsuperscript{45} Ward, supra note 20, at 1075.
\textsuperscript{46} Id.
standard is applied because of the importance of the personal interest at stake and also the grave consequences of an erroneous decision (namely, an individual’s loss of freedom).  

A preponderance of the evidence is the lowest standard and is applied in most civil cases where only monetary loss is at stake. By this standard, the weight of the evidence tends to support the facts of one party more so than the other party. The clear and convincing standard of proof falls in between reasonable doubt and preponderance of evidence. This standard is applied when there is something at stake more important than just a pecuniary interest, but not as protected as an individual’s liberty. The clear and convincing standard is most often applicable when an individual’s fundamental rights are at stake. Generally, proof by clear and convincing evidence is defined as the persuasion of the trier of fact that “the facts asserted are highly probably true” and the trier of fact has a “clear conviction, without hesitation, of the truth of the facts related.” Specifically, the trier of fact must be persuaded by more than a “substantial margin” and with a “higher probability than is required by the preponderance-of-the-evidence standard.”

Prior to the decision in *Santosky v. Kramer*, states varied as to the standard of proof required for termination of parental custody. In *Santosky v. Kramer*, the Court struck down a New York statute as unconstitutional on the grounds that it offended the Due Process Clause of the Fourteenth

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49 *Id.*
50 Annotation, *Instructions Defining Term “Preponderance or Weight of the Evidence,”* 93 A.L.R. 155 (1934).
51 Ward, *supra* note 20, at 1075.
52 *Id.*
Amendment because it allowed for termination of custody rights upon a showing by a preponderance of the evidence that the parent was unfit and the child was permanently neglected.\textsuperscript{58} The Court concluded that in order to terminate parental custody rights, the State must prove by clear and convincing evidence that the parents are no longer entitled to custody of their children.\textsuperscript{59} Thus, to terminate a parent's custody rights,\textsuperscript{60} the trier of fact must have a “clear conviction, without hesitance, of the truth of the facts related”\textsuperscript{61} and believe that “the facts asserted are highly probably true.”\textsuperscript{62} In support of its decision, the Court applied the \textit{Eldridge} factors in ruling out the preponderance standard in favor of the clear and convincing standard.\textsuperscript{63} First, the Court found that the private interests at stake were compelling.\textsuperscript{64} Second, the Court found that the risk of error in using the preponderance of the evidence standard was high because the parents would suffer an irrevocable grievous loss.\textsuperscript{65} Third, the Court concluded that any countervailing governmental interest in using a preponderance standard was minimal when compared to the first and second factors.\textsuperscript{66}

Since \textit{Santosky}, all parental termination proceedings require the clear and convincing standard.\textsuperscript{67} The Court affirmed that, going forward, a case by case analysis for the evidentiary standard in termination proceedings was inappropriate and due process rules are applied to “the generality of the cases, not the rare exception.”\textsuperscript{68} It is crucial that the parties and the fact-

\textsuperscript{59} \textit{Id.} at 747-48.
\textsuperscript{60} A parent’s custody rights are generally terminated when there is evidence of abuse or neglect to the child. \textit{See generally} Scott E. Friedman, \textit{The Law of Parent-Child Relationships: A Handbook} 133-44 (1992).
\textsuperscript{62} Lopinto v. Haines, 441 A.2d 151, 156 (Conn. 1981).
\textsuperscript{63} \textit{See Santosky}, 455 U.S. at 758, 769.
\textsuperscript{64} \textit{Id.} at 758. The Court considered the private interests of the parents to the care and custody of their children to be “far more precious than any property right.” \textit{Id.} at 758-59. Further, to terminate a parent’s right to custody of his or her child would not mean merely an infringement upon the parent’s constitutional fundamental rights but an obliteration of this right all together. \textit{See id.} at 759. Thus, the court found the private interest of the parents to be so compelling that a higher degree of certainty as to the parent’s unfitness is necessary to terminate custody rights. \textit{See id.} at 759, 769.
\textsuperscript{65} \textit{Id.} at 758-59.
\textsuperscript{66} \textit{Id.} at 758.
\textsuperscript{67} \textit{Id.} at 769.
\textsuperscript{68} \textit{Id.} at 757 (internal quotation marks omitted) (quoting Matthews v. Eldridge, 424 U.S. 319, 344 (1976)).
finder are aware of “how the risk of error will be allocated, [thus] the standard of proof necessarily must be calibrated in advance.” Accordingly, state courts have unmistakably adopted the clear and convincing standard for child termination proceedings. Texas is no exception: the Texas Appellate Court has consistently held that the termination of parental rights requires clear and convincing evidence.

The effect of the use of this heightened standard in termination proceedings can be seen in other child protection laws. For instance, in Texas, emergency removal of children from the home is allowed only if there is an immediate danger to the health or safety of the child caused by the act or omission of a person entitled to custodial possession of the child, and protection requires immediate removal. Once this evidence is satisfied, a court may conclude that the child is in continuing danger by remaining in the home, and a temporary order of removal is therefore appropriate. This temporary removal could lead to permanent removal of a child from the home. Thus, the high standards for temporary removal are another safeguard for the parents in a termination proceeding. For example, the Yearning for Zion Ranch case merely concerned a temporary, as opposed to permanent, removal, and the Texas Supreme Court held that there was no evidentiary basis for

69 Id.


72 TEX. FAM. CODE ANN. § 262.201(b) (Vernon 2008); see also In re Tex. Dep’t of Family and Protective Servs., 255 S.W.3d 613, 614 (Tex. 2008).

73 TEX. FAM. CODE ANN. § 262.201(c); see also In re Tex. Dep’t. of Family and Protective Servs., 255 S.W.3d at 614-15.

74 See TEX. FAM. CODE ANN. § 105.001; TEX. FAM. CODE ANN. § 161.206; TEX. FAM. CODE ANN. § 262.201(c).
temporary removal of the children from the Yearning for Zion Ranch.\textsuperscript{75} The court found the belief system of the members of the Ranch alone did not prove an immediate danger to the health and safety of the children.\textsuperscript{76} Therefore, it is highly unlikely that this evidence would be sufficient to satisfy the clear and convincing standard in a permanent termination proceeding.

B. The First Amendment: The Parent's Rights to Control the Child's Religious Upbringing

As part of a parent's fundamental right to the custody and control of his or her child, as established in Meyer v. Nebraska and Prince v. Massachusetts, a parent has the right to control the child's religious upbringing.\textsuperscript{77} This right, grounded in the Fourteenth Amendment, is further protected by the First Amendment's Establishment and Free Exercise clauses.\textsuperscript{78} The Court has interpreted these clauses to include the notion that parents are entitled to the protection of their religious beliefs in raising their children.\textsuperscript{79}

A pivotal case demonstrating the extent to which a parent has a right to control his or her child's religious upbringing is Wisconsin v. Yoder. In this case, Amish parents refused to enroll their children in any public or private school after completing the eighth grade, thereby violating Wisconsin's mandatory school-attendance law.\textsuperscript{80} As a result, the parents were convicted and fined for violating the state statute.\textsuperscript{81} The parents brought suit on the grounds that their First and Fourteenth

\textsuperscript{75} In re Tex. Dep't of Family and Protective Servs., 255 S.W.3d at 615.


\textsuperscript{77} CHEMERINSKY, supra note 20, at 778-79.

\textsuperscript{78} U.S. CONST. amend. I. The First Amendment is applied to the states through the Fourteenth Amendment. Wisconsin v. Yoder, 406 U.S. 205, 207 (1972). The First Amendment is divided into two clauses: the Establishment Clause and the Free Exercise Clause. The Establishment Clause can be interpreted in a number of different ways. However, it is often interpreted to mean that the government cannot use religion as a ground for its action or inaction or favor one religion over another. CHEMERINSKY, supra note 20, at 1193, 1196 (3d ed. 2006). The Free Exercise Clause provides that the government will not interfere with an individual's right to believe nor the individual's right to act in regards to religious beliefs. Id. at 1247.


\textsuperscript{80} Yoder, 406 U.S. at 207.

\textsuperscript{81} Id. at 208.
Amendment rights were violated due to the fact that enrollment in high school violated the Amish belief system.\textsuperscript{82} The Supreme Court held that Wisconsin’s requirement of education after the eighth grade violated the Amish parents’ free exercise of their religious beliefs.\textsuperscript{83} In so deciding, the Court established that the free exercise of religion includes the right of parents to control the religious upbringing of their children\textsuperscript{84} and that the parent’s right to religious upbringing trumps the right of the state to require child education.\textsuperscript{85}

Nonetheless, the right of parents to control the religious upbringing of their children is not absolute.\textsuperscript{86} In \textit{Prince v. Massachusetts}, an aunt, having custodianship over her niece, brought the young girl with her to distribute Jehovah’s Witness material, in violation of the state’s child labor laws.\textsuperscript{87} Although the Court recognized that children have the right to exercise their religious beliefs and that parents have the right to promote religious education for their children,\textsuperscript{88} the right to exercise religion is not beyond state limitation.\textsuperscript{89} The state may limit parental freedoms where the child’s welfare is affected, even if the freedoms include religious conviction.\textsuperscript{90} Exercising its police powers, the state has a right to limit child labor by

\textsuperscript{82} Id. at 208-09. The Amish religion supports the belief that in order to have salvation, members of the religion must live in a church community that is separate from the world. Id. at 210. The Amish believe in a simple life that is in contradiction with the typical contemporary ideals, which praise material success and individuality as opposed to community. Id. There is a pervasive belief in the Amish community that a child’s attendance in high school provides “impermissible exposure of their children to a ‘worldly’ influence in conflict with their beliefs.” Id. at 211. No objection is made by the Amish community to a child’s attendance of grades first through eighth because the community believes that the children need to be taught the basic skills in order to be good Amish citizens. Id. at 212. The parents in this case brought substantial expert testimony about the beliefs and lifestyle of the Amish community in order for the court to rule on the First Amendment claim. Id. at 209.

\textsuperscript{83} Id. at 219.

\textsuperscript{84} Drobac, supra note 79, at 1614.

\textsuperscript{85} \textit{Yoder}, 406 U.S. at 214-15, 221-22.

\textsuperscript{86} \textit{See generally} Prince v. Massachusetts, 321 U.S. 158 (1944) (holding that exercising religious beliefs may not override child labor laws).

\textsuperscript{87} Id. at 160-61, 163. Under Massachusetts General Laws, it is illegal for any person to furnish a minor with articles knowing that the minor intends to sell these articles. Furthermore, it is illegal for a parent, guardian or custodian to encourage a child to work in violation of child labor laws, including allowing a child under the age of sixteen to work or to work long hours or work in the evening. \textit{Mass. Gen. Laws Ann.} ch. 149 §§ 80-81 (West 2004).

\textsuperscript{88} Prince, 321 U.S. at 165.

\textsuperscript{89} Id. at 166.

\textsuperscript{90} Id. at 167.
placing restrictions on when and where children may work, even if their work consists of furthering their religious beliefs.\textsuperscript{91}

Although \textit{Yoder} and \textit{Prince} appear to be diametrically opposed, it is possible to distinguish the propositions for which they stand and to create a rule regarding state intervention in parental religious rights. The determining factor underlying the different outcomes in each case is the nature of the law violated by the parents’ religious practice. For instance, in \textit{Prince}, Sarah Prince’s First Amendment right to allow her niece to distribute religious pamphlets conflicted with the state’s child labor laws.\textsuperscript{92} In limiting Prince’s right to control her niece’s practice of religion, the Court held that child labor was “among evils . . . [whose] crippling effects” require state action to protect the “healthy, well-rounded growth” of children.\textsuperscript{93} However, in \textit{Yoder}, the conflict arose from a state statute requiring mandatory school attendance for students from grades one through twelve.\textsuperscript{94} In finding in favor of the Amish parents, the Court decided that non-compliance with the mandatory school attendance statute was not a threat to the social welfare of the child.\textsuperscript{95} The Court was concerned that by forcing the Amish children to attend school, the state would undermine the Amish community’s religious beliefs by influencing and shaping the beliefs of their children through education.\textsuperscript{96} According to the \textit{Yoder} Court, this was the “kind of objective danger to the free exercise of religion that the First Amendment was designed to prevent.”\textsuperscript{97}

Indeed, the \textit{Yoder} Court distinguished the facts of the case from the \textit{Prince} decision. In refusing to afford weight to the State’s argument that exempting Amish children from the school attendance requirement deprived the children of their right to secondary education, the Court noted that this right is not comparable to the “evils” associated with child labor.\textsuperscript{98} Accordingly, the rule suggested by these two cases is that unless the state can show a compelling interest in protecting

\textsuperscript{91} Id. at 168-69.
\textsuperscript{92} Id. at 159.
\textsuperscript{93} Id. at 168.
\textsuperscript{94} Wisconsin v. Yoder, 406 U.S. 205, 207 n.2 (1972).
\textsuperscript{95} Drobac, supra note 79, at 1615.
\textsuperscript{96} Yoder, 406 U.S. at 218.
\textsuperscript{97} Id.
\textsuperscript{98} Id. at 229-30.
the child’s welfare, such as preventing child labor, the parent’s First Amendment claim will prevail.\textsuperscript{99}

\textbf{C. Considering Religion in Child Custody Cases}

In child custody proceedings, the state has a compelling interest to protect the welfare of the child involved;\textsuperscript{100} thus, parents generally do not have a valid First Amendment claim when the court considers the religion of the parents in custody proceedings. The Court in \textit{Prince} qualified its decision by stating that its ruling did “not extend beyond the facts [of] the case” and did not give the states license to justify intervention in religious activities on behalf of children “in the name of health and welfare.”\textsuperscript{101} Nonetheless, since the \textit{Prince} decision, courts have carefully examined the religious beliefs of parents in child custody cases.\textsuperscript{102} In divorce proceedings involving child custody disputes, the courts have looked to religion as one factor to determine the fitness of each parent to care for the child.\textsuperscript{103} The standard used by many courts is that a parent’s religious activity will not be a factor when it is clear that the child will not be harmed from the religious activity.\textsuperscript{104} As one court noted, “[s]o long as a court makes findings as to a child’s actual needs respecting religion, the court may consider such needs, as one factor, in awarding custody.”\textsuperscript{105} Thus, the courts are using a standard derived from \textit{Prince} and \textit{Yoder}—the child’s welfare must be at stake in order to deprive parents of

\textsuperscript{99} See Drobac, supra note 79, at 1615 (“The [Yoder] decision suggests that absent a showing that a parent’s actions will ‘jeopardize’ the child’s health or safety, a court may not regulate or restrict the religious behaviors of the parent.”). However, since the decision in \textit{Yoder}, the Court has held that laws which are facially neutral with regard to religion will be considered valid. See id. at 1617. While this is the current state of the law regarding free exercise of religion, it is not of much use in child custody cases because these cases involve the parent’s fundamental right to the upbringing of their children and thus the heightened standard is still necessary. See id.

\textsuperscript{100} See supra note 38 and accompanying text.

\textsuperscript{101} Prince v. Massachusetts, 321 U.S. 158, 171 (1944).

\textsuperscript{102} See George L. Blum, Annotation, Religion as a Factor in Child Custody Cases, 124 A.L.R. 5TH 203 (2004); see also Lauren C. Miele, Note, Big Love or Big Problem: Should Polygamous Relationships Be a Factor in Determining Child Custody, 43 NEW ENG. L. REV. 105, 122-23 (2008) (discussing religious considerations in child custody proceedings).

\textsuperscript{103} Id. at 123.

\textsuperscript{104} Id. at 122.

