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about Legal Education and Parenting

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TIGER CUB STRIKES BACK: MEMOIRS OF AN EX-CHILD PRODIGY ABOUT LEGAL EDUCATION AND PARENTING¹

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University of Colorado Law School

ABSTRACT

I am a Chinese American who at 14 enrolled at Princeton and at 17 began my applied mathematics Ph.D. at Harvard. I was a first-year law student at the University of Chicago before transferring to Stanford, preferring the latter's pedagogical culture. This Article offers a complementary account to Amy Chua's parenting memoir. The Article discusses how mainstream legal education and tiger parenting are similar and how they can be improved by fostering life-long learning about character strengths, emotions, and ethics. I also recount how a senior professor at the University of Pennsylvania law school claimed to have gamed the U.S. News & World Report law school rankings.

"And honestly it can't be fun to always be the chosen one."³

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¹ Thanks to Elissa S. Guralnick, Nancy Levit, Scott Moss, Leonard L. Riskin, and K, my eldest niece, for helpful comments, discussions, questions, and suggestions. Thanks also to Amy Chua for introducing the phrase tiger mom into popular usage and Paul Ohm for suggesting this Article's main title. Finally, gratitude to my tiger mom for pushing me to excel and my grandma for teaching me much about at what, how to, to where, and why to excel.

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³ MADONNA, *Masterpiece*, on MDNA (Interscope Records 2012).

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I. INTRODUCTION

This is not your typical law review article. It is also not like any of the articles that I have published in law reviews and peer-referred economics or law journals.⁴ This Article is atypical in style and subject matter. The style is that of a memoir involving personal stories. The subject matter is that of a cautionary tale about (legal) education and (tiger) parenting.

This Article is also partially a response⁵—through the vehicle of reflections—to Amy Chua’s celebrated and controversial book about how she raised two daughters to excel scholastically and musically.⁶ Professor Chua was a featured luncheon plenary speaker⁷ of the 2011 the National Asian Pacific American Bar Association (NAPABA) convention.⁸

⁴ Peter H. Huang, *Tenure and Tenure Track-Faculty*, UNIVERSITY OF COLORADO, <http://lawweb.colorado.edu/profiles/profile.jsp?id=456> (last visited July 18, 2012). (providing a list of publications and hyperlinks to downloading most of them).

⁵ See also Peter H. Huang, *From Tiger Mom to Panda Parent*, 17 *ASIAN PAC. AM. L.J.* (forthcoming 2012) (providing another brief response to Amy Chua’s book).

⁶ AMY CHUA, *BATTLE HYMN OF THE TIGER MOTHER* (2011); AMY CHAU WEBSITE <http://amychua.com/> (describing and explaining her book). See also Amy Chua, *Why Chinese Mothers Are Superior?*, *WALL ST. J.*, Jan. 8, 2011 (including provocative excerpts from her book), available at <http://online.wsj.com/article/SB10001424052748704111504576059713528698754.html>.

⁷ *Annual Convention*, NAPABA, <http://convention.napaba.org/> (last visited July 18, 2012).

⁸ NAPABA is the national association of Asian Pacific American (APA) attorneys, judges, law professors, and law students.

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The 2011 NAPABA convention also included a panel titled *Realities of Life in the Jungle for the Tiger Club*.⁹ The program described those realities as surprisingly grim:¹⁰

Thanks to Tiger Mothers who teach us to work hard and be smart and disciplined, APA associates are over 50% of the minority associates roaming the halls of Wall Street's most prestigious law firms. But when it comes to making partner, why is the APA lawyer consistently voted "Least Likely to Succeed?" In a world of good old boys and sharp-elbow corporate politics, is there anything inherent in the traditional focus of Asian families, including playing by the rules and over-rigorously "checking the boxes" (best grades, music, sports), that's inconsistent with the secret recipe for sustained success in your career? This session will explore the myths and realities of the smart, hard-working, respectful, humble, unassertive, shy, and reserved APA lawyer.

I have first-hand experience with these myths and realities.

The most recent empirical analyses of the National Association for Law Placement, Inc. (NALP)[®] Directory of Legal Employers,¹¹ the annual compendium of legal employer data, finds that Asians make up almost half of all minority associates nationally and in the largest law firms (where the term minority includes lawyers identified as African American, Asian, Hispanic, Native American, Native Hawaiian/Pacific Islander, and multi-racial).¹² From a total of 56,599 law firm partners in 2011, 6.56% were minorities, 2.04% were minority women, 2.36% were Asian, with 0.82% Asian women, 1.71% African American, with 0.58% African-American women, and 1.92% Hispanic, with 0.48% Hispanic women. The very few Native American, Native Hawaiian, and multi-racial partners were not reported separately.¹³ Although there are slightly more law firm partners who are Asian than either African American or Hispanic, Asian partners are most prevalent at smaller and the largest firms, while African American and Hispanic law firm partners increase with law firm size.¹⁴

A member of the board of directors for the national grassroots organization Building A Better Legal Profession,¹⁵ and Stanford University law professor Michele Dauber pointed out that the gap between Asian associates and Asian partners is "the largest gap of any minority group.... An example is Clifford

⁹ *Convention Schedule*, NAPABA, <http://convention.napaba.org/full-schedule/> (last visited July 18, 2012).

¹⁰ *Convention Program*, NAPABA, p. 39, <http://napaba.org/uploads/napaba/11ConventionProgramBook.pdf> (last visited July 18, 2012) (CLE Breakout Sessions III, 301).

¹¹ NALP DIRECTORY OF LEGAL EMPLOYERS, www.nalpdirectory.com (last visited July 18, 2012) (providing individual firm listings upon which the above aggregate analyses are based).

¹² *Women and Minorities in Law Firms – By Race and Ethnicity*, NALP BULLETIN Jan. 2012, http://www.nalp.org/women_minorities_jan2012, tbl. 2.

¹³ *Id.*, tbl. 1.

¹⁴ *Id.*, tbl. 1, 3.

¹⁵ BETTER LEGAL PROFESSION, <http://betterlegalprofession.org/mission.php> (last visited July 18, 2012).

Chance in New York, with 26.8% Asian associates but only 2% Asian partners.”¹⁶

Columbia law professor Tim Wu observed that Caucasians “have this instinct that is really important: to give off the impression that they’re only going to do the really important work. You’re a quarterback. It’s a kind of arrogance that Asians are not trained to have.”¹⁷ He noted “this automatic assumption in any legal environment that Asians will have a particular talent for bitter labor. . . . There was this weird self-selection where the Asians would migrate towards the most brutal part of the labor.”¹⁸

Outside the law firm context, demographic data reveal a similar dearth of Asians in leadership roles in corporate America¹⁹ and higher education.²⁰ Such a “bamboo ceiling” may result from overt racism or unconscious bias.²¹ A national, non-profit organization, Leadership Education for Asian Pacifics, Inc. (LEAP) formed in 1982 with the “mission of achieving full participation and equality for Asian and Pacific Islanders (APIs) through leadership, empowerment, and policy.”²² LEAP has offered over 2,500 classes, programs, and workshops to over 125,000 individuals from community organizations, Fortune 1000 companies, government agencies, and universities in the belief that APIs can maintain their unique cultural identities and values while learning to develop new, effective, and vital leadership skills.

Clearly there are costs as well as benefits to growing up as a tiger cub. This Article discusses some of these costs and benefits by reflecting upon the desirability and motivational consequences of having a tiger mom such as Professor Chua or my own immigrant mother, who is a New York University medical school biochemistry professor. This Article also points out many similarities between mainstream modern American legal education and tiger parenting, including their common hierarchical, top-down learning environments, which entail authority, compliance, extrinsic incentives, fear, memorization, obedience, paternalism, precedent, and respect for one’s elders. The educational methodologies and philosophies of tiger parenting and the prevailing orthodoxy of United

¹⁶ David Lat, *New Data on Law Firm Diversity*, ABOVE THE LAW, May 20, 2011, <http://abovethelaw.com/2011/05/new-data-on-law-firm-diversity/> (providing the quotation). See also Clifford Chance, BETTER LEGAL PROFESSION, <http://betterlegalprofession.org/CliffordChance> (last visited July 18, 2012) (providing the data).

¹⁷ Wesley Yang, *Paper Tigers: What Happens to All the Asian-American Overachievers when the Test-Taking Ends*, NEW YORK (May 8, 2011), <http://nymag.com/news/features/asian-americans-2011-5/>.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Jonathan Zimmerman, *Asian-Americans, the New Jews on Campus*, CHRON. HIGHER EDUC. (Apr. 29, 2012), <http://chronicle.com/article/Asian-Americans-the-New-Jews/131729/> (commenting about Asian-Americans being only one percent of the presidents of American higher education institutions).

²¹ JANE HYUN, *BREAKING THE BAMBOO CEILING* (2006) (suggesting how traditional Asian values clash with Western corporate culture).

²² *Growing Leaders*, LEAP, http://www.leap.org/about_main.html (last visited July 18, 2012) (describing the history, mission, and philosophy of LEAP).

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States legal instruction, especially the substantive content of the standard first-year law school curriculum, explicitly and implicitly privilege a type of information processing that emphasizes analyzing over feeling.²³ The well-known Socratic method of legal instruction often places a premium on and leads to students answering a professor's questions aggressively, quickly, and superficially instead of mindfully, slowly, and thoughtfully.

To be clear and for the record, tiger parenting and the prevailing orthodoxy of legal education in the United States do train people to reason analytically, make legalistic arguments, and respect authority. In addition, tiger parenting and the prevalent style of American legal instruction at best neglect and at worst interfere with learning about emotional intelligence,²⁴ extra-legal forms of conflict resolution, and questioning of authority. Tiger parenting²⁵ and the predominant form of American non-clinical legal education²⁶ also share a risk of promoting extrinsic motivations to learn, such as class rank, course grades, future job prospects, social status, and starting salaries, while crowding out intrinsic motivations to learn, such as curiosity, identity, interest, joy, and seeking meaning.

This Article advocates that tiger parents and legal educators help individuals develop and nourish an intrinsic love of and passion for learning.²⁷ People should come to appreciate that learning is not only informative, but can also be transformative and empowering. In other words, parents and educators can and

²³ Cognitive psychology differentiates between two systems of information processing. System one is affective, associative, automatic, fast, habitual, heuristic-based, holistic, intuitive, and unconscious; while system two reasoning is analytical, cognitive, conscious, controlled, deliberative, effortful, logical, rule-based, and slow. *See generally* DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011) (detailing differences between these two systems of thinking).