\textsuperscript{105} Miele, supra note 102, at 122.
their right to care and custody of their child on the grounds of their religious beliefs.\textsuperscript{106}

For example, in \textit{Colopy v. Colopy}, the Massachusetts Supreme Court considered the religious needs of children in a custody dispute.\textsuperscript{107} In this case, the father was awarded custody of the couple’s five children.\textsuperscript{108} Prior to the proceeding, the couple had lived at a religious center as part of a religious community.\textsuperscript{109} However, as a result of a change in the rules of the community, the couple was no longer allowed to live as husband and wife, and the children were separated from their parents and each other and forced to live with other adults in the community.\textsuperscript{110} When the mother refused to leave the religious center, the court found that it was in the best interest of the children to award custody to the father, who had left the community and established a home in mainstream society.\textsuperscript{111}

As evidenced in \textit{Colopy v. Colopy}, in order for religion to be considered in a child custody hearing, it must pose an extreme threat to a child’s safety or welfare. Simply practicing a religion that promotes seemingly unorthodox beliefs is not enough to infringe upon a parent’s right to control the religious upbringing of his or her children. For instance, in \textit{Burnham v. Burnham}, the Nebraska court considered the religious beliefs of the parents in determining custody of the child in a divorce proceeding.\textsuperscript{112} In this case, the mother of the child practiced Catholicism of the Tridentine Church of Fatima Crusaders.\textsuperscript{113} Under this religion, the woman’s marriage to the child’s father was not legitimate because they were not married in the Fatima Crusader Church.\textsuperscript{114} Consequently, the mother believed the child to be illegitimate.\textsuperscript{115} She also believed that she was

\begin{itemize}
  \item \textsuperscript{106} \textit{See supra} note 99 and accompanying text.
  \item \textsuperscript{107} \textit{Colopy v. Colopy}, 203 N.E.2d 546, 547 (Mass. 1964).
  \item \textsuperscript{108} \textit{Id}.
  \item \textsuperscript{109} \textit{Id}.
  \item \textsuperscript{110} \textit{Id}.
  \item \textsuperscript{111} \textit{Id}.
  \item \textsuperscript{112} \textit{Burnham v. Burnham}, 304 N.W.2d 58, 61 (Neb. 1981). “The courts preserve an attitude of impartiality between religions and will not disqualify a parent because of his or her religious beliefs.” \textit{Id}.
  \item \textsuperscript{113} \textit{Id}. (internal quotation marks omitted) (quoting \textit{Goodman v. Goodman}, 141 N.W.2d 445, 448 (Neb. 1966)). “However, we do have a duty to consider whether such beliefs threaten the health or well-being of the child.” \textit{Id}.
  \item \textsuperscript{114} \textit{Id}. at 60.
  \item \textsuperscript{115} \textit{Id}.
\end{itemize}
“bound . . . [by] mortal sin to educate her child in the . . . Church.” The school connected with the Tridentine Church allowed for corporal punishment and strict discipline and required a parental waiver releasing the school of all liability in case of an unforeseen accident. The mother stated that it was her intention to send the child to this school because failure to do so would result in her excommunication from the Church. Additionally, the mother’s brother was ostracized from the family by the mother and her own parents for his failure to convert from Catholicism to the Church of Tridentine. She testified that if her daughter was to decide that she did not want to be a part of the Church of Tridentine, she would be willing to cut the child from her life.

Based on these facts, the court held that it was obligated to consider the religious beliefs of the mother in determining who should be awarded custody. In considering the mother’s religious beliefs, the court decided that these beliefs could possibly have an adverse impact on the upbringing of the child. Namely, the belief that the child was illegitimate and the fact that the mother would be willing to cut the child out of her life caused the court to conclude that the father should be awarded custody of the child.

The above-mentioned cases are not the exception to the norm, many state courts find that religion can be a determining factor in child custody suits. Thus, based on the

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116 Id.
117 Id.
118 Id.
119 Id.
120 Id. at 61.
121 Id.
122 Id.
123 Id. at 61-62.
124 Although these cases are not the exception to the norm, some courts still refuse to look at religion as a factor in determining the custody placement of a child. See Alaniz v. Alaniz, 967 S.W.2d 54, 56-57 (Tex. App. 1993) (holding that awarding custody on the premise that one parent’s religion is more normal than the other parent’s is not proper); In re Marriage of Knighton, 723 S.W.2d 274, 285 (Tex. App. 1987) (holding that the test for determining the custody of a child is the “best interest of the child” test and not the religious beliefs of the mother without evidential proof that these beliefs were illegal or caused harm to the child (citing TEX. FAM. CODE ANN. § 14.07(a) (Vernon 1986))); Blum, supra note 102.
125 See Kendall v. Kendall, 687 N.E.2d 1228, 1235-36 (Mass. 1997) (holding that when the children had been brought up in the Jewish faith, it was proper for the court to limit their exposure to the father’s Christian beliefs as a matter of custody provisions); Graci v. Graci, 187 A.D.2d 970, 973 (N.Y. App. Div. 1992) (holding that the mother’s religious education of the children contributed to her home being a superior
above examples, courts have the ability to consider religion in child custody cases without infringing upon the First Amendment rights of the parents.\textsuperscript{126} If the courts can apply religion as a factor in determining the outcome for child custody disputes without violating the First Amendment, then by logical extension, the courts can apply religion to parental termination proceedings without violating the First Amendment.

II. SUPPORT FOR TERMINATION UNDER THE CURRENT LAW

Where there is a pervasive religious belief throughout a community condoning child abuse,\textsuperscript{127} the burden of proof should be lowered from the clear and convincing standard to a preponderance of the evidence standard. However, even under the current evidentiary standard there is support for the removal of children who have not been abused but where abusive religious beliefs are present in a communal living arrangement.

A. Applying Religion to Termination Proceedings

Considering religion in parental termination proceedings is a necessary step towards lowering the standard of proof for termination of parental custody rights in cases where a pervasive belief system in a community condones child abuse. However, the application of religion as a factor in child custody proceedings has been confined mostly to individual child custody disputes, usually arising out of divorce.\textsuperscript{128} The religious beliefs of a child's parents are generally not a factor in parental termination proceedings because for termination to occur, the state must prove that “the child is subjected to real physical or emotional harm and less drastic measures would be unavailing.”\textsuperscript{129} Typically, grounds for

\begin{footnotes}
\footnotetext[126]{See generally Blum, supra note 102.}
\footnotetext[127]{See discussion infra notes 152-157 and accompanying text.}
\footnotetext[128]{See supra Part I.C.}
\footnotetext[129]{Roe v. Conn, 417 F. Supp. 769, 779 (M.D. Ala. 1976). Although religion is generally not the main factor in parental termination proceedings, in some cases, religion is a motivating factor. See In re State ex rel. Black, 283 P.2d 887, 913 (Utah 1955). However, these types of cases historically involved other strong factors warranting removal. For instance, in In re State ex rel. Black, the Blacks' religion dictated that the family engage in illegal polygamous behavior. Id. at 903.}
\end{footnotes}
termination result from “severe or chronic abuse or neglect.” For example, sexual abuse including anything from fondling to sexual intercourse is considered a crime and gives the state grounds to intervene “under its parens patriae authority.” Additionally, emotional abuse resulting in diminished psychological functioning or failure to thrive or control aggressive behavior also may result in state protection of the child. Thus, more often than not, physical or emotional abuse is the focus of a termination proceeding rather than the ideological beliefs of the parents involved.

However, religion often plays an indirect role in termination proceedings when it is the source of abuse or neglect. For example, in In re Edward C, the California Court of Appeals considered evidence that the children had been physically abused because they were being hit with a strap and “lectured about God at mealtimes for so long that they often fell asleep without eating.” In defending his actions, the father explained that “he loved and treated his children equally and that God directed his discipline of them.” Thus, while the court did not specifically base its termination decision on the religious beliefs of the father, it was the effect of those beliefs that led to the permanent termination of his rights. In response to the parents’ claim that their religious freedoms prevented the court from infringing upon the upbringing of their children, the court stated that “mistreatment of a child . . . is not privileged because it is imposed in the guise of freedom of religious expression.” Therefore, while on its face religion is not generally considered in parental termination proceedings, its effect on the treatment of children will be a factor in determining whether a parent should maintain his or her custodial rights.

131 FRIEDMAN, supra note 60, at 136. Parens patriae is the doctrine invoked by courts that treats the state as a parent to a child by asserting jurisdiction over the child. DAVID J. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA 205-07, 210 (1980), reprinted in HARRIS & TEITELBAUM, supra note 130, at 322 n.1, 323 (2002).
132 FRIEDMAN, supra note 60, at 138.
133 Id. at 134; see also In re Edward C., 178 Cal. Rptr. 694, 697 (Cal. Ct. App. 1981).
134 In re Edward C., 178 Cal. Rptr. at 698; see also FRIEDMAN, supra note 60, at 134.
135 In re Edward C., 178 Cal. Rptr. at 699; see also FRIEDMAN, supra note 60, at 135.
Another case considering religion in custodial termination proceedings arose out of the Short Creek raid. The court ruled that the removal of children from the care of their parents was appropriate in *In re State in Interest of Black*. This case involved a family living on the Utah side of Short Creek, rather than the Arizona side, and subject to the Utah courts’ jurisdiction. In this case, Leonard Black and Vera Johnson were deprived of the custody and control of their children resulting from an unlawful polygamous marriage.

The court held that exposing the children to “[t]he practice of polygamy, unlawful cohabitation and adultery” constituted child neglect because the parents failed to offer “the proper maintenance, care, training and education contemplated and required by law and morals.” Effectively, the court found that the parents created an environment that was not conducive to the proper upbringing of children through their unlawful practice of polygamy. As such, the court conclusively determined that religious beliefs and practices will not be afforded constitutional protection when they are in conflict with the laws of the nation and result in detriment to the child’s welfare.

Applying the foregoing facts to the Yearning for Zion case, the religious beliefs of the residents of the Ranch would likely not be considered as a prima facie factor for termination. However, the effects of the beliefs held by members of the Ranch are certainly relevant to a termination proceeding. Specifically, a group of pubescent, underage girls at the Ranch were spiritually married. This “effect” of the religion is a clear

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136 See supra notes 13-19 and accompanying text.
138 Whereas most of the custody hearings for children taken from their parents in Short Creek were held under Arizona’s jurisdiction and ultimately led to custody being placed with the parents as a result of due process violations, this case was tried separately in the Utah state courts and thus avoided constitutional infringements. *Id.* at 888.
139 *Id.*
140 *Id.* at 913.
141 *Id.* at 895.
142 As a result of the court’s findings, Vera Johnson was deprived of her right to custody of her children and only upon a showing that she was no longer living with Leonard Black would she be granted temporary custody of the children. *Id.* at 913.
143 Miele, supra note 102, at 132-34 (discussing the impact of polygamy and the belief system surrounding the practice in child custody hearings).
144 Spiritually married refers to the fact that girls and women on the Ranch were not legally married to their “husbands.” Rather they were spiritually married typically in a polygamous household. *In re Tex. Dept’ of Family and Protective Servs.*,
violation of Texas law prohibiting sexual conduct with a minor and constitutes traditional sexual abuse, which is a ground for parental termination. In fact, the court acknowledged that sexual abuse was established as to these girls on the basis of the evidence of their pregnancies and involvement in underage sexual intercourse as condoned by the belief system of the Yearning for Zion Ranch community.

However, as to the other female children (not among the group identified as having been sexually abused), the court specifically found there to be no abuse or threat to the physical health or safety of these children. The court held that, absent any evidence of a danger to the physical health or safety of the children, the belief system of the Ranch was not enough to warrant interference by the state. Similarly, the court decided that there was no threat to boys on the Ranch because there were no signs of any physical or sexual abuse. Thus, the court decided that the religious beliefs of the residents on the Yearning for Zion Ranch did not constitute strong enough evidence to warrant removal of the children that had not been physically abused.

Justice O'Neill, joined by Justices Willet and Johnson, concurred with the court’s ruling that the Texas Department of Family and Protective Services failed to provide evidence of an imminent danger to the children’s health and safety as it related to boys and pre-pubescent females. However, Justice O’Neill disagreed with the majority’s holding that there was no


145 See id. See generally FRIEDMAN, supra note 60, at 136-38.

146 In re Steed, No. 03-08-00235-CV, 2008 WL 2132014, at *2 (Tex. App. May 22, 2008), aff’d sub nom. In re Tex. Dep’t of Family and Protective Servs., 255 S.W.3d 613 (Tex. 2008). As to the five female children alleged to have suffered sexual abuse, they were not among the children the court considered in the petition for mandamus and the court as much as conceded that these five females were sexually abused, stating “[w]ith the exception of the five female children identified as having become pregnant between the ages of fifteen and seventeen, there was no evidence of any physical abuse or harm to any other child.” Id. at *2.

147 Id. at *3.

148 Id.

149 Id.

150 The five female children who showed signs of sexual abuse were not included in the court’s decision. These female children were not the children of the parents petitioning for a writ of mandamus. Id.

evidence that pubescent girls were in danger. Justice O'Neill pointed to the high number of girls on the Ranch under eighteen years old who were pregnant, had given birth, or were “spiritually married.” She also noted that under the standards of the Ranch, girls were never too young to be married or to have children and that the religious leader of the sect had the power to decide when and to whom a girl would be married. Further evidence was offered that under the Texas Penal Code, child abuse occurs when a person engages in sexual conduct with a child under the age of seventeen who is not the legal spouse of that individual. Given this definition, the girls from the Yearning for Zion Ranch fit under the definition of sexual abuse because they were not legally married to their “husbands,” but rather were only spiritually married. Based on this evidence of a “pattern or practice of sexual abuse,” Justice O'Neill concluded that all the pubescent girls at the Ranch were in danger of sexual abuse and therefore, removal from the Ranch and their parents was appropriate.

Contrary to the majority’s opinion, Justice O'Neill found that the religious beliefs did “present[] evidence that ‘there was a danger to the physical health or safety’ of pubescent girls on the [Ranch].” Because the Ranch community believed in polygamy, spiritual marriage, and impregnating girls under

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152 Justice O'Neill found that the evidence of abuse in some of the pubescent females created a “pattern or practice of sexual abuse, that ‘the urgent need for protection required the immediate removal’ of those girls.” Id. (citing TEX. FAM. CODE ANN. § 262.201(b)(1)-(3)).

153 In re Texas Department of Family and Protective Servs., 255 S.W.3d at 616 (O'Neill, J., concurring in part and dissenting in part).

154 Id. Justice O'Neill was persuaded by testimony from a child psychologist that these practices constitute child abuse because children who are fifteen and sixteen years old are “not sufficiently emotionally mature to enter a healthy consensual sexual relationship or a ‘marriage.’” Id. The child psychologist also testified that the belief system on the Ranch was such that all of the children exposed to these beliefs were in danger, regardless of their age or gender. TEXAS DEPARTMENT OF FAMILY AND PROTECTIVE SERVICES, ELDORADO INVESTIGATION 7 (2008) [hereinafter ELDORADO INVESTIGATION].

155 TEX. PENAL CODE ANN. § 21.11(a)-(b) (Vernon 2003).

156 In re Tex. Dep’t of Family and Protective Servs., 255 S.W.3d at 616 (O'Neill, J., concurring in part and dissenting in part).

157 Id. at 616-17. Supporting her holding, Justice O'Neill cited Texas Department of Human Services v. Boyd, where the court held that endangering a child meant “more than a threat of metaphysical injury or the possible ill effects of a less-than-ideal family environment, it is not necessary that the conduct be directed at the child or that the child actually suffers injury.” Id. (quoting Tex. Dep’t of Human Servs. v. Boyd, 727 S.W.2d 531, 533 (Tex. 1987)).

158 Id. at 616.
the age of eighteen, Justice O’Neill found that there was enough evidence to establish “a pattern or practice of sexual abuse” and “that other such girls were at risk of sexual abuse as well.”159 Similarly, the Texas Department of Family and Protective Services made an ultimate finding that twelve girls, or one out of every four, on the Ranch, were victims of sexual abuse and that their parents were aware of this abuse.160 As a result, the Department found that these twelve girls, along with 262 other children on the Ranch, were victims of neglect because their parents failed to remove them from situations where they would be exposed to sexual abuse.161 Accordingly, Justice O’Neill’s opinion and the Department of Family and Protective Services’ findings suggests that religious beliefs serve as a factor in establishing a pattern of sexual abuse that can extend beyond just the abused children to other children at risk of the same behavior.162 Therefore, in considering the religious convictions of the FLDS members at the Yearning for Zion Ranch, it is possible to conclude that their religious beliefs condone statutory rape resulting from the adherence to “spiritually marrying” underage girls. Given this conclusion, removal of these children was warranted because the Ranch provided an unsafe atmosphere and created a risk of harm to all the children on the Ranch.

B. Analogizing the Yearning for Zion Ranch to a Family

The children at the Yearning for Zion Ranch were properly removed from their parents by the Department of Family and Protective Services due to the fact that the community as a whole condoned sexual abuse among some of the children. The Texas Supreme Court should have characterized the Ranch as a family in order to justify removal of the remaining children who were not abused but are at risk for future abuse. Conversely, the Texas Supreme Court determined that there was not sufficient evidence to warrant removal of most of the children from the Yearning for Zion Ranch because there was no apparent physical abuse as to these children individually.163 However, the court failed to

159 Id. at 616-17.
160 ELDORADO INVESTIGATION, supra note 154, at 4.
161 Id.
162 See discussion infra Part II.B.
163 See generally In re Tex. Dep’t of Family and Protective Servs., 255 S.W.3d 613.
consider the idea that individualized proof is not necessary.\textsuperscript{164} Courts and legislatures have authorized the removal of children from parental care in cases where there was only evidence that one sibling had been abused.\textsuperscript{165} Similarly, the Texas Supreme Court should have characterized the Ranch as a family in order to justify removal of the remaining children who were not abused but are at risk for future abuse.

Cases where parents lose custody of all their children based on evidence of abuse in only one child are justified by reasoning that if there is evidence of neglect or abuse in one child, then it is likely that the other children are also victims of abuse or neglect.\textsuperscript{166} One study showed that in almost half of the families where abuse was present, more than one child was abused.\textsuperscript{167} This same study also demonstrated that the likelihood of the abuse reoccurring was high.\textsuperscript{168} Other similar

\textsuperscript{164} See, e.g., N.Y. FAM. CT. ACT § 1046(a)(i) (Consol. 1999) (“[P]roof of the abuse or neglect of one child shall be admissible evidence on the issue of the abuse or neglect of any other child of, or the legal responsibility of, the respondent . . . .”).

\textsuperscript{165} In Maryland, the Court of Special Appeals held that removal of one child based on neglect of a sibling was appropriate. In re William B., 533 A.2d. 16, 21 (Md. Ct. Spec. App. 1987) (“The parents’ ability to care for the needs of one child is probative of their ability to care for other children in the family.”). In support of its holding, the court stated that authorities should not have to wait until a child suffers abuse or neglect to determine that the parents are unfit. See id. Although such a finding must be adduced by actual evidence, “the fear of harm” may be enough to remove a child from parental custody. Id. Similarly, a New York court held that “proof of the abuse or neglect of one child is admissible evidence on the issue of abuse or neglect of a sibling and in appropriate cases it can be sufficient alone to sustain a finding of abuse or neglect.” In re Kimberly H., 242 A.D.2d 35, 36, 38 (N.Y. App. Div. 1998) (where an infant was taken from her mother on derivative grounds due to the fact that the mother had already had her three other children taken from her recently as a result of her beating one of the children with a belt). The court further explained that when a prior finding of abuse is close enough in time to the current proceeding, the condition of abuse is presumed to still exist. Id. at 36. In Texas, the relevant statute states:

In determining whether there is a continuing danger to the physical health or safety of the child, the court may consider whether the household to which the child would be returned includes a person who: (1) has abused or neglected another child in a manner that caused serious injury to or the death of the other child; or (2) has sexually abused another child.

TEX. FAM. CODE ANN. § 262.201(d)(1)-(2) (Vernon 2008).

\textsuperscript{166} See generally DONALD T. KRAMER, 2 LEGAL RIGHTS OF CHILDREN § 16:38 (2008); Robin Fretwell Wilson, The Cradle of Abuse: Evaluating the Danger Posed by a Sexually Predatory Parent to the Victim’s Siblings, 51 EMORY L.J. 241, 244, 255 (2002) (discussing social science studies tending to show abuse in one child leads to a presumption of abuse in the child’s siblings).

\textsuperscript{167} In over forty-five percent of the families studied, more than one child in the family suffered abuse. Roy C. Herrenkohl et al., The Repetition of Child Abuse: How Frequently Does It Occur?, 3 CHILD ABUSE & NEGLECT 72 (1979).

\textsuperscript{168} Id. (incidents of abuse were reported in 18.5% of the 206 families studied whose cases had been closed, while reoccurrence, the repetition of abuse, was an even
studies demonstrate that where one child is abused, there is an increased likelihood that other children in the household are also being abused.\textsuperscript{169} Yet another study found that one-third to one-half of cases involving sexual abuse involved abuse of another relative as well.\textsuperscript{170} Despite these alarming figures, they may actually underestimate the true number of children suffering from abuse because often abuse goes unreported.\textsuperscript{171} These studies further substantiate the idea that where one child in a family is abused, another child is probably also at risk because abuse towards the sibling could have gone unreported. Based on these studies it is possible to conclude that where there is abuse in one child, there is a presumption of abuse in the other children. Furthermore, even if that child has not also been abused or neglected, a home where family violence is present is not a safe atmosphere for the child.\textsuperscript{172} Thus, courts often are willing to terminate parental custody in cases where there is no evidence of abuse towards one child but there is clear and convincing evidence of abuse towards the child’s sibling.\textsuperscript{173} The issue in these cases becomes not whether the child has been abused, but whether the child is likely to be abused and, therefore, the court has discretion to protect the children in an abusive household.\textsuperscript{174} Based on the characteristics and practices of the members at the Ranch, it is possible to analogize the Yearning for Zion Ranch community

\textsuperscript{169} For a discussion on studies showing incest and sexual abuse see Wilson, supra note 166, at 256-58.

\textsuperscript{170} DIANA E.H. RUSSELL, THE SECRET TRAUMA 242 (1986). A further study found that in one-fourth of cases involving abuse towards a child, the sibling was also abused. See Wilson, supra note 166, at 257.

\textsuperscript{171} RUSSELL, supra note 170; Farber et al., supra note 168, at 294; see also Wilson, supra note 166, at 256.

\textsuperscript{172} See supra note 165.

\textsuperscript{173} In re Baby Boy Santos, 336 N.Y.S.2d 817, 820 (N.Y. Fam. Ct. 1972) (holding that there was sufficient evidence to terminate the parental custody rights for a baby boy given the significant amount of abuse his sister had suffered even though he had not personally suffered abuse); see also In re Interest of M.B., 480 N.W.2d 160, 161-62 (Neb. 1992) (“If evidence of the fault or habits of a parent or custodian indicates a risk of harm to a child, the juvenile court may properly take jurisdiction of that child, even though the child has not yet been harmed or abused.”).

\textsuperscript{174} In re Baby Boy Santos, 336 N.Y.S.2d at 819-20 (“It has been the experience of the Court, as well as authorities in the subject of child abuse, that there is in effect a ‘child abuse syndrome’ and that when one abused child is removed from the home, that another child in the home may become the object of abuse by the parent.” (citations omitted)).
to a family. In doing so, there is support for removal of all the children despite a lack of physical abuse in each child.

The Texas Department of Family and Protective Services did argue that the Yearning for Zion Ranch constituted the equivalent of a household for the purposes of a custody proceeding. However, the Texas Appellate Court rejected this argument and the Texas Supreme Court affirmed. The Appellate Court stated that the notion that the Ranch comprised one household was contrary to the evidence, which showed that there were separate living arrangements and separate family groups. Contrary to the court’s opinion, the living arrangements at the Ranch indicate otherwise.

Notably, the members of the Yearning for Zion Ranch do not all live in a single unit; they live in a guarded, concrete compound within which there are several housing units. Although this is not a traditional single dwelling unit, it is similar to one in that the aggregate of the individual housing units within the locked compound equal one large estate. Furthermore, the fact that the Ranch does not allow outsiders into the compound makes it similar to the family dwelling that restricts outsiders unless they have been invited to enter the dwelling.

The court also incorrectly pointed to the existence of separate family groups to reject the notion that the Ranch constitutes a family. Adherents to the FLDS religion encourage the practice of polygamy, allowing a male to take several wives and have multiple children with each wife. As such, it is difficult to distinguish separate family groups amongst the mix of husbands with several wives and children. In fact, because it was facially unclear which child belonged to which parents, the residents of the Ranch were compelled to participate in DNA

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175 See infra notes 192-196 and accompanying text.
176 See supra notes 165-173 and accompanying text.
178 Id. at *3 n.10.
180 See Romero, supra note 179, at 1.
181 See Kovach & Murr, supra note 179.
testing to determine the correct lineage of the children. The practice of polygamy and the refusal of the Ranch members to procreate with “outsiders” has created in-breeding and an undeniably biological link between many of the Yearning for Zion residents.

Moreover, there are other factors that weigh in favor of the Yearning for Zion Ranch community being treated as a family. The traditional notion of family includes a husband and wife, legally married and living together with their children. However, a family can also consist of unrelated individuals residing together. Some of the key factors that courts consider in establishing a family relationship are whether there is “stability, permanency and [a] functional lifestyle which is equivalent to that of the traditional family unit.” For instance, a group of college students living together were considered a family because they had renewable leases and an intention to remain in the living unit through the completion of their degrees. They also “ate together, shared household chores, and paid expenses from a common fund.” In contrast, a group-home was not considered a family because the staff worked for the home on a rotating basis, which caused a lack of stability. Also, the residents lived at the home for only a short period of time, thereby creating a lack of permanency.

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187 Borough of Glassboro, 568 A.2d at 894.
188 Id.
189 Id. Although in a similar case, a group of college students were not considered a single family because they were not related by blood, adoption or marriage. However, this case involved an ordinance, which the Supreme Court upheld as not violating any constitutional right that specifically required that the individuals be related by blood, adoption or marriage. See Vill. of Belle Terre v. Boraas, 416 U.S. 1, 2-3, 9 (1974). In the present case, there is no ordinance in question that limits the definition of families to relation by blood, adoption or marriage.
190 Penobscot Area Housing Dev. Corp., 434 A.2d at 21-22.
191 Id.
Applying these factors here, the Yearning for Zion Ranch resembles a family due to the unique characteristics of the Ranch members’ lifestyle. The Ranch community exudes “stability, permanency and [a] functional lifestyle which is equivalent to that of the traditional family unit.” Similar to the college students deemed to satisfy the definition of a family because of their functioning as a family-type unit, the residents of the Ranch also function as a family-type unit. In particular, the Ranch has communal facilities such as a garden where residents can grow fruit and vegetables to share, a milk barn, a cheese factory, and other establishments meant for sustaining the community. The maintenance and use of these establishments in a communal fashion for the benefit of everyone at the Ranch is comparable to the college students sharing chores for the maintenance and benefit of the entire house in a familial manner. Additionally, unlike the group home where the rotation of staff members undermined stability, the Yearning for Zion Ranch has religious leaders that act as patriarchal figures. Therefore, the Yearning for Zion Ranch is more similar to a family than a shared home.

Even if it is accepted that the Ranch constitutes a family, the issue of whether or not the belief system on the Ranch creates a dangerous atmosphere for the children is still debated. Similar to a family, the residents of the Ranch share

192 Borough of Glassboro, 568 A.2d at 894.
193 See id.
195 See Borough of Glassboro, 568 A.2d at 894. Similar to the college students who shared food and the responsibility of cooking and cleaning, members of the Yearning for Zion Ranch also share the source of their food and the expense and labor associated with their food source. See Hunting Ground to Polygamist Ranch, supra note 194; Sinclair, supra note 194.
196 See Penobscot Area Housing Dev. Corp, 434 A.2d at 21-22. The Yearning for Zion Ranch is led by male religious leaders who dictate which men will marry which women, what type of contact the members will have with modern products and the way of life within the sect in general. See Hunting Ground to Polygamist Ranch, supra note 194; Kirk Johnson & Gretel C. Kovach, Daughter of Sect Leader Gets Additional Protection, N.Y. TIMES, June 4, 2008, at A16; Kovach & Murr, supra note 179.
religious beliefs and require specific rules in the upbringing of children and the way of life in the Ranch.\textsuperscript{198} The Texas Department of Family and Protective Services argued that the existence of a “pervasive belief system” that condones young girls “marry[ing], engag[ing] in sex, and bear[ing] children as soon as they reach puberty” posed a threat of abuse to all the children on the Ranch.\textsuperscript{199} In response, the Texas court held that it was the beliefs and actions of certain individuals, and not the community as a whole, that posed a danger to the children.\textsuperscript{200} However, as demonstrated in \textit{Yoder}, courts will look at the beliefs of the entire religious community as precedent for determining how certain convictions will impact the community.\textsuperscript{201} Thus, a court examining this case should find that where members of a community, acting in a manner so as to resemble a family, promulgate a belief that in practice violates criminal statutes and constitutes sexual abuse of children and other members fail to stop this abuse or report it to authorities, the community has accepted this practice as a whole. This behavior creates an unsafe atmosphere for all the children exposed to it.

In summary, the case of the Yearning for Zion Ranch can be analogized to a family for the purpose of removal in that it is a closed community that resembles a household. Thus, if some of the children on the Ranch are being abused and therefore qualify for removal, the court should be able to remove the other children because the possibility exists that these children are or will be abused and the atmosphere is not promoting the child’s welfare. However, because the Texas court applied the requisite clear and convincing evidence standard, the parents’ rights were not terminated and the children were returned to an unsafe environment.

\textsuperscript{198} See Kovach & Murr, supra note 179.
\textsuperscript{199} \textit{In re Steed}, 2008 WL 2132014, at *2 (internal quotation marks omitted).
\textsuperscript{200} \textit{Id.} at *3. The Texas Appellate Court found that there was disagreement amongst members of the Yearning for Zion Ranch on what is an appropriate age for marriage. \textit{Id.} at *3 n.9.
\textsuperscript{201} See Wisconsin v. Yoder, 406 U.S. 205, 209-12, 215, 219 (1972) (examining the effect of compulsory school attendance past the age of sixteen on the upbringing of children in the faith of the Old Order Amish religion).
III. LOWERING THE EVIDENTIARY STANDARD

Currently, the standard for termination of parental rights is the clear and convincing standard.\(^{202}\) However, in a situation where a pervasive belief system in a closed community, such as the Yearning for Zion Ranch, promotes child abuse in some of the children, the standard of proof for removal of the remainder of the children should be lowered. Although the current state of the law does not promote this assertion,\(^{203}\) the law should be revised in consideration of important policy perspectives.

Requiring that the state prove by clear and convincing evidence that the parent has either abused or neglected his or her children or caused them some other irreparable harm satisfies the *Eldridge* factors as to the *parent*.\(^{204}\) However, this standard does not necessarily provide adequate protection for the children involved.\(^{205}\) In granting parents greater protection by requiring the state to prove abuse by clear and convincing evidence, a potentially abused or neglected child is afforded less protection. In some circumstances, this could mean that an abused or neglected child is also being afforded less protection because the evidence of abuse or neglect may not be apparent. For instance, in *DeShaney v. Winnebago County Department of Social Services*, a young boy was treated several times for injuries caused by his father, prompting a physician to report the injuries to the Department of Social Services.\(^{206}\) However, based on the requirement that the state show clear and convincing proof of abuse, the Department decided that there was not sufficient evidence of abuse to require that the boy be removed from the parent’s custody.\(^{207}\) Subsequently, the boy suffered from continual abuse that led to permanent brain damage and severe retardation.\(^{208}\) The rationale behind the Department’s decision and the clear and convincing standard in general is that just like it is better to let a guilty man go free than to send an innocent man to prison in the criminal

\(^{202}\) See supra Part I.A.2.


\(^{204}\) See supra text accompanying note 33.


\(^{206}\) *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 192-93 (1989).

\(^{207}\) *Id.*

\(^{208}\) *Id.* at 193.
context,\textsuperscript{209} here too it is better to allow a child to stay with parents who are abusive rather than to take a child away from non-abusive parents. However, the situations are distinct because in the criminal context the victim will likely never be harmed again by a wrongly acquitted defendant whereas a child is forced to continue living with his or her abusive parents when the state fails to prove abuse or neglect by clear and convincing evidence. Accordingly, the rationale in support of protecting a parent’s fundamental rights and liberty interests is upheld while the consequences to the child victim are not even considered.

Returning to \textit{DeShaney v. Winnebago}, the young boy’s mother brought suit against the Department of Social Services asserting a violation of the boy’s due process rights because the state failed to intervene on the boy’s behalf to protect him from his father’s abuse.\textsuperscript{210} The Court ruled against the child and held that the Fourteenth Amendment Due Process Clause is meant to protect individuals from state interference with their liberty or property rights, as opposed to private interference from private actors.\textsuperscript{211} Therefore, when the state’s interest and the parent’s interest diverge, in that the parent is no longer looking out for the health, safety, and welfare of the child, the child has virtually no due process protection of his or her own interest in being free from abuse.\textsuperscript{212} The Fourteenth Amendment protects the parent’s interest against undue interference by the state, while the clear and convincing standard places a heavy burden on the state to interfere even when abuse may be present.