²⁴ Colin James, *Seeing Things As We Are: Emotional Intelligence and Clinical Legal Education*, 6 INT'L J. CLINICAL LEGAL EDUC. 123 (2005) (explaining how clinical legal education can help improve emotional intelligence).

²⁵ Mark R. Lepper & David Greene, *Undermining Children's Intrinsic Interest with Extrinsic Reward: A Test of the "Overjustification" Hypothesis*, 28 J. PERSONALITY & SOC. PSYCHOL. 129 (1973) (providing a supporting field experiment). *See generally* THE HIDDEN COSTS OF REWARD: NEW PERSPECTIVES ON THE PSYCHOLOGY OF HUMAN MOTIVATION (Mark R. Lepper & David Greene eds., 1978) (describing how, when, and why extrinsic incentives can be strong enough to undermine intrinsic motivation). *See also* Edward L. Deci & Richard M. Ryan, *The "What" and "Why" of Goal Pursuits: Human Needs and the Self-Determination of Behavior*, 11 PSYCHOL. INQUIRY 227 (2000) (differentiating between autonomous and controlled forms of motivation).

²⁶ *See, e.g.*, Gerald F. Hess, *Heads and Hearts: The Teaching and Learning Environment in Law School*, 52 J. LEGAL EDUC. 75, 78 (2002) (explaining how class rank and grades as external rewards to success in law school and practice exacerbate fear, stress, and loss of self-esteem); Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test of Self-Determination Theory*, 33 PERSONALITY & SOC. PSYCHOL. BULL. 883, 884, 893 (2007) (finding displacement in law school of intrinsic motivation by extrinsic motivation correlates with less happiness and satisfaction and more depression and distress).

²⁷ Ben Dean, *Learning about Learning*, AUTHENTIC HAPPINESS, (2004), <http://www.authentichappiness.sas.upenn.edu/newsletter.aspx?id=71> (defining love of learning, explaining its benefits, and how to develop and nourish it).

should make learning not only less depressing and stressful,²⁸ but also more engaging and fun!²⁹

Race to Nowhere, a recent documentary, is part of a movement among some parents, educators, and policy makers to rethink how America's high-school educational system can and should help young kids be more engaged, happy, healthy, inspired, and resilient.³⁰ Madeline Levine, a psychologist featured in the film *Race to Nowhere*, documents that a lot of affluent parents are inadvertently raising their kids to become adolescents who feel anxious, angry, depressed, empty, and lost.³¹ Dominic Randolph, headmaster of Riverdale Country School, believes that education and parenting should strive to foster happy, meaningful, and productive lives.³² I vividly remember when I was in seventh grade at Horace Mann School,³³ that I had been very excited and happy to have received 3 A+ and 2 A grades on a trimester report card until my mom asked me why I had failed to receive 5 A+ grades. She reminded me how expensive Horace Mann was.³⁴ My flippant response was that grades and tuition were not correlated because other parents also paid the same tuition and some of their kids received a total of zero A+ grades. She was not amused.

Parents and (law) professors can and should reframe learning as an activity that can produce flow³⁵ and play.³⁶ In summing up how and why Supreme Court Justice Elena Kagan was able as the dean of Harvard Law School to change its culture from one of student alienation to "a happy and engaged community fo-

²⁸ Richard Sheehy & John J. Horan, *Effects of Stress Inoculation Training for 1st-Year Law Students*, 11 INT'L J. STRESS MGMT. 41 (2004) (developing and reporting on a study which taught 22 first-year law students a four session program about stress, coping skills, and their application in practice).

²⁹ See generally NANCY LEVIT & DOUGLAS O. LINDER, *THE HAPPY LAWYER: MAKING A GOOD LIFE IN THE LAW* (2010) (applying research about happiness to suggest how to improve legal education and practice). See also Peter H. Huang & Rick Swedloff, *Authentic Happiness and Meaning at Law Firms*, 58 SYRACUSE L. REV. 335 (2008) (applying positive psychology to suggest how law firms and law schools can improve lawyer and law student well-being); Todd David Peterson & Elizabeth Waters Peterson, *Stemming the Tide of Law Student Depression: What Law Schools Need to Learn from the Science of Positive Psychology*, 9 YALE J. HEALTH POL'Y L. & ETHICS 357, 395-418 (2009) (applying positive psychology to suggest how law schools can improve student well-being).

³⁰ RACE TO NOWHERE (2010), <http://www.racetonowhere.com/> (providing links to clips, trailers, advocacy tools, and updates).

³¹ MADELINE LEVINE, *THE PRICE OF PRIVILEGE: HOW PARENTAL PRESSURE AND MATERIAL ADVANTAGE ARE CREATING A GENERATION OF DISCONNECTED AND UNHAPPY KIDS* (2008).

³² Paul Tough, *The Character Test*, N.Y. TIMES, Sept. 18, 2011, §6 (Magazine), at MM38.

³³ HORACE MANN SCHOOL, <http://www.horacemann.org/> (last visited July 18, 2012).

³⁴ *Tuition, Costs and Financial Aid*, HORACE MANN SCHOOL <http://www.horacemann.org/page.cfm?p=261> (last visited July 18, 2012).