Justice Rehnquist, writing for the dissent in \textit{Santosky}, also found that the clear and convincing standard does not adequately protect the child’s interest in remaining free from abuse.\textsuperscript{213} While the majority opinion, in applying the \textit{Eldridge} factors, merely considered the private interests of the parent, Justice Rehnquist also considered the private interest of the child involved.\textsuperscript{214} Specifically, Justice Rehnquist reasoned that the child has an interest independent from the parent in the

\textsuperscript{210} \textit{DeShaney}, 489 U.S. at 193.
\textsuperscript{211} \textit{Id.} at 196-97.
\textsuperscript{212} \textit{Cf. id.} at 202-03 (holding that the State was not required to protect a child from abuse at the hands of his father).
\textsuperscript{214} \textit{Id.} at 788-90.
outcome of a termination proceeding. While both the child and the parent have an interest in avoiding an erroneous termination, severing the ties between the parent and child, the child also has an interest in avoiding an erroneous continuation of a relationship where abuse is present. Thus, since the interests of the parent and the child are of equal importance, the appropriate conclusion, according to Justice Rehnquist, is to apportion the risk of an erroneous termination equally and therefore the preponderance of the evidence standard is the correct standard.

Based on the foregoing, it is apparent that children are not afforded the same protection as adults in termination proceedings. While it is undeniable that parents have a fundamental right to the upbringing of their children, and that the state has a compelling interest in avoiding wrongful termination of parental custodial rights, children have an equally compelling interest in remaining free from abuse. However, as DeShaney demonstrates, children have no due process protection to be free from abuse. Thus, while parents have the Fourteenth Amendment right to the control of their children and the added protection of the clear and convincing standard in termination proceedings, children have virtually no protection. As such, the clear and convincing standard may not always be the right standard to apply in termination proceedings. In order to best protect a child’s interest to be free from abuse, it is prudent to lower the standard of proof from clear and convincing to a preponderance of the evidence in some circumstances, such as cases involving extreme and potentially dangerous religious communities.

In the case of the children from the Yearning for Zion Ranch, the children remain at risk of abuse due to the “pervasive belief system” of the community, as evidenced by the presence of pregnant and “married” underage females on

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215 Id. at 788 n.13.
216 Id.
217 Id. at 791; see generally Raymond C. O’Brien, An Analysis of Realistic Due Process Rights of Children Versus Parents, 26 CONN. L. REV. 1209 (1994) (arguing that the clear and convincing standard is too onerous a burden and does not adequately protect the interests of the children involved).
218 See supra text accompanying notes 33-36.
219 See supra notes 211-212 and accompanying text.
220 See supra notes 211-212 and accompanying text.
the Ranch. Although the Texas Supreme Court held that there was not enough evidence of an imminent threat to the children's health or welfare, given this risk of future abuse, the children on the Ranch should be removed. Yet, in order to establish abuse warranting removal, the standard of proof must be lowered. If it can be established by clear and convincing evidence that some of the children in a family-like community were abused, then the standard by which the state needs to show that the other children are threatened by abuse should be lowered to a preponderance of the evidence standard. Therefore, since there was enough evidence of abuse to satisfy the clear and convincing standard for five pregnant and married underage girls on the Ranch, then it should be possible to prove abuse as to the other children by a preponderance of the evidence.

While it is true that the boys living on the Ranch are not subject to the same possibility of abuse as the girls, they should nevertheless be considered in danger. Regardless of gender, if one child is abused in the home by the parents then the other children are deemed to be at risk and the parents are considered unfit. Because there is abuse against some of the girls at the Ranch, which can be analogized to a family, the boys should be removed from the Ranch as well. A study in the Netherlands concluded that there are actually few differences between sexual abuse towards girls and boys and in as many as 21% of the cases studied, offenders were equally interested in males and females. Additionally, parental termination

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222 See In re Tex. Dep't of Family and Protective Servs., 255 S.W.3d at 616 (O'Neill, J., concurring in part and dissenting in part).
223 Id. at 615 (majority opinion).
224 See In re Steed, 2008 WL 2132014, at *2 (noting that there was no evidence as to abuse in the children except as to the five female children).
225 By lowering the standard to a preponderance of the evidence for the remaining children not showing signs of abuse, the state will be able to prove the need for termination by demonstrating conclusive abuse in some of the children on the Ranch and the presence of pervasive belief condoning abuse. This is based on the presumption that where abuse is present in some children, it is likely to be present or at least pose a risk to other children in the same environment. See supra Part II.B.
226 Courts have been willing to find a risk of potential abuse where one child has been abused regardless of the gender of the child's siblings. See, e.g., In re Burchfield, 555 N.E.2d 325, 333 (Ohio Ct. App. 1988) (removing both the brother and sister of a female child who had suffered sexual abuse based on the unfitness of the environment).
227 See supra note 165 and accompanying text.
228 See supra Part II.B.
229 Farber et al., supra note 168, at 295.
statutes, such as the Texas Family Code, do not differentiate by gender when authorizing removal of one child because of evidence of sexual abuse to the child’s sibling.\textsuperscript{230} In fact, the California Appellate Court has specifically dealt with the issue of abuse towards a female child as being sufficient evidence for removal of her brothers.\textsuperscript{231} The court held that “[b]rothers can be harmed by the knowledge that a parent has so abused the trust of their sister”\textsuperscript{232} and “aberrant sexual behavior by a parent places the victim’s siblings who remain in the home at risk of aberrant sexual behavior.”\textsuperscript{233} Furthermore, boys exposed to a sister’s abuse are being taught to become predators. Although there was no evidence that the boys on the Ranch were subject to sexual abuse, there is still a strong argument to be made that they are residing in a dangerous atmosphere. Therefore, a preponderance of evidence of abuse could be demonstrated to effectuate removal.

IV. POTENTIAL ISSUES ARISING FROM LOWERING THE STANDARD OF PROOF

Analogizing the Yearning for Zion Ranch to a family to provide a legal basis for lowering the standard of proof required to terminate parental rights is not without potential criticisms. Although these criticisms are valid, they do not create impermeable barriers to lowering the standard of proof under specific circumstances.

A. Unequal Application of Due Process Principles

The first potential issue arises from the premise of the argument: that in some cases the standard of proof required to

\textsuperscript{230} TEX. FAM. CODE ANN. § 262.201(d)(1)-(2) (2008). The statute specifically states: “In determining whether there is a continuing danger to the physical health or safety of the child, the court may consider whether the household to which the child would be returned includes a person who: . . . has sexually abused another child.” § 262.201(d)(2) (2005). Similarly, in New York, “proof of abuse or neglect of one child shall be admissible evidence of the abuse or neglect of any other child.” N.Y. FAM. CT. ACT § 1046 (1999). California’s statute provides that a child may be deemed a dependent of the court if “[t]he child has been sexually abused, or there is a substantial risk that the child will be sexually abused . . . by his or her parent” or if “[t]he child’s sibling has been abused or neglected” in a manner defined by this section. CAL. WELF. & INT. CODE § 300(d), (j) (West 2008).

\textsuperscript{231} In re P.A., 51 Cal. Rptr. 3d 448, 452-54 (Cal. Ct. App. 2006).

\textsuperscript{232} Id. at 453 (citing In re Rubisela E., 101 Cal. Rptr. 2d 760, 775 (Cal.Ct. App. 2000)).

\textsuperscript{233} Id. at 454.
terminate parental rights should be lowered. This creates an inequality in the application of parental termination law, where parents who are not part of a religious family espousing beliefs in child abuse are afforded a higher burden of proof than their counterparts who are part of such religious groups. Thus, certain persons are arguably provided greater due process than others.

While on its face this criticism may ring true, the reality is that parents will still be afforded substantial due process even in situations where the standard of proof should be lowered. Due process requires procedural and substantive safeguards to protect parents from an erroneous termination decision. By lowering the burden of proof, there is no change substantively because the government still needs to prove a compelling interest in order to terminate the parent’s rights. Procedurally, parents will be afforded protections because they will still be allowed a hearing before the termination of their rights and further, it will be necessary to first prove by clear and convincing evidence that at least one child is suffering from child abuse as a result of a pervasive belief system within the religious family. Thus, the burden of proof will be lowered only after the state had produced clear and convincing evidence of some abuse. Consequently, the lower standard of proof will only apply to other children after the higher standard has already been met.

Furthermore, applying the preponderance of the evidence standard to parental termination proceedings will still comport with the Eldridge factors. In fact, each of the Eldridge factors will probably be applied more equitably. First, the private interest affected by lowering the burden of proof in certain cases considers both the child and the parent as distinct interests. Whereas currently the parent’s interest also include the child’s interest because it is assumed that their interests align, by lowering the burden of proof, the child is given a distinct interest from the parent to be free from abuse. This distinction of interests is apposite because the child’s interest was presumed aligned with the parent’s interest up until the point in time where clear and convincing evidence of abuse was shown as to another child. Once this threshold has been passed, it should then be assumed that the child’s interest

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234 See supra Part IA.1.
235 See supra Part IA.1.
236 See supra notes 32-43.
diverges from the parent’s. Second, the government’s interest is enhanced in the sense that its interest in ensuring the health, safety, and welfare of the children involved will be given greater consideration. By seriously considering the threat of abuse in a community where a pervasive belief system condoning abuse exists, the government’s interest in the children’s welfare is given greater weight than if the sole standard is the clear and convincing standard. Further, lowering the standard of proof in certain cases will also inherently lessen fiscal and administrative burdens in that it will not be necessary to exhaust resources attempting to collect elusive physical evidence for children who are in danger as a result of a belief condoning abuse and evidence of abuse in other children besides themselves.

Finally, the risk of an erroneous decision resulting in a parent’s rights being terminated unjustly is no more than where a parent’s rights are terminated as to one child when there is no abuse as to that child but there is clear and convincing evidence of abuse committed against another child in the same family. If terminating a parent’s rights to all of his or her children as a result of abuse of one child complies with due process, then applying the same principles to the Ranch, being treated as a family, should likewise comply with due process. Consequently, even if the standard of proof is lowered in some specific cases, the parents involved in these cases will still be afforded an appropriate level of due process.

Even if it is conceded that some parents will be afforded a different level of due process than other parents, equality in due process is not necessary and not always possible. This should not be viewed as lowering the standard of proof because, as noted by the Supreme Court in *Lassiter v. Department of Social Services of Durham County, North Carolina*, “due process ‘is not a technical conception with a fixed content unrelated to time, place and circumstances.’” The Court went on to hold that the “fundamental fairness” required by due process may vary based on the circumstances and thus a case-

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238 See supra text accompanying notes 36-38.
239 See supra text accompanying notes 39-41.
240 See supra notes 172-173 and accompanying text.
241 See supra notes 172-173 and accompanying text.
by-case analysis is appropriate. Dissenting from the majority in the *Santosky* opinion, Justice Rehnquist reasoned that “not all situations calling for procedural safeguards call for the same kind of procedure.” In his opinion, Justice Rehnquist stated that the flexibility of the due process concept required that its mandates be considered based upon the facts of each particular case. Thus, considering due process requirements on a case-by-case basis means that it is not necessary in every case to afford the same standard of proof afforded in a previous case of the same nature because the underlying facts will inherently require a different analysis.

Accordingly, while it is possible to argue that lowering the standard for termination of parental rights will afford unequal constitutional process to some people based upon certain criteria, this is not fatal to this Note’s argument. First, a different standard of due process does not necessarily mean that the parents are not being afforded the appropriate level of due process. Second, the concept of due process is not completely clear or concrete, and thus, it is essential to provide for different procedural safeguards based upon the specific facts of the case. Therefore, regardless of whether the state is required to prove by only clear and convincing evidence or clear and convincing and by a preponderance of the evidence, a parent’s constitutional rights to due process will be protected.

B. Problems with Treating the Ranch as a Family

A second criticism arising from lowering the standard of proof in certain parental rights termination proceedings evolves from the idea that the Yearning for Zion Ranch is treated as a single family. First, treating the Ranch as a family would be contrary to the concept that each parent must be suspected of abuse before a child can be removed. Second, defining the Ranch as a family would create a slippery slope to
allow other communities to be considered a family for the purpose of parental termination. While both of these arguments raise legitimate concerns, ultimately they should not defeat the objective that the burden of proof for parental termination proceedings must be lowered in some instances.

The first counterargument to treating the Ranch as a family unit arises from the concept that each parent needs to be accused individually of abuse. The Texas courts specifically rejected the argument by the Department that the Ranch should be treated as one family unit.\(^{247}\) The Texas Court of Appeals noted that among the FLDS communities there were differences in opinions as to “what is an appropriate age to [marry], how many spouses to have, and when to start having children.”\(^{248}\) The court went on to state that “not all FLDS families are polygamous or allow their female children to marry as minors.”\(^{249}\) Supporting the view that the community’s beliefs cannot be treated as one whole, Catherine Ross in her article, *Legal Constraints on Child-Saving: The Strange Case of the Fundamentalist Latter-Day Saints at Yearning for Zion Ranch*, argues that the Fourth Amendment requires that “individualized suspicion of each parent [is necessary] before his or her child is removed.”\(^{250}\)

While these arguments against treating the Ranch as a family are somewhat compelling, they are not sufficient to preclude lowering the burden of proof. In analyzing the Department’s argument regarding treating the Ranch as a family, the Texas Court of Appeals simply stated that the notion that the Ranch constituted a family was contrary to the evidence, not that such a concept was an unreasonable possibility.\(^{251}\) Ostensibly, if sufficient evidence is presented, the Ranch or a similar community could be considered a family. Further, Professor Ross admits that requiring child welfare workers to “weigh the risk of abuse to each child in the household before removing the child” is a break from current

\(^{247}\) See *supra* notes 177-178 and accompanying text.


\(^{249}\) Id. at *3 n.11.

\(^{250}\) Ross, *supra* note 205, at 399. Ross argues that the Fourth Amendment, governing searches and seizures, requires individualized suspicion before the government acts, thus precluding any action based on suspicion of the community as a whole. *Id.* at 399-400.

\(^{251}\) See *In re Steed*, 2008 WL 2132014, at *3 n.10.
Therefore, because the current laws of most states allow the government to remove children that it suspects are at a risk of abuse based on evidence of abuse to siblings, requiring individualized proof that each child is at risk from each parent is too stringent of a standard.

Even if individualized proof is too stringent of a standard, critics may still argue that analogizing the Ranch to a family creates precedent that all religious communities or communities organized in a manner espousing a particular belief can also be analogized to a family. This parallel to a family should not be read so broadly. The Ranch can be analogized to a family because of the extreme measures it has taken to seclude itself from the rest of society and the lifestyle the members of the Ranch lead, including polygamy (creating confusion as to who comprises each nuclear family) and an integrated system of working and living together. Thus, asserting that the Ranch constitutes a legal family for the purpose of a parental termination proceeding is much different from a religious community that may share a belief system, attend religious services together, share meals together, etc., but are still members of the rest of society because they live and work and integrate with people outside of their community. Therefore, while it is possible that other communities could be seen as families for the sake of parental termination proceedings if the Ranch is considered a family, such a determination should be limited to situations where the community truly resembles a family as defined by cases such as Penobscot Area Housing Development Corp. and Borough of Glassboro.

V. CONCLUSION

Parents have a constitutional right to the custody and control of their children, which encompasses the control over the religious upbringing of their children. Because this right is deemed to be fundamental, clear and convincing evidence of abuse and neglect must be demonstrated when the state seeks to

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252 Ross, supra note 205, at 400; see also supra notes 173-174 and accompanying text.
253 See supra notes 192-196 and accompanying text.
254 See supra notes 186-191 and accompanying text.
255 See supra Part I.A.1.
terminate these parental rights. However, while this standard adequately protects the rights of the parents, it fails to adequately protect the rights of the children to be free from abuse or neglect.

In parental termination cases in a closed community where there is a pervasive belief system condoning sexual abuse of children, similar to that of the Yearning for Zion Ranch, the best procedure is to require clear and convincing evidence that abuse has occurred in some of the children as a result of this belief system. However, since this type of community resembles a family, it should be treated as a legal family. Thus, abuse found in one child in the community should be enough to remove the other children. In order to protect the interest of the children to be free from abuse, while still protecting the constitutional rights of parents to the custody of their children, the standard of proof required to remove the children who have not been abused should be the preponderance of the evidence standard. Therefore, to satisfy the burden of proof for parental termination, the state needs only prove that the children who have not been abused more likely than not will be abused because of the clear and convincing evidence of the actual abuse of other children in the compound.

By lowering the standard of proof required for termination of parental custody rights, the court will be protecting the rights of children to live free from the abuse of their parents. Although the First Amendment right of free exercise of religion and the Fourteenth Amendment parental due process right require preservation, their importance should not overshadow the need for the state to protect the welfare of children.