³⁵ See generally MIHALY CSIKSZENTMIHALYI, *FLOW: THE PSYCHOLOGY OF OPTIMAL EXPERIENCE* (1991) (describing how people can create meaning in their lives via full intention and focus and in so doing sustain an ongoing sense of fulfillment and state of satisfaction).

³⁶ STUART BROWN WITH CHRISTOPHER VAUGHAN, *PLAY: HOW IT SHAPES THE BRAIN, OPENS THE IMAGINATION, AND INVIGORATES THE SOUL* (2009) (explaining how play helps brain development and promotes empathy, fairness, and justice).

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cused on student learning,” a legal scholar described Harvard Law School as “a richer and happier community” that for “a legal academic, now feels like an academic version of Disneyland, fun and playful with many different types of entertainment.”³⁷

When parents say that they want their kids to be happy, they also have quite specific ideas about what it means for their kids to be happy.³⁸ In the eyes of my tiger mom, her sons would be happy when they became doctors or scientists who earned graduate degrees from Harvard.

Parents are not agnostic over the sources of happiness for their kids. As Federal Reserve Vice Chair macroeconomist Janet Yellen pointed out in a conference: “we care about more than just whether people are happy; we’d like to understand why they are happy.”³⁹ At that same conference, a former Chair of the Council of Economic Advisors,⁴⁰ the author of a best-selling introduction to economics textbook,⁴¹ and macroeconomist Gregory Mankiw, recounted this anecdote:

Like many parents, I try to impress upon my children that there is a vast difference between happiness and satisfaction, that a good life is more important than a happy one. This conversation usually takes place when I am trying to explain to my young son that it is time to turn off his Game Boy, and that I am telling him to do this not as a punishment but for his own good. Somehow, he never seems convinced.⁴²

A normative analysis of parenting requires the adoption of benchmarks. Professor Martin Seligman, who founded positive psychology,⁴³ recently proposed that flourishing entails these five items: Positive emotion, Engagement, positive Relationships, Meaning, and Accomplishment (Seligman coined the

³⁷ Kevin K. Washburn, *Elena Kagan and the Miracle at Harvard*, 61 J. LEGAL EDUC. 67, 74-69, 75 (2011).

³⁸ See generally CHRISTINE CARTER, RAISING HAPPINESS: 10 SIMPLE STEPS FOR MORE JOYFUL KIDS AND HAPPIER PARENTS ix-x (2010). See also Christine Carter, *Raising Happiness: Science for Joyful Kids and Happier Parents*, GREATER GOOD: THE SCIENCE OF A MEANINGFUL LIFE, http://greatergood.berkeley.edu/raising_happiness/ (last visited July 18, 2012) (blog offering parenting advice based mostly upon positive psychology); THE RAISING HAPPINESS CLASS, <http://raisinghappiness.com/theClass.php/> (last visited July 18, 2012) (describing online parenting class focusing on bringing more joy into kids’ lives).

³⁹ Janet L. Yellen, *Implications of Behavioral Economics for Monetary Policy*, in POLICYMAKING INSIGHTS FROM BEHAVIORAL ECONOMICS 379, 389 (Christopher L. Foote et al., eds., 2009), available at <http://www.bos.frb.org/economic/conf/BehavioralPolicy2007/chapter7b.pdf>.

⁴⁰ Council of Economic Advisers, *Former Members of the Council*, THE WHITE HOUSE, <http://www.whitehouse.gov/administration/eop/cea/about/Former-Members> (last visited July 18, 2012).

⁴¹ GREGORY MANKIW, PRINCIPLES OF ECONOMICS (5th ed., 2012).

⁴² N. Gregory Mankiw, *Comments on “Happiness, Contentment, and Other Emotions for Central Bank Policymakers” by Rafael Di Tella and Robert MacCulloch*, in Foote et al., *supra* note 39, at 363, 364.

⁴³ MARTIN E. P. SELIGMAN, AUTHENTIC HAPPINESS: USING THE NEW POSITIVE PSYCHOLOGY TO REALIZE YOUR POTENTIAL FOR LASTING FULFILLMENT 208-46 (2002).

acronym and mnemonic of PERMA).⁴⁴ PERMA provides five normative criteria by which to evaluate parenting and (legal) education. Thus, we can ask whether, and if so how much, flourishing according to the normative yardsticks in PERMA results from different kinds of parenting⁴⁵ and (legal) education.⁴⁶

A key reason why some children and also adults flourish is their practice of wise judgment and decision-making (JDM). Conversely, those who choose poorly suffer the consequences of poor JDM.⁴⁷ Examples of JDM include assessing evidence critically, estimating probabilities, evaluating risks, hypothesis testing, planning for (possibly unforeseen) contingencies, and updating probability beliefs. In other words, “[t]he science of decision making is what the field of *judgment and decision making* studies.”⁴⁸ JDM entails behaviors that most people would classify as characteristic of “good thinking” and rationality.⁴⁹ JDM skills are related to, although different from, the kinds of cognitive intelligence⁵⁰ that

⁴⁴ See generally MARTIN E. P. SELIGMAN, *FLOWRISH: A VISIONARY NEW UNDERSTANDING OF HAPPINESS AND WELL-BEING* (2011) (offering a revision of positive psychology). See also John Tierney, *A New Gauge to See What's Beyond Happiness*, N.Y. TIMES (May 17, 2011) at D2, available at <http://www.nytimes.com/2011/05/17/science/17tierney.html> (reporting on Seligman's book).

⁴⁵ See generally PROMOTING CHILDREN'S WELL-BEING IN THE PRIMARY YEARS (Andrew Burrell & Jeni Riley eds., 2005) (explaining how to help children have positive experiences that help emotional, intellectual, social, and spiritual development); ERICA FRYDENBERG, JAN DEANS, & K O'BRIEN, *DEVELOPING EVERYDAY COPING SKILLS IN THE EARLY YEARS PROACTIVE STRATEGIES FOR SUPPORTING SOCIAL AND EMOTIONAL DEVELOPMENT* (2012) (helping parents and practitioners develop coping skills of children aged 3-8 via arts, creative play, and language-based strategies); ERICA FRYDENBERG, *THINK POSITIVELY! A COURSE FOR DEVELOPING COPING SKILLS IN ADOLESCENTS* (2009) (explaining how to prevent depression and stress by a positive approach to promoting health and well-being that enhances coping skills); IAN MORRIS, *TEACHING HAPPINESS AND WELL-BEING IN SCHOOLS: LEARNING HOW TO RIDE ELEPHANTS* (2009) (introducing positive psychology in secondary schools); NEL NODDINGS, *HAPPINESS AND EDUCATION* (2003) (analyzing implications of happiness being an educational objective); JIM TAYLOR, *POSITIVE PUSHING: HOW TO RAISE A SUCCESSFUL AND HAPPY CHILD* (2009) (describing how to create and foster emotional maturity).

⁴⁶ Prue Vines, *Working Towards the Resilient Lawyer: Early Law School Strategies*, University of New South Wales Law Research Paper No. 2011-30, 4-5 (July 2, 2011) (discussing how Seligman's PERMA framework is applicable to foster resilience in first-year law students). See generally WILLIAM M. SULLIVAN ET AL., *EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW* (2007) (concluding that legal education should offer more training in ethics and social responsibility to help aspiring lawyers develop professional competence and identity).

⁴⁷ SamuelRay92, *Nazi Uber Aging- Indiana Jones*, YOUTUBE (March. 30, 2008), <http://www.youtube.com/watch?v=-DGFuHC75aY>.

⁴⁸ Kathleen D. Vohs & Mary Frances Luce, *Judgment and Decision Making*, in *ADVANCED SOCIAL PSYCHOLOGY: THE STATE OF THE SCIENCE* 733, 733 (Roy F. Baumeister & Eli J. Finkel, eds. 2010).

⁴⁹ See generally KEITH E. STANOVICH, *DECISION MAKING AND RATIONALITY IN THE REAL WORLD* (2009) (explaining how concept of rationality is understood in cognitive science in terms of good JDM).

⁵⁰ See generally HOWARD GARDNER, *MULTIPLE INTELLIGENCES: NEW HORIZONS IN THEORY AND PRACTICE* (2006) (proposing these seven types of intelligence: bodily-kinesthetic, intrapersonal, interpersonal, linguistic, logical-mathematical, musical, and spatial).

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intelligence quotient tests and their proxies, such as the Scholastic Aptitude Test and the Law School Admissions Test, measure.⁵¹ The Decision Education Foundation is a non-profit organization that strives to empower youth with effective JDM.⁵²

This Article rests upon three central assumptions. First, JDM is an essential component of being successful at life⁵³ and lawyering;⁵⁴ and so teaching effective JDM is a key part of successful parenting⁵⁵ and successful (legal) education.⁵⁶ In recognition of JDM's importance to attorneys, Harvard Law School recently introduced a mandatory real-world problem-solving workshop that first-year students take in a three-week winter quarter session.⁵⁷ This uniquely structured class requires collaboration to produce written analysis, advice, and memos to clients about complex fact patterns and open-ended problems. Students must confront such questions as these: What categories of problems do lawyers solve? How do lawyers solve these problems? What cognitive paradigms and practical judgments do lawyers use in making decisions and solving problems? North-

⁵¹ See generally KEITH E. STANOVICH, *WHAT INTELLIGENCE TESTS MISS: THE PSYCHOLOGY OF RATIONAL THOUGHT* (2009) (arguing that rational thought is as important as intelligence and should be valued as much as what intelligence tests currently measure); KEITH E. STANOVICH, *RATIONALITY & THE REFLECTIVE MIND* (2011) (presenting empirical evidence that tendencies to make cognitive errors are not highly related to intelligence).

⁵² See generally DECISION EDUCATION FOUNDATION, <http://www.decisioneducation.org/> (providing course materials to help train educators and youth counselors about how to improve adolescents' JDM).

⁵³ Jonathan Baron, Katherine Laskey, & Rex V. Brown, *Going through the Goop: An Introduction to Decision Making*, U PA. (1989) <http://www.sas.upenn.edu/~baron/papers.htm/dmtext.htm> (providing a short primer about how to make better decisions).

⁵⁴ See generally PAUL BREST & LINDA HAMILTON KRIEGER, *PROBLEM SOLVING, DECISION MAKING, AND PROFESSIONAL JUDGMENT: A GUIDE FOR LAWYERS AND POLICYMAKERS* (2010) (offering a systematic guide).