Brittany Nilson

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256 See supra Part IA.1-2.

257 Since the Yearning for Zion Ranch case was decided, ordering the return of the children to their parents, Texas Department of Family and Protective Services has initiated safety plans signed by the parents of the children involved in order to protect against any possible future abuse. ELDORADO INVESTIGATION, supra note 154, at 5. Of the 439 children involved in the investigation, 424 of the cases have been nonsuited. Id. However, the investigation has led to a grand jury indictment of twelve of the male residents for charges ranging from sexual assault of a child to tampering with evidence to bigamy and failure to report child abuse. Id. at 15.

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Lessons from the British and American Approaches to Compelled Decryption

As society careens faster and faster into the digital age, the amount of information stored electronically will only continue to grow. This proliferation of electronic storage has given rise to new threats to data security, both legal and illegal. To protect against these extrinsic threats, people have increasingly turned to data encryption, a process that renders data unintelligible to unauthorized viewers. Due to the limits of current technology, encryption software programs, some of which are available free to the public, can render data virtually indecipherable without access to the appropriate encryption key or password. Encryption is a “double-edged

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2 Illegal threats to electronically stored data include identity theft, corporate espionage, phishing, etc. See generally Terrence Berg, The Changing Face of Cybercrime: New Internet Threats Create Challenges to Law Enforcement, 86 MICH. B.J. 18, 18 (2007).

3 See generally infra note 14; see also Press Release, PGP Corp., Aberdeen Group Research Reveals Increased Use of Encryption by Top Performing, Best-in-Class Companies (Nov. 20, 2008), available at http://www.pgp.com/insight/newsroom/press_releases/aberdeen_group_research.html (“[T]he use of encryption to protect sensitive data in the enterprise is becoming even more pervasive . . . .”).

4 A powerful encryption software program, named TrueCrypt, can be downloaded free of charge at the TrueCrypt web site. TrueCrypt, Downloads, http://www.truecrypt.org/downloads (last visited Aug. 28, 2009).

5 In In re Grand Jury Subpoena to Boucher, with regard to the government’s efforts to decrypt seized encrypted files, a Secret Service agent testified “that it is nearly impossible to access these encrypted files without knowing the password . . . .” The only way to get access without the password is to use an automated system which repeatedly guesses passwords. According to the government, the process . . . could take years . . . .” In re Grand Jury Subpoena to Boucher (Boucher I), No. 2:06-mj-91, 2007 WL 4246473, at *2 (D. Vt. Nov. 29, 2007), rev’d, No. 2:06-mj-91, 2009 WL 424718 (D. Vt. Feb. 19, 2009); see also D. Forest Wolfe, The Government’s Right to Read: Maintaining State Access to Digital Data in the Age of Impenetrable Encryption, 49 EMORY L.J. 711, 712 (2000) (“Modern computerized cryptography uses encryption algorithms to keep digital information private, and the most complex of these algorithms can encode data so thoroughly that it would take millennia to decipher it with current technology.” (citations omitted)); see infra Part II.B. Of course, future
sword,” and can be used by criminals and ordinary citizens alike. This presents a major dilemma for law enforcement officials, who, without the proper legal mechanisms, would be practically powerless to gather electronic evidence in the face of widespread encryption.

Because the trend towards the ever increasing use of data encryption is not confined to the United States, the aforementioned dilemma is an issue for law enforcement agencies around the world. Despite being faced with the same problem, countries have adopted different solutions. In particular, the United States and Great Britain have approached the dilemma in vastly different fashions.

Great Britain has taken a direct, and decidedly pro-law enforcement, approach. Under Part III of the Regulation of Investigatory Powers Act (“RIPA”), various British governmental actors are empowered to compel decryption and criminally charge citizens who refuse to comply. This statute has drawn criticism from a variety of groups, ranging from civil rights activists to citizens concerned about the deleterious effect the statute could have on the British economy.

The United States has adopted an entirely different approach. Unlike Great Britain, the United States has, as of now, declined to statutorily grant law enforcement the power to compel decryption. Due to this lack of statutory guidance, the issue of compelled decryption has been left to the judiciary. Although case law on the subject is extremely limited, at least one early decision has analyzed this problem under Fifth

advances in technology are hard to predict, and there could be major advances in either encryption or encryption-cracking technology. It is part of an ongoing struggle between those creating more powerful encryption and those creating more powerful computers to break encryption. See Dawn Walton, A Quantum Leap in Information Security, GLOBE & MAIL, Apr. 3, 2007, at B9 (discussing a very advanced form of encryption in development called quantum cryptography).


7 Infra Part I.B.


9 See infra Part IV.A.

10 Jeffrey Yeates, CALEA and the RIPA: The U.S. and the U.K. Responses to Wiretapping in an Increasingly Wireless World, 12 ALB. L.J. SCI. & TECH. 125, 141 (2001) (“Significantly, [under CALEA] telecom carriers have no responsibility to decrypt any encrypted communications or ensure that law enforcement can do so.”).

11 See generally id.
Amendment jurisprudence.\footnote{12} In \textit{In re Grand Jury Subpoena to Boucher}, a magistrate judge in the District of Vermont ruled that the federal government could not compel a citizen to turn over his encryption password because doing so would infringe upon his Fifth Amendment privilege against self-incrimination.\footnote{13}

Both approaches are decidedly problematic, albeit in different ways. The British approach, while highly protective of law enforcement interests, encroaches too far on individual civil liberties. The American approach, as typified by \textit{Boucher}, while adequately protecting civil liberties, leaves the government without the proper tools to effectively fight crime in a digital age. The consequences of the ubiquitous use of unbreakable encryption by criminals like terrorists, hackers, child pornographers, and members of organized crime syndicates, to name a few, would be devastating.\footnote{14}

\footnote{12} The first case, as far as my research has revealed, to deal with this issue is \textit{In re Grand Jury Subpoena to Boucher}, which analyzed the issue under Fifth Amendment jurisprudence. \textit{In re Grand Jury Subpoena to Boucher (Boucher I), No. 2:06-mj-91, 2007 WL 4246473, at *2 (D. Vt. Nov. 29, 2007), rev'd, No. 2:06-mj-91, 2009 WL 424718 (D. Vt. Feb. 19, 2009). Notably, on February 19, 2009, the decision was reversed by District Judge William K. Sessions on narrow grounds. \textit{In re Grand Jury Subpoena to Boucher (Boucher II), No. 2:06-mj-91, 2009 WL 424718 (D. Vt. Feb. 19, 2009); see also infra note 50. Judge Sessions held that, due to a body of law called the foregone conclusion doctrine, the defendant would not be able to resist the governmental order to turn over his password. Boucher II, 2009 WL 424718, at *3-4; see also infra notes 104-111 and accompanying text. This narrow holding does not alter the following analysis because where the foregone conclusion doctrine does not apply, defendants could still seek refuge in the Fifth Amendment.}

\footnote{13} \textit{Boucher II, 2009 WL 424718, at *3.}

\footnote{14} In a 1997 press release, Senator Patrick Leahy (D-VT) stated,

\begin{quote}
We are all acutely aware of, and concerned about, the “bad” uses of encryption by criminals, who want to thwart police surveillance of their criminal activities, and by spies, who engage in activities harmful to our national security. The Working Group report contains startling estimates of 50 to 100 percent in the future annual growth rates for criminal uses of encryption. Even if the impact on law enforcement is not great now, the potential future impact is alarming.
\end{quote}

examines both methods and argues that America should devise a new approach by drawing upon the strengths of each tack and devise a middle ground that provides for both effective law enforcement and adequate protection of civil liberties.

Part I of this Note briefly describes the history and technical background of encryption. Then, Part II discusses the American approach to compelled decryption and the application of the Fifth Amendment, while Part III analyzes the British approach of statutorily compelled decryption. Next, Part IV discusses the criticisms levied at both of the approaches and proposes a statutory middle ground based, in part, on the federal wiretap statute in the Omnibus Crime Control Statute. Finally, the Note concludes with a reiteration of the notion that both approaches have fundamental flaws and that American policy makers should consider adopting a middle ground.

I. HISTORY AND TECHNICAL BACKGROUND OF ENCRYPTION

The goal of encryption is to safeguard important data from unauthorized viewing by third parties. Although modern encryption in its digital form is a relatively recent innovation, more primitive forms have been in existence for thousands of years. With the passage of time and advances in technology, encryption techniques have grown immensely more sophisticated. Currently, freely available software can render data virtually undecipherable without the proper password or encryption key.

A. History and Background of Encryption

Cryptography, the science of secret writing, is the means by which parties can safeguard their important information by preventing unauthorized access. In order to keep information secret, a party will encrypt it, which is the method by which a message is rendered undecipherable to third parties, and in order for the authorized party to read the

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15 See infra text accompanying notes 19-20, 24-27.
16 See infra text accompanying notes 24-27.
17 See Part I.B.
18 See supra text accompanying notes 24-27.
19 See supra note 4.
20 See supra note 4.
21 THE AMERICAN HERITAGE DICTIONARY OF ENGLISH LANGUAGE 439 (Houghton Mifflin Co., 4th ed. 2000) (defining cryptography as “1. The process or skill of communicating in or deciphering secret writings or ciphers. 2. Secret writing.”).
hidden message, it must be decrypted, which is the method by which a secret message is turned into regular text. Depending on whether the data is encrypted or decrypted, it is referred to as “plaintext” or “ciphertext.” Plaintext is the underlying information that is being encrypted—i.e., the secret message or document that is meant to be protected. Ciphertext is the product of the encryption—i.e., the undecipherable text in which the message is hidden. Anyone wishing to uncover the secret message, including governments acting in their criminal investigatory capacities, will be after the underlying data, i.e., the plaintext.

States and individuals have relied on cryptography to safeguard critical information and communications throughout history. A primitive example of the practice, reported by Greek historian Herodotus, involved the tattooing of a secret message on the scalp of a slave, allowing the slave’s hair to grow back, and then sending the slave to the recipient of the message so that his head could be shaved and the secret message revealed. Julius Caesar employed a slightly more advanced method of cryptography in ancient Roman times. Fearing that his military communiqués would be intercepted, Caesar employed the simple cryptographic process of shifting every letter in the alphabet up three steps, such that a “B” would become a “E,” and a “P” would become an “S.” Since the days of Herodotus and Julius Caesar, encryption methods have evolved from simple ciphers, to complex mechanical devices,
and finally to digital encryption of electronic data. Today, electronic encryption has become standard practice for governments, corporations, and, to a somewhat lesser extent, individuals.\textsuperscript{28}

\textbf{B. Technical Background}

Although the basic idea of cryptography is simple, in fact it can be a quite complex process. As one might suspect, in today’s digital world, ciphers are no longer created and decoded simply by tattooing or transcribing letters. Rather, quite intricate methods are required to encrypt and decrypt messages.

First, in order to decrypt information that has been encrypted using modern techniques, an “encryption key” is needed. An encryption key is essentially a very long string of numbers whose length makes it extremely hard to memorize.\textsuperscript{29} Users of encryption software generally do not have to remember this long number and, instead, can enter a more easily remembered password or passphrase, which in turn activates the encryption key.\textsuperscript{30} Thus, when the government seeks to compel an ordinary citizen to turn over the means by which he can decrypt the data, the disclosure order will


\textsuperscript{30} Anoop MS, \textit{Public Key Cryptography: Applications Algorithms and Mathematical Explanations} 2 (2007), \url{http://www.tataelxsi.com/whitpapers/pub_key2.pdf?pdf_id=public_key_TEL.pdf} [hereinafter \textit{Public Key Cryptography}] (“The public key algorithms operate on sufficiently large numbers to make [deriving the private key from the public key] practically impossible and thus make the system secure. For example, RSA algorithm operates on large numbers of thousands of bits long.”); see also Reitinger, supra note 21, at 174 (“For example, the widely used Data Encryption Standard (“DES”) algorithm uses a single key fifty-six bits in length—up to more than 70,000,000,000,000,000,000 in decimal notation—for both encryption and decryption. Public-key algorithms use different keys for encryption and decryption, and much longer keys, such as 512 (and greater) bit numbers—over 150 decimal digits.” (footnote omitted)).

\textsuperscript{25} Such a password would be similar to the password used to log into an email account, or the pin number used to access a bank account at an ATM.
typically compel him to turn over his password rather than the encryption key. \(^{31}\)

There are two methods of using encryption keys—public key encryption and private key encryption. Historically, most encryption was accomplished via the private key method. In the simplest of terms, a private key system involves one key that is used for both encrypting and decrypting the encoded message. \(^{32}\) The sender uses a certain key to encrypt the message, and the receiver uses that same key to decrypt it. \(^{33}\)

In 1976 \(^{34}\) Whitfield Diffie and Martin Hellman proposed a new method of encryption: public key encryption. \(^{35}\) In this system, there are two keys, a public key, which is used for encryption, and a private key, which is used for decryption. \(^{36}\) The public key is available to the public at large, and the private key is known only to the person using the encryption. \(^{37}\) Thus, for example, if one wishes to send a secure message using this type of encryption, he would encrypt the message using a public key, send it, and then the recipient would decrypt the message using her private key. \(^{38}\) One hoping to intercept and decrypt this message would be unable to do so using only the public key because it is a “computationally infeasible” task to derive the private key from the public key. \(^{39}\) In other words, the reason it is difficult to break strong encryption is that while it is a simple task to compute the public key from the private key, it is extremely difficult to do the opposite and derive the private key from the public key. \(^{40}\)


\(^{32}\) Wolfe, *supra* note 5, at 715.

\(^{33}\) Id.

\(^{34}\) Public key encryption was actually invented earlier than 1976 by members of the British Government Communications Headquarters, but their findings were not disclosed. Martin Campbell-Kelly, *Not All Bad: An Historical Perspective on Software Patents*, 11 Mich. Telecomm. & Tech. L. Rev. 191, 230 (2005).


\(^{36}\) *Public Key Cryptography*, supra note 29, at 3.

\(^{37}\) Id.

\(^{38}\) Id.

\(^{39}\) Diffie & Hellman, *supra* note 35, at 644.

\(^{40}\) *Public Key Cryptography*, supra note 29, at 1-2. It is a computationally infeasible task to derive the private key because:

The private and public key of a device is related by the mathematical function called the one-way function. One-way functions are mathematical
This is known as a “one-way function” because it is only easily solvable in one direction.\textsuperscript{41} The only way to ascertain the private key in such circumstances is to use a specialized computer program that guesses, one at a time, the correct number.\textsuperscript{42} This process can take an exceptionally long time.\textsuperscript{43} Thus, it is virtually impossible to break strong public key encryption without compelling, or otherwise obtaining, access to the private key.\textsuperscript{44}

II. THE AMERICAN APPROACH TO COMPULSORY KEY DISCLOSURE

Encryption technology is a double-edged sword and, as such, can be utilized by criminals to shield evidence from governments.\textsuperscript{45} Unlike Great Britain, which has dealt with the issue statutorily,\textsuperscript{46} Congress has thus far declined to pass a statute directly addressing the issue of compelled decryption.\textsuperscript{47} Thus, the problem has been left to the judiciary, and there it has been examined under Fifth Amendment jurisprudence.

functions in which the forward operation can be done easily but the reverse operation is so difficult that it is practically impossible. In public key cryptography the public key is calculated using private key on the forward operation of the one-way function. Obtaining of private key from the public key is a reverse operation. If the reverse operation can be done easily, that is if the private key is obtained from the public key and other public data, then the public key algorithm for the particular key is cracked. The reverse operation gets difficult as the key size increases.