⁵⁵ See generally TIMOTHY D. WILSON, *RE-DIRECT: THE SURPRISING NEW SCIENCE OF PSYCHOLOGICAL CHANGE* 75-111 (2011) (explaining how to become a better parent by improving a child's JDM).

⁵⁶ Janet Reno, *Lawyers as Problem Solvers: Keynote Address to the AALS*, 49 J. LEGAL EDUC. 5 (1999) (advocating fostering of problem-solving skills in law students). See generally WARD FARNSWORTH, *THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW* (2010) (collecting a number of JDM tools for thinking about legal problems); SULLIVAN, ET AL., *supra* note 46 (suggesting legal educational reforms). See also Joshua Gans, *Tiger Mom Management*, HBR BLOG NETWORK, (Jan. 21, 2011), [http://blogs.hbr.org/cs/2011/01/tiger_mother_management.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+harvardbusiness/cs+\(Conversation+Starter+on+HBR.org\)](http://blogs.hbr.org/cs/2011/01/tiger_mother_management.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed:+harvardbusiness/cs+(Conversation+Starter+on+HBR.org)) (blogging about management styles based upon and informed by parenting styles).

⁵⁷ Elaine McArdle, *An Innovative New Course Teaches Students to Solve Problems Right from the Start*, HARVARD LAW SCHOOL, (Feb. 23, 2010) http://www.law.harvard.edu/news/spotlight/classroom/problem_solving.html (reporting on this class); *Problem Solving Workshop*, HARVARD LAW SCHOOL, <http://www.law.harvard.edu/academics/registrar/winter-term/problem-solving-workshop.html> (describing course) (last modified Dec. 21, 2009).

western Law School offers a similar course for first-year and Master of Laws students titled *The Lawyer as Problem-Solver*.⁵⁸

Second, central to JDM is the development and practice of skills related to emotions⁵⁹ and emotional intelligence.⁶⁰ A number of business trade books and business school courses focus on how managers can improve their emotional intelligence and, in so doing, become more effective organizational leaders.⁶¹ MIT Sloan School finance professor Andrew Lo recently proposed a cognitive neuroscience-informed conception of rationality that emphasizes the important role that emotions play in JDM and that differs vastly from a neoclassical economic vision of unemotional rationality.⁶² Law school clinical and negotiation casebooks and courses often discuss the importance of recognizing and responding appropriately to emotions in attorneys, clients, judges, juries, and other legal actors.⁶³ Yet much of current American legal non-clinical education teaches students that lawyering is just about logical analysis and not about feelings.⁶⁴ Some noteworthy exceptions include these pedagogically innovative courses: *Skills of Exceptional Lawyers - Social Intelligence and The Human Dimension*, which Jeffrey Newman and Leslie Chin co-teach at the Boalt law school; *Well-Being and the Practice of Law*, which Daniel S. Bowling teaches at Duke law school; and *Emotional Intelligence in Law*, which Richard C. Reuben teaches at the University of Missouri law school.

Third, education concerning and life-long practice of cultivating one's character strengths, ethics, and professionalism are crucial to achieving happi-

⁵⁸ *Lawyer as a Problem Solver*, NORTHWESTERN LAW, <http://www.law.northwestern.edu/problemsolver/>.

⁵⁹ See generally PAUL SLOVIC, *THE FEELING OF RISK* (2010) (collecting research about risk as feelings). See also PAUL SLOVIC, *THE PERCEPTION OF RISK* (2010) (collecting research examining experts' versus public's perceptions of risk).

⁶⁰ See generally DANIEL GOLEMAN, *EMOTIONAL INTELLIGENCE: WHY IT CAN MATTER MORE THAN IQ* (1997) (arguing emotional intelligence is best predictor of human success). See also DANIEL GOLEMAN, *WORKING WITH EMOTIONAL INTELLIGENCE* (2000) (applying emotional intelligence to workplace).

⁶¹ See, e.g., DAVID R. CARUSO & PETER SALOVEY, *THE EMOTIONALLY INTELLIGENT MANAGER: HOW TO DEVELOP AND USE THE FOUR KEY EMOTIONAL SKILLS OF LEADERSHIP* (2004).

⁶² Andrew W. Lo, *Fear, Greed, and Financial Crises: A Cognitive Neuroscience Perspective*, in *HANDBOOK ON SYSTEMIC RISK* (J. P. Fouque & J. Langsam eds., forthcoming 2012).

⁶³ See, e.g., Melissa L. Nelken, Andrea Kupfer Schneider, & Jamil Mahuad, *If I'd Wanted to Teach About Feelings, I Wouldn't Have Become a Law Professor*, in *VENTURING BEYOND THE CLASSROOM* 357 (Christopher Honeyman, James Coben, & Giuseppe De Palo eds., 2010) (presenting tools for teaching law students about importance of emotions in negotiation); Mario Patera & Ulrike Gamm, *Emotions – A Blind Spot in Negotiation Training*, in *VENTURING BEYOND THE CLASSROOM* 335 (Christopher Honeyman, James Coben, & Giuseppe De Palo eds., 2010) (same).

⁶⁴ Melissa L. Nelken, *Negotiation and Psychoanalysis: If I'd Wanted to Learn about Feelings, I Wouldn't Have Gone to Law School*, 46 J. LEGAL EDUC. 421, 422 (1996). See generally RANDALL KISER, *HOW LEADING LAWYERS THINK: EXPERT INSIGHTS INTO JUDGMENT AND ADVOCACY* 75-85 (2011) (discussing how important emotional intelligence is to legal practice).