Id.\textsuperscript{41} Id.\textsuperscript{42} See supra note 5 and accompanying text.\textsuperscript{43} Id.\textsuperscript{44} See supra text accompanying notes 41-44.\textsuperscript{45} See supra note 6.\textsuperscript{46} The Regulation of Investigatory Powers Act was passed in 2000. Regulation of Investigatory Powers Act, ch. 23, §§ 49-56.\textsuperscript{47} Congress had an opportunity to address the issue of compelled decryption in the Communications Assistance for Law Enforcement Act (“CALEA”), 47 U.S.C. §§ 1001-1010 (2006). The only section that references encryption merely states that telecommunications providers will not be responsible for decrypting any encrypted information that happens to moving over its lines. Id. § 1002(b)(3) (“A telecommunications carrier shall not be responsible for decrypting, or ensuring the government’s ability to decrypt, any communication encrypted by a subscriber or customer, unless the encryption was provided by the carrier and the carrier possesses the information necessary to decrypt the communication.”). Therefore, unlike its British counterpart, CALEA does not contain any language compelling individuals to decrypt their encrypted data. See generally RIPA, 2000, ch. 23 (Eng.).
A. Fifth Amendment Analysis

The first federal case to directly touch upon the issue of compelled decryption is *In re Grand Jury Subpoena to Boucher*, handed down in the Federal District Court of Vermont on November 29th, 2007. In *Boucher*, Magistrate Judge Jerome J. Niedermeier held that the act of being compelled to turn over an encryption password has testimonial aspects. As a result, the defendant was allowed to refuse to surrender his password under protection of the Fifth Amendment right to refrain from testimonial self-incrimination. This case forms the basis of the American approach to compelled decryption under Fifth Amendment jurisprudence.

Early American legislators were so opposed to the ancient English system, in which admissions of guilt won under torture were admissible, that they made the right against self-incrimination a cornerstone of the Bill of Rights.

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*Id.* at *3.

*Id.* at *3-4. The holding of *Boucher* was reversed on narrow grounds by the District Court of Vermont. *In re Grand Jury Subpoena to Boucher* (*Boucher II*), No. 2:06-mj-91, 2009 WL 424718, at *3-4 (D. Vt. Feb. 19, 2009). Judge William K. Sessions reversed Judge Niedermeier’s opinion on the grounds that the foregone conclusion doctrine precluded the use of Fifth Amendment protection. *Id.* As discussed later, in being forced to turn over a password, a defendant makes three implicit assertions which may be incriminating: that the sought after files exist, that they are authentic, and that the defendant has control over the files. See infra text accompanying notes 64-65. When the government is already aware of these three facts, a defendant is not able to seek refuge in the Fifth Amendment because the incriminating information that would be produced is a foregone conclusion. See infra text accompanying notes 104-105.

In *Boucher*, when Sebastien Boucher came over the border, his hard drive was unencrypted and government agents were able to view the files, thus learning of the existence of the purported child pornography. *Boucher II*, 2009 WL 424718, at *3-4. Further, in admitting that the computer was his, Boucher communicated to the government that the files were under his control and authentic. *Id.* at *4. Thus, the implicit assertions were foregone conclusions, and Judge Sessions ordered Boucher to comply with the order. *Id.*

This reversal does not alter the fundamental analysis presented here. It is easy to imagine a situation where the existence, authenticity, and control over a file or files were not a foregone conclusion. For example, the government could raid the headquarters of a criminal enterprise and find several encrypted hard drives. Because the hard drives were encrypted and the government never had initial access, a defendant ordered to turn over the password to these hard drives could potentially refuse to comply under the Fifth Amendment because the foregone conclusion doctrine would not apply.

See *Brown v. Walker*, 161 U.S. 591, 597 (1896) (“So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England...”)
The Fifth Amendment states, “No person shall . . . be compelled in any criminal case to be a witness against himself.” This right against self-incrimination is not, however, absolute. In order for Fifth Amendment protection to attach, three prerequisites must be met: (1) the disclosure must be testimonial, (2) the disclosure must be compelled, and (3) it must be possible that criminal liability could result. In the vast majority of criminal cases where the government is seeking an encryption key or password, that disclosure is being compelled and criminal liability could result, thus typically leaving only the question of whether disclosing the encryption key is testimonial in nature.

A communication is considered testimonial when it “explicitly or implicitly, relate[s] a factual assertion or disclose[s] information.” Conversely, the Supreme Court has held that a communication is non-testimonial when the suspect is “not required to disclose any knowledge he might have,” or

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was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment.”

52 U.S. CONST. amend. V.

53 Fisher v. United States, 425 U.S. 391, 408 (1976) (“Fifth Amendment . . . applies only when the accused is compelled to make a testimonial communication that is incriminating.” (second emphasis added)).

54 Id. at 409 (“A subpoena served on a [person] requiring him to produce [documents] in his possession without doubt involves substantial compulsion.”); see also Boucher I, 2007 WL 4246473, at *2 (“Subpoenas require compliance and therefore constitute compulsion.”).

55 Generally, Fifth Amendment protection does not attach unless there is the possibility that criminal sanctions could result. Fisher, 425 U.S. at 408 (“Fifth Amendment . . . applies only when the accused is compelled to make a testimonial communication that is incriminating.”). Hence, if a suspect is granted complete immunity, he cannot seek refuge in the Fifth Amendment. United States v. Rose, 806 F.2d 931, 932 (9th Cir. 1986) (“The federal grant of use immunity is sufficient to overcome the Fifth Amendment privilege against self-incrimination.”). More specifically, as a matter of common sense, encrypted information being sought by the government in its investigative capacity will likely be incriminating. In Boucher, the judge noted, “Because the files sought by the government allegedly contain child pornography, the entry of the password would be incriminating.” Boucher I, 2007 WL 4246473, at *2.

56 See Boucher I, 2007 WL 4246473, at *2. Generally, the plaintext which is hidden by the encryption would not be protected by the Fifth Amendment, because in most cases such plaintext would be voluntarily prepared, and thus would not be a testimonial statement afforded protection under the Fifth Amendment. Reitinger, supra note 21, at 178 (“[I]f law enforcement subpoenas information that I have encrypted, I must produce the information in plaintext if it remains available to me in that form, assuming I have no other proper objection, such as my privilege against self-incrimination”.

‘to speak his guilt.’” There are a number of compelled disclosures that are non-testimonial and thus do not violate the Fifth Amendment, including taking blood samples, taking fingerprints, taking voice and handwriting exemplars, compelling someone to wear particular clothing, and forcing someone to stand in a lineup.  

Typically, the contents of a document or hard drive will not be protected by the Fifth Amendment. Nevertheless, in certain circumstances the very act of turning over a document or providing a password to an encrypted hard drive will implicitly communicate incriminating facts and hence will be protected. In Fisher v. United States, the government sought to compel the production of certain incriminating documents, and the defendant refused to comply on the grounds that the act of producing the documents would constitute self-incrimination. Although the documents themselves were voluntarily prepared and were therefore not protected, the defendants argued that the act of production implicitly asserted incriminating facts and should be protected by the Fifth Amendment. Justice White’s majority opinion for the Supreme Court held that complying with a subpoena to produce documents could implicitly communicate three facts: that the documents exist, that they are in the control of the accused, and that the papers are authentic. This is sometimes referred to as the “act of production doctrine.”

58 Id. at 210 (quoting United States v. Wade, 388 U.S. 218, 222-23 (1967); see also Holt v. United States, 218 U.S. 245, 252-53 (“The prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion to extort communications from him, not an exclusion of his body as evidence when it may be material.”).  
60 Boucher I, 2007 WL 4246473, at *2.  
63 Id. at 410-11.  
64 The first element, that the documents actually exist, is interesting with regard to encryption software programs, such as TrueCrypt, which specifically market the ability to hide even the fact that the encrypted files even exist within the ciphertext. TrueCrypt, Plausible Deniability, Hidden Volume, http://www.truecrypt.org/docs/?s=plausible-deniability (last visited Aug. 29, 2009).  
65 Fisher, 425 U.S. at 410 (“Compliance with the subpoena tacitly concedes the existence of the papers demanded and their possession or control by the taxpayer. It also would indicate the taxpayer’s belief that the papers are those described in the subpoena.”); see also Clemens, supra note 27, at 11-12 (discussing the application of the three Fisher prongs to encryption key disclosure).  
66 See Reitinger, supra note 21, at 180. Notably, turning over an encryption password would not be explicitly incriminating, unless the password itself
doctrine to compelled decryption, it can be argued that being forced to turn over a password would implicitly communicate that the electronic files that the government is seeking exist, that the defendant actually has control over and access to the files, and that the electronic files are authentic. This is the defense that Sebastien Boucher raised when the government attempted to compel him to turn over his password in *Boucher*.  

Nevertheless, the government may be able to draft a subpoena compelling disclosure in a manner such that the testimonial aspects of the act of production are not implicated. In such circumstances, the protection against self-incrimination would not attach and the defendant would be left no recourse save compliance. This was the case in *Doe v. United States*. The government subpoenaed bank records for several accounts in the Cayman Islands and Bermuda. The unnamed defendant failed to respond to the subpoena, and so the government attempted to force the defendant to sign a number of release forms that would allow the banks to turn over the records. The defendant claimed Fifth Amendment protection. The Supreme Court held that the forms the defendant was asked to sign spoke only in the hypothetical, and, that because of the non-specific way in which they were drafted, signing them did not acknowledge the existence of, or control over, any account, or communicate the authenticity of any records. Thus, the three implicit assertions about which the *Fisher* Court was concerned were not implicated, and the defendant was not entitled to Fifth Amendment protection.

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communicated some incriminating fact, for example, if, in a child pornography case, the password was “iluvyoungkidz.”


69. *Id.* at 202-03.

70. *Id.* at 203.

71. *Id.* at 203-04.

72. *Id.* at 215-16 (“It is carefully drafted not to make reference to a specific account, but only to speak in the hypothetical. Thus, the form does not acknowledge that an account in a foreign financial institution is in existence or that it is controlled by petitioner. . . . Nor would his execution of the form admit the authenticity of any records produced by the bank.”).
B. In re Boucher

_Boucher_ is the first case to apply this Fifth Amendment logic to the issue of compelled decryption. On December 17, 2006, while crossing the border from Canada into the United States at the town of Derby Line, Vermont, Sebastian Boucher's car was pulled over and inspected by Customs and Border Protection agent Chris Pike. In re Boucher (Boucher I), No. 2:06-mj-91, 2007 WL 4246473, at *1 (D. Vt. Nov. 29, 2007), rev’d, No. 2:06-mj-91, 2009 WL 424718 (D. Vt. Feb. 19, 2009). While performing the inspection, Officer Pike noticed a laptop in the back seat, opened it, and was able to access the hard drive without entering a password. \(^{73}\) After investigating the computer's contents, Officer Pike located approximately 40,000 images, some of which appeared to be pornographic. \(^{74}\) When asked if any of the images contained child pornography, Boucher responded that he was not sure. \(^{75}\) After discovering several file names that appeared to reference child pornography, Officer Pike called in Special Agent Mark Curtis of Immigration and Customs Enforcement. \(^{76}\) During the course of his investigation, Agent Curtis found a file, entitled “2yo getting raped during diaper change.” \(^{77}\) Although Agent Curtis could tell that the file had been recently opened, he was unable to open it at that time. \(^{78}\)

Boucher was then arrested and subsequently waived his _Miranda_ rights. \(^{79}\) When asked about the aforementioned file, _Miranda_ rights is to counteract the inherently coercive nature of custodial interrogation and protect the privilege against self-incrimination. See generally _Miranda v. Arizona_, 384 U.S. 436, 444 (1966). “[T]he [suspect] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” _Id._ Here, Boucher waived his Miranda rights so the police were allowed to interrogate him without counsel present. _Boucher I_, 2007 WL 4246473, at *1. However, the Fifth Amendment can be invoked at anytime, so even

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\(^{74}\) Id.


\(^{76}\) Id.

\(^{77}\) Id.

\(^{78}\) Id.

\(^{79}\) Id.

\(^{80}\) Id. The purpose of _Miranda_ rights is to counteract the inherently coercive nature of custodial interrogation and protect the privilege against self-incrimination. See generally _Miranda v. Arizona_, 384 U.S. 436, 444 (1966). “[T]he [suspect] must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.” _Id._ Here, Boucher waived his Miranda rights so the police were allowed to interrogate him without counsel present. _Boucher I_, 2007 WL 4246473, at *1. However, the Fifth Amendment can be invoked at anytime, so even
Boucher said that, because he downloaded many pornographic images, sometimes he would “unknowingly” download child pornography.81 When he discovered the child pornography, Boucher claimed he would immediately delete the images.82 Boucher then showed Agent Curtis the drive (“drive Z”) on which he downloaded the pornography, and Agent Curtis discovered several “images and videos of child pornography in drive Z.” The laptop was shut down and seized.83

On December 29, 2006, Mike Touchette of the Vermont Department of Corrections restarted Boucher’s computer, and made a mirror image copy of its hard drive.84 However, Touchette was then unable to access drive Z because it had been encrypted using a software program named Pretty Good Privacy (“PGP”).85 In fact, because of this encryption, the government has not been able to view any of the files on drive Z since December 17, 2006, the day the laptop was seized.86 In an attempt to gain access to the files, the government obtained a grand jury subpoena for the production of “all documents, whether in electronic or paper form, reflecting any passwords used or associated with the Alienware Notebook Computer . . . seized from Sebastien Boucher at the Port of Entry at Derby Line, Vermont on December 17, 2006.” Boucher motioned to quash the subpoena, claiming that the act of turning over the password violated his Fifth Amendment right against self-incrimination.87

In addressing the motion, Judge Niedermeier began his analysis with the conclusion that, because the subpoena sought to compel Boucher to enter his key for the purposes of subjecting Boucher to criminal liability, the self-incrimination issue turned entirely on whether this act was testimonial in nature.88 He determined that entering the password “implicitly though Boucher initially waived his rights, he is permitted to subsequently claim them at any later time. Miranda, 384 U.S. at 444-45.
81 Boucher I, 2007 WL 4246473, at *1.
82 Id.
83 Id.
84 Id.
85 Id.
86 Id.
87 See supra Part I.B.
88 Boucher I, 2007 WL 4246473, at *2 (emphasis added).
90 See Boucher I, 2007 WL 4246473, at *2 (“Because the files sought by the government allegedly contain child pornography, the entry of the password would be
communicates facts,” and that if Boucher was forced to comply, he would “be faced with the forbidden trilemma; incriminate himself, lie under oath, or find himself in contempt of court.” Judge Niedermeier rejected the government’s argument that, like signing the non-specific release forms at issue in Doe, the act of entering the password was non-testimonial. He distinguished the two cases on the grounds that, in Doe, the Court found that no implicit facts would be communicated due to the artful drafting of the release form, whereas in the present case, entering the password would implicitly communicate that Mr. Boucher had access to the files. According to Judge Niedermeier, in Doe, “the suspect was compelled to act to obtain access without indicating that he believed himself to have access. Here, when Boucher enters a password he indicates that he believes he has access.”

In an attempt to avoid a Fifth Amendment challenge, the government offered immunity specifically with regards to the act of producing the password, as opposed to immunity for any child pornography charge. The government argued that a grant of immunity would permit compelled disclosure because the Fifth Amendment does not protect communications for which no criminal liability could result. The Supreme Court passed on a similar government tactic in United States v. Hubbell. There, the government subpoenaed documents from the defendant, and they were supplied after immunity was granted solely for the act of production. After the defendant turned over the documents, the government sought to use them against him in an unrelated tax case. The Supreme Court

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incriminating. Whether the privilege against self incrimination applies therefore depends on whether the subpoena seeks testimonial communication.”).

91 Id. at *3 (citing Doe v. United States, 487 U.S. 201, 212 (1988)).
92 Id.
93 See id. at *4.
94 Id.
95 Id. The government was attempting to only grant use, and not derivative use, immunity. A grant of both “use” and “derivative use” immunity prevents the government from using a particular piece of the suspect’s testimony against him, and from using any evidence which is derived only from that particular testimony. 22 C.J.S. Criminal Law § 98 (2009). In any event, use or derivative use immunity “is not full immunity from prosecution for the offense to which the compelled testimony relates, [as it] allows . . . a prosecution using evidence from legitimate independent sources.” Id. (citations and footnotes omitted).
96 See Boucher I, 2007 WL 4246473, at *4.
99 Id. at 31-32.
rejected this tactic, holding that the grant of immunity for the production of the documents included immunity for any information that was derived from that act of production.\textsuperscript{100}

Similarly, in \textit{Boucher}, “the government offered not to use the production of the password against Boucher,” and thus, in their eyes, “remove[d] the testimonial aspect from the” disclosure.\textsuperscript{101} Judge Niedermeier disagreed and, relying on \textit{Hubbell}, stated that the “testimonial aspect of the entry of the password precludes the use of the files themselves as derivative of the compelled testimony.”\textsuperscript{102} Thus, Judge Niedermeier concluded that the government’s offer of immunity for the act of production was unavailing because obtaining the plaintext would be a derivative use of the compelled act.\textsuperscript{103} Under the court’s reasoning, immunizing a person solely for the act of typing in his encryption password would prevent the government from using the derivatively acquired plaintext in a criminal trial against him.