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ness and satisfaction in school,⁶⁵ work,⁶⁶ and life.⁶⁷ Empirical and experimental studies provide support for the assumption that being happy and satisfied with your life is correlated with ethical and professional JDM, which in turn is correlated with attorneys being effective.⁶⁸ A recent study about lawyer effectiveness identified 26 distinct factors underlying career success, many of which involve good JDM.⁶⁹

Most American law schools require that students in their second or third year take a course titled Legal Ethics and Professionalism (or some permutation or proper subset of those words). The reason that law schools have such a requirement is the fact that many of the principals in the infamous 1972 Watergate scandal were lawyers. Over a dozen lawyers were convicted of criminal offenses and most of these lawyers were also disbarred or suspended from legal practice. In 1973, the response of the American Bar Association (ABA) was to enact a new requirement for training in legal ethics and professional responsibility, which covers the Model Rules of Professional Conduct (MRPC) and what is sometimes known as the “law of lawyering.”⁷⁰ This is the history behind why law schools require all students take such a course to graduate.

As for how this is done, at most law schools, this required course is neither inspiring to, nor popular among students. A traditional way to teach this course is to march through cases about dishonest, impaired, incompetent, or negligent attorneys making poor decisions professionally and often personally. It seems that a more productive and uplifting approach is to analyze how ethical and profes-

⁶⁵ See, e.g., Jin Li, *U.S. and Chinese Cultural Beliefs About Learning*, 95 J. EDUC. PSYCHOL. 258 (2003) (finding Chinese conceptions of learning emphasized achievement standards of breadth and depth of knowledge, contributions to society, and unity of knowing and morality); Laura Parks & Russell P. Guay, *Can Personal Values Predict Performance? Evidence in an Academic Setting*, 61 APPLIED PSYCHOL.: AN INT’L REV. 149 (2012) (finding achievement values correlate with performance in college courses even after controlling for personality traits of conscientiousness, emotional stability, and extraversion).

⁶⁶ See e.g., JOHN R. FLYNN, *ASIAN AMERICANS: ACHIEVEMENT BEYOND I.Q.* (1991) (concluding that due to diligence and hard work, East Asian immigrants’ kids grow up to become elite professionals at higher rates than American peers who score higher on IQ tests).

⁶⁷ See generally CHARACTER PSYCHOLOGY AND CHARACTER EDUCATION (Daniel K. Lapsley & F. Clark Power eds., 2005) (advocating that moral education of character must draw upon empirical research about development, identity, personality, and selfhood).

⁶⁸ See, e.g., Robert J. B. Goudie et al., *Happiness as a Driver of Risk-Avoiding Behavior*, CESifo Working Paper No. 3451 (May 2011) (finding that happy people value life, act to preserve it, and so wear seat belts more often); and Neil Hamilton & Verna Monson, *The Positive Empirical Relationship of Professionalism to Effectiveness in the Practice of Law*, 24 GEO. J. LEGAL ETHICS 137 (2011) (examining how professionalism is related to effectiveness by reviewing empirical social sciences and professions literatures).

⁶⁹ Marjorie M. Schultz & Sheldon Zedeck, *Identification, Development, and Validation of Predictors for Successful Lawyering, Final Report to LSAC*, BERKLEY LAW SCHOOL (Sept. 2008), <http://www.law.berkeley.edu/files/LSACREPORTfinal-12.pdf>.

⁷⁰ The ABA Accreditation Standards requires a law school to provide each student with “substantial instruction in:... (5) the history, goals, structure, values, rules and responsibilities of the legal profession and its members.” ABA Accreditation Standard 302(a)(5); see also Interpretation 302-9 (requiring “instruction in matters such as the law of lawyering and the Model Rules of Professional Conduct of the American Bar Association”).

sional JDM is related to sustainable lawyer effectiveness and satisfaction. Ethical and unethical JDM entail short-run and long-term costs and benefits, personally and professionally. Taking inappropriate risks, especially seriously future-foreclosing risks, is unwise JDM. Ethical JDM is related to professional success due to reputation and word of mouth among clients, judges, and other attorneys.

Admission to practice in the bar of all but four U.S. jurisdictions requires a passing score (the definition of which varies across jurisdictions) on the Multi-state Professional Responsibility Examination (MPRE)⁷¹ that covers the MPRC and the ABA's Model Code of Judicial Conduct. It is worth remembering that the MPRE intends "to measure the examinee's knowledge and understanding of established standards related to a lawyer's professional conduct; the MPRE is not a test to determine an individual's personal ethical values."⁷²

Many students take a legal ethics and professionalism course in the semester that they take the MPRE. The required legal ethics and professional responsibility course is not intended to prepare students to pass the MPRE. Most students prepare for the MPRE by taking commercial review courses. Unfortunately many law students view the MPRE as testing esoteric black letter law they memorize for the MPRE and then forget. Some law schools,⁷³ faculty,⁷⁴ and books⁷⁵

⁷¹ NATIONAL CONFERENCE OF BAR EXAMINERS, <http://www.ncbex.org/multistate-tests/mpre/>. The four American jurisdictions that do not require applicants pass the MPRE are Maryland, Puerto Rico, Washington, and Wisconsin.