The government also argued that it should have access to the files under the “foregone conclusion” doctrine.\textsuperscript{104} Under this doctrine, if the government is already aware of the existence and location of a particular document or file, and if producing the document or file would not “implicitly authenticate” it, then any evidence gained would be a foregone conclusion, and the suspect would not be entitled to Fifth Amendment protection.\textsuperscript{105} Simply restated, if the act of production would not implicitly communicate the three \textit{Fisher} elements because the government already could prove each of them, then the three assertions would be a foregone conclusion and Fifth Amendment protection would not attach. In \textit{Boucher}, the government argued that because its agents were able to access drive Z and view child pornography before the computer was shutdown, it already knew the location and existence of at least some child pornography on Boucher’s laptop and, thus, the foregone conclusion doctrine applied.\textsuperscript{106}

\begin{thebibliography}{100}
\item \textit{Id.} at 40.
\item \textit{Boucher I}, 2007 WL 4246473, at *4.
\item \textit{Id.} at *5 (emphasis added).
\item \textit{Id.}
\item \textit{Id.} at *5-6. This is the argument Judge Sessions seized upon in reversing \textit{Boucher I}. See \textit{supra} note 50 and accompanying text.
\item \textit{See In re Grand Jury Subpoena Duces Tecum Dated Oct. 29, 1992, 1 F.3d 87, 93-94 (2d Cir. 1993) (internal quotation marks omitted) (quoting United States v. Fox, 721 F.2d 32, 36 (2d Cir. 1983)).}
\item \textit{See Boucher I}, 2007 WL 4246473, at *5-6.
\end{thebibliography}
Judge Niedermeier disagreed. With regard to turning over the files, he wrote that the government only knew the location of a couple of files, and that there was a lot of information on drive Z about which the government had no knowledge.\footnote{107} Because “the files the government has not seen could add much to the sum total of the government’s information,” Judge Niedermeier held that “the foregone conclusion doctrine [did] not apply.”\footnote{108} With regard to solely turning over the password, Judge Niedermeier argued that “[t]he foregone conclusion doctrine does not apply to the production of non-physical evidence, existing only in a suspect’s mind where the act of production can be used against him.”\footnote{109}

In reversing Judge Niedermeier’s holding, Judge Sessions seized upon the foregone conclusion doctrine and held that, because government agents were able to view the files before they were encrypted, and because Boucher admitted the laptop was his, the foregone conclusion doctrine did, in fact, apply.\footnote{110} Thus, Boucher was directed to comply with the order and turn over an unencrypted version of the Z drive.\footnote{111} Regardless, it is easy to imagine a scenario in which the foregone conclusion would not apply. For example, if agents seized an encrypted computer, but they were not sure if it belonged to a particular suspect, they would never have had access to the encrypted files, and they could not prove it was under the suspect’s control. In such a situation, it is likely that the foregone conclusion doctrine would not apply, and a defendant could seek refuge in the Fifth Amendment.

Ultimately, Judge Niedermeier’s opinion in Boucher exemplifies the American approach to the dilemma posed by powerful encryption: the idea that compelled password disclosure can have Fisher-like testimonial aspects, and thus Fifth Amendment protection can, in certain circumstances, be invoked to avoid compliance with a governmental order to turn over a password.

\footnote{107} Id. at *6. 
\footnote{108} Id. 
\footnote{109} Id. 
\footnote{111} Boucher II, 2009 WL 424718, at *4.}
III. The British Approach to Compelled Key Disclosure

Great Britain is one of the most heavily surveilled countries on the planet. In 2006, there were an estimated 4.2 million closed circuit televisions in Britain, meaning there was roughly one surveillance camera for every fourteen people. In light of this, it is not surprising that, contrary to the American legislative avoidance of the issue, Great Britain enacted a statute which expressly permits the government to compel decryption. This statute, the Regulation of Investigatory Powers Act (“RIPA”), empowers certain governmental actors, like the judiciary, high-level police, customs and excise officials, and military officers to compel decryption by threat of imprisonment and fines for noncompliance.

A. Background of RIPA

As a member of the Council of Europe, the United Kingdom and its laws are subject to the jurisdiction of the European Court of Human Rights (“ECHR”). In 1997, the ECHR held that Britain’s then-applicable law on the interception of communications violated the European Human Rights Convention because it did not address “interceptions carried out over private communication networks.” In response, Great Britain passed the Regulation of Investigatory Powers Act (“RIPA”). RIPA was designed not only to comply with the ECHR decision, but also to address the rapid growth


Id.

Regulation of Investigatory Powers Act, 2000, ch. 23 (Eng.).

Id.


European Court of Human Rights, How the Execution of Judgment Works, http://www.echr.coe.int/ECHR/EN/Header/The+Court/Execution/How+the+execution+o f+judgments+wo-rks/ (last visited Jan. 28, 2009) (“The [parties] to the European Convention on Human Rights have committed themselves to secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention and, in this respect, have undertaken to ‘abide by the final judgments of the Court in any case to which they are parties.’”).

Yeates, supra note 10, at 133.

of communications technology and the fervent desire of government officials to ensure that police agencies were able to keep up with this shifting landscape.\footnote{Yeates, supra note 10, at 134-38 (discussing in more depth the technological changes that led to the passage of both CALEA and the RIPA).}

The preamble of RIPA identifies the purposes of the Act, and specifically singles out encryption as a primary focus:

An Act to make provision for and about the interception of communications, the acquisition and disclosure of data relating to communications, the carrying out of surveillance, the use of covert human intelligence sources and the acquisition of the means by which electronic data protected by encryption or passwords may be decrypted or accessed . . .\footnote{ Regulation of Investigatory Powers Act, ch. 23, §§ 49-56 (emphasis added).}


B. \textit{RIPA}

1. Section 49

Part III of RIPA is entitled "Investigation of Electronic Data Protected by Encryption etc."\footnote{Id. for Invest. Pow. Act, ch. 23, §§ 49-56.} The statute lays out several important definitions. First, it defines a key as "any key, code, password, algorithm or other data the use of which (with or without other keys) . . . (a) allows access to the electronic data, or (b) facilitates the putting of the data into an intelligible form."\footnote{Id. § 56(1).} Protected information is "any electronic data which, without the key to the data . . . (a) cannot, or cannot readily, be accessed, or (b) cannot, or cannot readily, be put into an intelligible form."\footnote{Id. § 56(3).} Lastly, rendering a document into intelligible form requires putting the document "in the condition in which it was before an encryption or similar process was applied to it."\footnote{Id. § 56(3).}

Section 49 of Part III governs the conditions under which the British government is permitted to compel citizens to
Accordingly, the orders which the government employs to compel disclosure are known as “Section 49 Notices.” Notably, turning over the plaintext of an encrypted document is tantamount to divulging the encryption password because, if one is being forced to turn over the plaintext, one must enter the password against his will.

Section 49 first requires that the ciphertext be obtained in a lawful manner. There are several enumerated examples of how this can be done. The two most prominent are when information has come into a government agent’s possession either by “means of the exercise of a statutory power to seize, detain, inspect, search,” or “by means of the exercise of any statutory power to intercept communications.” This includes the common situation in which information is seized pursuant to a judicial warrant.

The requirement to obtain the ciphertext in a lawful manner is important because it means that the British government is not permitted to compel decryption unless it has obtained possession of the encrypted information lawfully. For example, if a police officer seized a computer without a valid warrant, the government would not have lawful possession of that computer, and thus could not compel plaintext disclosure.

In the ordinary case, a law enforcement agency will receive permission to issue a Section 49 notice from an official with the appropriate authorization, then serve the notice upon the target of the investigation. The recipient, in turn, must

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127 Id. § 49.
129 Additionally, there is a section in Part III which empowers the government to require that the key itself be turned over. Regulation of Investigatory Powers Act, ch. 23, § 51. The British government is more reluctant to compel disclosure of the actual key when the plaintext will suffice so it adds several extra burdens that must be met in order compel key disclosure as compared to plaintext disclosure. See Explanatory Notes to Regulation of Investigatory Powers Act, ¶ 272 (2000) [hereinafter Explanatory Notes].
130 Regulation of Investigatory Powers Act, ch. 23, § 49(1); see also Explanatory Notes, supra note 129, ¶ 256.
131 Id.
132 Id. § 49(1)(a)-(b).
133 Explanatory Notes, supra note 129, ¶ 256.
hand over the requested plaintext within a reasonable amount of time.\footnote{135} Failure to comply is a crime.\footnote{136}

Subsection (2) of Section 49 places certain limiting factors on the ability of the government to compel decryption, and also references Schedule 2, which describes the governmental actors that have the authority to compel decryption.\footnote{137} First, the key must be in the possession of the person on whom the notice is being served.\footnote{138} Second, decryption can be compelled only if there is a specifically enumerated justification for doing so\footnote{139} (the acceptable justifications are delineated in subsection (3), discussed in the next paragraph).\footnote{140} Third, the “imposition of such [compelled disclosure must be] proportionate to what is sought to be achieved by its imposition.”\footnote{141} Thus, the statute implements a balancing test in which the governmental interest in obtaining the plaintext must be equal to or greater than the interests of the individual seeking to prevent compelled decryption. Finally, it must not be “reasonably practicable” for the government agent to obtain the plaintext without such compulsion.\footnote{142} Thus, for example, if the encryption is very weak and could be easily deciphered, or if the password is written down on a piece of paper whose location is known to the police, compelled decryption would not be appropriate because it would be reasonable to acquire the plaintext by other means.\footnote{143} This has the effect of making compelled disclosure a last resort.

Subsection (3) of Section 49 delineates the three specific justifications for compelled key disclosure.\footnote{144} Under this subsection, plaintext disclosure can be compelled only “in the interests of national security,” “for the purpose of preventing or detecting crime,” or “in the interests of the economic well-being of the United Kingdom.”\footnote{145}
2. Schedule 2

Schedule 2 of RIPA addresses who is allowed to authorize compelled disclosure. First, in order to compel plaintext disclosure, one must have appropriate written permission from a judge, unless one of the statutory exceptions applies. These exceptions are laid out in Paragraphs 2 through 5 of Schedule 2, which also discuss the level of authority required to grant permission to force plaintext disclosure. Importantly, the level of authority “varies depending on the powers under which [the] unintelligible information . . . is likely to be obtained.” As a result, the statute allows for non-judicial governmental actors to authorize compelled decryption.

Under Paragraph 2 of Schedule 2 (“Data obtained under a warrant etc”), a government officer may serve a notice compelling plaintext disclosure if he or she obtained unintelligible information pursuant to a warrant issued by “the Secretary of State or a person holding judicial office,” so long as the officer was given authorization to do so either in the warrant itself, or subsequently. Paragraph 2 specifically excludes from compelled disclosure any encrypted information that was seized without a warrant.

Pursuant to Paragraph 3 of Schedule 2 (“Data obtained by the intelligence services under statute but without a warrant”), where an intelligence service comes into possession of unintelligible information in the course of lawful surveillance but without a warrant, the intelligence service can issue a notice compelling disclosure of the plaintext if it has written permission from the Secretary of State. In these instances, there is no requirement of prior judicial approval.

Paragraph 4 of Schedule 2 (“Data obtained under statute by other persons but without a warrant”) covers situations when a government agency other than the intelligence services comes into the possession of encrypted information which was not obtained pursuant to a warrant, but

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146 Id. sched. 2, ¶ 1(1).
147 Explanatory Notes, supra note 129, ¶ 357.
148 Id. at ¶ 360.
150 Id. ¶ 2(9).
151 Explanatory Notes, supra note 129, ¶ 366. Unintelligible information refers to encrypted data.
was acquired legally pursuant to statutory power. In such situations, the high ranking members of these agencies may grant permission to compel plaintext disclosure. To compel disclosure, a police officer must be of at least the rank of superintendent to give such permission, with some exceptions. With regard to Customs and Excise, the official must be the Commissioner of Customs and Excise, or above a lesser rank set by the Commissioner. Finally, for the military, the officer must be above the rank of lieutenant colonel, or above a rank set by a lieutenant colonel.

Similarly, Paragraph 5 (“Data obtained without the exercise of statutory powers”) grants the aforementioned officials the power to authorize compelled disclosure where the encrypted information has come into the hands of the police, Customs and Excise, or an intelligence service lawfully, but not via their respective statutory powers—i.e., if it was voluntarily handed over. Thus, when encrypted information is seized pursuant to the statutory power of one of the enumerated agencies, there is no requirement of judicial oversight for compelled disclosure.

3. Section 50

Section 50 discusses some of the formalities that accompany receiving a Section 49 notice. Under this section, recipients of an order to compel disclosure are given the option to turn over the encryption key instead of the requested plaintext. Moreover, Subsection (8) of Section 50 requires a person no longer in possession of the key to provide information that could help law enforcement gain possession of it.

153 Explanatory Notes, supra note 129, ¶ 368.
154 The agencies are the police, Customs and Excise, and the military. Id. ¶ 369.
155 Id.
156 Regulation of Investigatory Powers Act, ch. 23, sched. 2, ¶ 6(3) (concerning information that has come into the police’s hands through the exercise of power of section 44 of the Terrorism Act 2000 or section 13A or 13B of the Prevention of Terrorism Act of 1989).
157 Id. ¶ 6(4).
158 Id. ¶ 6(5).
159 Id. ¶ 5; see also Explanatory Notes, supra note 129, ¶ 371.
160 Regulation of Investigatory Powers Act, ch. 23, § 50(1)-(2) (“A person subject to a requirement [of disclosing plaintext] . . . shall be taken to have complied with that requirement if . . . he makes, instead, a disclosure of any key to the protected information that is in his possession.” (emphasis added)).
161 Id. § 50(8).
4. Section 51

Section 51 addresses the situation where the government specifically wants the encryption key, instead of merely the plaintext. In such a case, Section 51 requires that the government satisfy several extra burdens. First, a government official may only require disclosure of the actual key when “special circumstances” exist such that the purpose of the disclosure, to get the plaintext, would be defeated without obtaining the actual key. Second, the official must balance the imposition of compelling the disclosure of the key against two factors: (1) the risk that other private information, not including that which the government is specifically seeking, may be turned over; and (2) the risk that compelled disclosure might have an adverse effect on the business of the person being compelled.

5. Section 53

In Section 53, RIPA criminalizes failure to comply with these disclosure requirements: it is a crime to “knowingly fail[] . . . to make the disclosure required” by a Section 49 notice. The punishment resulting from a conviction is up to two years imprisonment, a fine, or both.

There are several affirmative defenses to this crime. First, an individual who fails to comply with a Section 49 notice can demonstrate that he could not have complied with the disclosure requirement in the time required, and that he did comply as soon as it was reasonable to do so. Second, an individual can argue that he was not actually in possession of the key. If an individual is able to raise an issue of fact with regard to this second defense, the burden then shifts to the government to prove beyond a reasonable doubt that he does indeed have possession of the key. Thus, the government can

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162 Id. § 51.
163 Id.
164 Id. § 51(4).
165 Id. § 51(5)(b).
166 Id. § 53-54.
167 Id. § 53(1).
168 Id. § 53(5)(a).
169 Id. § 53(4); see also Explanatory Notes, supra note 129, ¶ 283.
171 Id. § 53(3)(b).
only prosecute under Section 53 if it has successfully proven beyond a reasonable doubt that the accused is in possession of the encryption key.

6. Section 54

Under Section 54, RIPA also criminalizes “tipping off.” This refers to the notion that, in some situations, a Section 49 notice will include a requirement that the recipient of the notice keep its delivery and its contents secret. A Section 49 notice may contain such a secrecy requirement only when the encrypted information has come into the possession of the police “by means which it is reasonable, in order to maintain the effectiveness of any investigation . . ., or in the interests of the safety or well-being of any person, to keep secret from a particular person.” Therefore, where the authorities can articulate a reason why their investigation would be hampered by disclosing the fact that they had served a Section 49 notice, they can include what amounts to a gag order. When the recipient of such a Section 49 notice “tips off” another person to the fact that he received the notice, or discloses the contents of the notice to another person, he can be subject to criminal liability. A person convicted of this “tipping off” offense will be subject to “imprisonment for a term not exceeding five years or to a fine, or to both.”

Section 54 also includes a number of affirmative defenses. These include: when the tipping off was the result of software which automatically informed other people that the encryption key was compromised, when the disclosure is made to legal counsel in a conversation about one’s options under Part III of RIPA, when the disclosure is made to persons within an organization so that they can comply with

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172 Id. § 53.
173 Id. § 54 (Eng.); see also Explanatory Notes, supra note 129, ¶ 285.
175 Id. § 54(3).
176 Id.
177 Id. § 54(4).
178 Id. § 54(4)(a).
179 Id. § 54(5).
180 Id. § 54(6)-(7).
the notice, and when a person is told about a notice but does not know that there was a secrecy requirement.

In contrast to the prospective American system, officers of the British government are thus empowered to compel decryption without so much as prior approval of a member of the judiciary. This system lends a powerful tool in the burgeoning war against modern criminals.

IV. CRITICISMS AND A MIDDLE GROUND

America and Great Britain have approached the dilemma posed by powerful encryption in vastly different manners. Each resides at one end of a continuum between providing adequate protection of civil rights and ensuring the effectiveness of law enforcement. The American approach favors the protection of civil liberties, while the British approach favors law enforcement interests. Ultimately though, each method is fraught with unique problems. Accordingly, America should seek to adopt a suitable middle ground that draws upon the strengths, and avoids the weaknesses, of both approaches.

A. Criticisms of the American and British Approaches

The major problem with the American approach, as exemplified by *Boucher*, is that the government’s power to investigate and prosecute crimes, especially those of a technological nature, will be significantly hampered if criminals are able to hide their activities behind a virtually unbreakable wall of encryption. It is easy to imagine nightmare scenarios in which law enforcement efforts are thwarted by criminals utilizing powerful encryption. In her testimony before the House of Representatives, then U.S. Attorney General Janet Reno described three such hypothetical situations: terrorists seeking to detonate a bomb in a major city using encrypted communications, a child abuser and distributor of child pornography encrypting photographs so as to hide them from law enforcement, and a computer hacker stealing personal financial data and then encrypting his hard

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181 *Id.* § 54(9).
182 *Id.* § 54(10).
183 See supra text accompanying note 5.
drive so as to avoid detection and prosecution. In each of these scenarios, the consequences to the public would be dire if the government were unable to access the information it needed.

The principal problem with the American approach is that, in the face of widespread encryption, the government might be severely hindered in its efforts to investigate and prosecute criminal activity. Despite the notion that there are some testimonial aspects implicated in forced decryption, affording sweeping Fifth Amendment protection to such actions would be impractical because of the possibility that prosecutions could grind to a halt as a result of widespread encryption. Moreover, leaving the issue solely to the judiciary might create uncertainty because the rules pertaining to compelled decryption could develop in different fashions and at different paces in the various jurisdictions confronting the issue. This would be detrimental as legitimate users of encryption, such as travelling businesspersons would be forced to alter their data protection strategies depending on in which jurisdiction they were located.

The British approach, while accounting for the law enforcement related problems of the American approach, is fraught with problems of its own. Most fundamentally, in an attempt to prevent criminals from being able to hide their activities behind a wall of encryption, RIPA does not provide adequate provisions for the protection of civil liberties. Ultimately, there is very little in the way of safeguards standing between the government and the encrypted files it seeks. For example, it is not even always necessary to gain judicial approval before a Section 49 notice is sent, as frequently the approval of a high ranking police, Customs and Excise, or military official will suffice. According to one commentator, RIPA is a “sledgehammer law designed to

186 Kirk, supra note 122 (“A Section 49 request must . . . be approved by a judicial authority, chief of police, the customs and excise commissioner or a person ranking higher than a brigadier or equivalent.”); supra Part III.B.2.
support security services at the expense of civil liberties which are taken for granted in most of the western world.”

This commentator continues that “Britain does not join the best company with [RIPA]—other places to have similar laws include Russia and Malaysia.”

A further problem with the British approach is the inclusion of the gag order provision. Such orders are reminiscent of the unsuccessful National Security Letters (“NSLs”) which were authorized by the USA PATRIOT Act. NSLs are administrative subpoenas issued by certain governmental agencies which require no probable cause or judicial oversight. They also contained a gag order provision similar to Section 54 of RIPA, which forbids the recipient of the NSL from disclosing to anyone that he received it. The gag order provision was held unconstitutional by a judge in the Southern District of New York as violative of the First Amendment. The statute was partially amended by Congress in response to this decision and still it was held unconstitutional by the same district judge on remand from the Second Circuit. There was also massive popular outcry in America against the NSL gag orders on civil rights grounds. Considering the controversy surrounding the NSL gag orders, one could imagine that an analogous gag order section in a potential American compelled decryption statute would be met with similar dissent.

RIPA has also faced stiff criticism from those who fear it will hurt e-commerce in Great Britain. Their concern is that RIPA will drive technology-centered companies out of Great Britain and into countries with more legal protections for

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188 Id.
encryption. In fact, after the passage of RIPA, Ireland passed a law which specifically made it clear that the Irish government would not be permitted to compel key disclosure. An independent report prepared for the British Chambers of Commerce on the economic impact of RIPA stated:

As it stands, RIPA is likely to create a legal environment which will inhibit investment, impede the evolution of e-commerce, impose direct and indirect costs on business and the consumer, diminish overall trust in e-commerce, disrupt business-to-business relationships, place UK companies at a competitive disadvantage, and create a range of legal uncertainties that will place a growing number of businesses in a precarious position.

Critics have also criticized the perverse incentives and harsh operation of the statute. They stress that the purported principal targets of Part III—terrorists and purveyors of child pornography—would likely take the two or five year sentence resulting from nondisclosure rather than face what would assuredly be a much longer sentence if the data was decrypted and their crimes were revealed. Further, critics argue that a person served with a Section 49 notice could legitimately have forgotten the requested encryption key, and could be subject to a two year sentence for nothing more than absentmindedness.

Lastly, a structural problem with RIPA is that there are software programs which foresee the possibility that one could

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195 See Yeates, supra note 10, at 153 (“Substantial apprehension exists in Britain as to whether the RIPA will blurt the growing U.K. e-economy . . . . [N]umerous critics bitterly pointed out the contrast between Prime Minister Tony Blair’s stated desire to make the U.K. the friendliest place in the world for e-commerce and the perceived negative impact of the RIPA on e-commerce.”); see also Victor Keegan, Op-Ed, Internet Monitoring ‘Time Bomb’ for E-commerce, THE GUARDIAN, June 13, 2000, http://www.guardian.co.uk/technology/2000/jun/13/freespeech.internet (“[RIPA] will produce one of the most draconian regimes in the world driving e-commerce to safer havens like Ireland and most countries in Europe.”).

196 See Yeates, supra note 10, at 153. The Irish Electric Commerce Bill states, “Nothing in this Act shall be construed as requiring the disclosure or enabling the seizure of unique data, such as codes, passwords, algorithms, private cryptographic keys, or other data, that may be necessary to render information or an electronic communication intelligible.” Electronic Commerce Act, 2000 (Act No. 27/2000) § 28 (Ir.) available at http://www.irishstatutebook.ie/2000/en/act/pub/0027/sec0028.html.


199 Id.
be forced to turn over a password and plan for this eventuality by allowing one to create a false “secret” location that is accessed by a dummy password. TrueCrypt, one such encryption software program, has a function which allows a user to set up a section of the encrypted portion of a hard drive that contains some files, but not the ones actually meant to be kept secret.\footnote{See TrueCrypt, Hidden Volume, http://www.truecrypt.org/hiddenvolume (last visited Aug. 30, 2009).} A different password or passphrase accesses this false drive and TrueCrypt recommends that the user store some files in this section that appear sensitive but that can become public.\footnote{Id. (“[Y]ou should copy some sensitive-looking files that you actually do NOT want to hide. These files will be there for anyone who would force you to hand over the password.”).} Under such a set-up, when compelled, the user can give the authorities the password to this false location. This allows him to seemingly comply with the compulsion order, but still keep his real secret files hidden.\footnote{Id. (“[I]t is impossible to prove whether there is a hidden volume within it or not, because free space on any TrueCrypt volume is always filled with random data when the volume is created and no part of the (dismounted) hidden volume can be distinguished from random data.” (emphasis added)).}

B. 

Middle Ground

To alleviate these problems, America must seek a middle ground between the current American approach and the British approach. Such a middle ground would be well served by incorporating the unique strengths of each approach, and avoiding some of their pitfalls.

Leaving the issue solely to the judiciary on a case by case basis would likely create uncertainty and leave the government ill-equipped to gain the plaintext they need to prosecute violations of the law. Because of this, a statutory solution is needed, and a bill should be passed that creates a standardized procedure that government agents must follow in order to get an order compelling decryption. The American government’s response to wiretapping is instructive, for wiretapping similarly involved the intersection of constitutional protections and modern technology. Fourth Amendment issues raised by wiretapping were initially handled by the judiciary; first in \textit{Olmstead v. United States},\footnote{277 U.S. 438 (1928) (Court held wiretapping did not violate the Fourth Amendment because they were reluctant to expand Fourth Amendment protections beyond the literal language of the text).}
and later in *Katz v. United States*\(^\text{204}\). Then, in 1968, Congress passed the Omnibus Crime Control and Safe Streets Act of 1968 ("Omnibus Crime Control Act"), which functionally took the wiretapping issue out of the hands of the judiciary.\(^\text{205}\)

This new statute laid out a detailed set of procedures, discussed below, that police must follow in order to be granted permission to run a wiretap.\(^\text{206}\) From this statute, and the above-discussed experiences of the American and British approaches to compelled decryption, a number of recommendations for a statutory middle ground can be made.

First, there should be an absolute prerequisite of prior approval by a member of the judiciary for the grant of a compelled decryption order. The Omnibus Crime Control Act contains a similar requirement with regards to prior judicial approval for wiretaps.\(^\text{207}\) Such a requirement would likely ease some of the criticism that would be leveled at a RIPA-like bill in America.\(^\text{208}\) Congress should not incorporate the portions of RIPA that allow compelled decryption orders to be authorized by non-judicial actors like high-ranking police, Customs and Excise, and military officers.

Second, Congress would have to account for the fact that the act of being compelled to produce a password or an encryption key can communicate any of the three incriminating *Fisher* elements: the existence of the plaintext, the defendant’s control over the plaintext, and the authenticity of the

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\(^\text{204}\) 389 U.S. 347 (1967) (Court overruled *Olmstead* holding that the protections of the Fourth Amendment extended to a government listening device attached a phone booth because it constituted a search).


\(^\text{206}\) Id. § 2518.

\(^\text{207}\) Id. § 2518(1) ("Each application for an order authorizing or approving the interception of a wire, oral, or electronic communication under this chapter shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application.").

\(^\text{208}\) An example of the American preference for prior judicial approval can be found in Fourth Amendment jurisprudence regarding search warrants. The Supreme Court has stated its preference for neutral magistrates, and not police officers personally involved in criminal investigations, to issue search warrants. Johnson v. United States, 333 U.S. 10, 14 (1948) (stating a preference for search warrant decisions to be made "by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime"); see also Mark Tran, *RIP Bill and Civil Liberties*, GUARDIAN, June 12, 2000, http://www.guardian.co.uk/world/2000/jun/12/qanda.marktran (quoting British “inventor of the world wide web” Tim Berner-Lee as stating RIPA “would have been thrown out in the US in a second” as it “gives the government great power to abuse personal liberties” and commercial innovation).
plaintext.\textsuperscript{209} This could be accomplished by requiring, through means unrelated to the defendant’s act of producing the password, proof of the existence of the plaintext, proof that the defendant has control of the plaintext, and proof that the plaintext is authentic.\textsuperscript{210} The standard of proof by which the government would have to prove each of these elements, in keeping with the Omnibus Crime Control Act,\textsuperscript{211} could be probable cause.

Third, a compelled decryption order should only be available for a certain list of specifically enumerated crimes. Such an approach was taken in the Omnibus Crime Control Act, which limits the types of crimes for which a wiretap may be sought.\textsuperscript{212} Commensurate with the serious intrusion on privacy, compelled decryption orders should only be available to law enforcement when the serious nature of the crime merits compelled disclosure.

Fourth, for a compelled decryption order, Congress should require that the government agent meet a heavy burden of proof in order to receive judicial approval.\textsuperscript{213} In the Omnibus Crime Control Act, the burden of proof typically required is probable cause,\textsuperscript{214} and that same level could be applied in a new compelled decryption statute. This burden could function on several fronts. First, the government should prove that the subject of the order is actually in possession of the encryption key or password.\textsuperscript{215} Second, the government should demonstrate that it has exhausted all other possible methods of obtaining the plaintext short of compelled disclosure.\textsuperscript{216} Third, the

\textsuperscript{209} See supra text accompanying notes 64-66.

\textsuperscript{210} The idea the government should be required to account for each of the three Fisher elements was proposed in an article by Aaron M. Clemens. See Clemens, supra note 27, at 1. Mr. Clemens recommended that the burden for proving each of these elements should be clear and convincing evidence. Id. Notably, this concept rings of the foregone conclusion doctrine in that if the government can already prove the three assertions of Fisher, nothing would be gained by compelling disclosure, and any incriminating assertions accompanying the act of production would be a foregone conclusion. See supra text accompanying notes 104-106.

\textsuperscript{211} See 18 U.S.C. § 2518(1)(d).

\textsuperscript{212} Id. § 2516(1).

\textsuperscript{213} This burden could, for example, be proof beyond a reasonable doubt or even clear and convincing evidence.

\textsuperscript{214} See 18 U.S.C. § 2518(3).

\textsuperscript{215} Cf. Regulation of Investigatory Powers Act, 2000, ch. 23, § 49(2)(a) (Eng.). RIPA only requires that there by “reasonable grounds” to believe that the person served with the section 49 notice actually be in possession of the key, and a higher standard of proof would be better suited to a new American approach. Id.

\textsuperscript{216} Cf. 18 U.S.C. § 2518(3)(c) (Judge may only authorize wiretap if “normal investigative procedures have been tried and have failed or reasonably appear to be
government should demonstrate that the plaintext it seeks goes to a material issue of their investigation.\textsuperscript{217} Lastly, the government should prove that one of the specifically enumerated crimes has been, or is about to be, committed.\textsuperscript{218}

Fifth, it is likely that an equivalent to RIPA’s Section 54 gag order would not pass muster in America.\textsuperscript{219} Based on the controversy surrounding similar provisions related to National Security Letters, any compelled disclosure statute would wisely omit any analogous section.

Sixth, the compelled decryption statute should precisely lay out the technical procedures that must be followed in order to obtain a compelled decryption order. For example, in borrowing from features of the Omnibus Crime Control Act, the statute could require that the application for the compelled decryption order include factual details pertaining to the identity of the suspect,\textsuperscript{220} the physical location and description of the electronic files to be decrypted,\textsuperscript{221} the other methods the police have exhausted to get the plaintext,\textsuperscript{222} and the factual details from the investigation that have led the police to believe that the suspect has committed, or is about to commit, a crime.\textsuperscript{223}

CONCLUSION

As the use of encryption becomes increasingly prevalent, governments will face a growing need to develop a comprehensive and coordinated response to situations where powerful encryption stands between the government and valuable evidence. The responses by Great Britain and America, while entirely different, are uniquely problematic. Nonetheless, the lessons of each, in addition to the Omnibus

\textsuperscript{217} This would ensure that compelled decryption orders were only being used when absolutely necessary for the successful prosecution of a crime.

\textsuperscript{218} \textit{Cf.} 18 U.S.C. § 2518(3)(a) (Judge may only authorize wiretap if there is “probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense”).

\textsuperscript{219} \textit{See supra} text accompanying notes 189-194.

\textsuperscript{220} 18 U.S.C. § 2518(1)(b).

\textsuperscript{221} \textit{Id.}

\textsuperscript{222} \textit{Id.} § 2518(1)(c).

\textsuperscript{223} \textit{Id.} § 2518(1)(b).
Crime Control Act, offer valuable insight into the creation of a more enlightened statutory approach.

The British statutory response very effectively gives law enforcement the ability to compel decryption in furtherance of criminal investigations, but it does so at too high a cost to civil liberties. The American approach, as exemplified by Judge Niedermeier's opinion in Boucher, does an excellent job of protecting civil liberties, but leaves law enforcement severely handicapped in its ability to investigate and prosecute serious crimes. Criminals with even minimal technical expertise are able to hide their activities behind virtually unbreakable walls of encryption, and the American government would be practically powerless to access the evidence.

Thus, while both the British and American approaches to compelled decryption are valuable, they are also fraught with their own unique difficulties. Consequently, America should seek a middle ground that better takes into account the competing ideals of civil liberty and law enforcement interests.

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