⁷² *Description of MPRE*, NATIONAL CONFERENCE OF BAR EXAMINERS, <http://www.ncbex.org/multistate-tests/mpre/mpre-faqs/description0/>.

⁷³ Carrie Hempel & Carroll Seron, *An Innovative Approach to Legal Education*, in THE PARADOX OF PROFESSIONALISM: LAWYERS AND THE POSSIBILITY OF JUSTICE 187-88 (Scott L. Cummings ed., 2011) (describing the first-year two-semester University of California, Irvine legal profession course); Ann Southworth & Catherine L. Fisk, *Our Institutional Commitment to Teach about the Legal Profession*, 1 U. C. IRVINE L. REV. 73 (2011) (detailing the premises, goals, content, successes, and challenges of the legal profession course at the University of California, Irvine).

⁷⁴ Joshua E. Perry, *Thinking Like a Professional*, 58 J. LEGAL EDUC. 159 (2008) (emphasizing importance of self-awareness, self-reflection, and integrating personal and professional development in law school); Michael Robertson, *Challenges in the Design of Legal Ethics Learning Systems: An Educational Perspective*, 8 LEGAL ETHICS 222, 226-29 (2005) (advocating legal educators go beyond usual rules approach to professional responsibility and even the skills approach, instead utilizing an identity and judgment approach); THE ETHICS PROJECT IN LEGAL EDUCATION (Michael Robertson et al. eds., 2011) (analyzing methods to foster engagement of law students with moral dimensions of legal practice); Alexander Scherr & Hillary Farber, *Popular Culture as a Lens on Legal Professionalism*, 55 S. C. L. REV. 351 (2003) (explaining how popular cultural images of attorneys from cartoons, film, novels, and television offer unique opportunities for teaching about professionalism); Carole Silver, Amy Garver, & Lindsay Watkins, *Unpacking the Apprenticeship of Professional Identity and Purpose: Insights from the Law School Survey of Student Engagement*, 17 J. LEGAL WRITING INST. 377 (2011) (advocating that law schools can and should let professionalism be an overarching and unifying structure for law school experiences).

⁷⁵ See generally AMEE R. MCKIM, MAXIMIZE LAWYER POTENTIAL: PROFESSIONALISM AND BUSINESS ETIQUETTE FOR LAW STUDENTS AND LAWYERS (2009) (explaining importance of professionalism skills to success in law schools and legal careers); MICHAEL C. ROSS, ETHICS AND INTEGRITY IN LAW & BUSINESS: AVOIDING "CLUB FED" (2011) (offering a professional

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are rethinking this course as providing unique opportunities to engage students in critical self-reflection upon and thinking about ethical and professionalism challenges (such as balancing life and work) that lawyers face in their careers.

This Article assumes the above hypotheses in discussing how growing up as a tiger cub entailed certain ongoing personal benefits and costs. The benefits included academic achievement, external measures of success, learning to work hard, be persistent, and be resilient, and have a reputation for possessing these characteristics. The costs included being overly deferential to authority, underappreciating non-scholastic strengths, undervaluing emotional intelligence and social skills, and perpetuating the model minority stereotype.⁷⁶

This Article presents a number of anecdotes. As a kid, I loved to watch cartoons and other shows after elementary school, and routinely did homework during commercials. My grandma, who made from-scratch delicious Chinese dim sum after school snacks (such as pan-fried mini-dragon buns,⁷⁷ pot stickers, scallion pancake, and spring rolls) for me, used to say repeatedly that no television show could ever be as exciting and interesting as someone's own real life. This Article recounts my own life experiences and some lessons that I learned from them and memories of them. As with memories in general, these particular memories are incomplete and selective because they have their own stories to tell.⁷⁸

You may draw other morals than the ones that I drew from the same anecdote. This is why I sometimes caution law students in a doctrinal class about how easy it can be to draw inappropriate lessons from reading only highly edited (appellate) judicial opinions in their casebooks by recounting the following anecdote. When one of my nephews, D, was approximately 1½ years old, his mother was pregnant with his younger brother R. She decided, rather than explaining the birds and the bees to D, to instead read D a story about a pregnant rabbit. D, who is precocious, quite reasonably inferred that his mother was expecting to give birth to a bunny! In a similar anecdote, when K, one of my three nieces, was around 2 years old, K's mother was pregnant with her younger brother S. Upon being shown a sonogram of S and being also told that it was a baby, K who is precocious, quite reasonably exclaimed: "That not a baby, that an octopus!"

The rest of this Article is organized as follows. Part I offers some childhood background and family context about growing up a tiger cub. Part II presents vignettes about being a first-year law student at the University of Chicago who

responsibility text that is more focused, fun, and interesting than traditional texts); VICTORIA VULETICH & NELSON P. MILLER, *THE LAW, PRINCIPLES, AND PRACTICE OF LEGAL ETHICS* (2011) (connecting personal morality to rules of professional responsibility to help law students become healthier and more satisfied lawyers who find deeper meaning in their practice and provide greater service to their clients and communities).

⁷⁶ Nathaniel A. Victoria, *A+ Does Not Mean All Asians: The Model Minority Myth and Implications for Higher Education*, 28 VT. CONNECTION 80 (2007).

⁷⁷ Also known as xia lon(g) bao.

⁷⁸ Peter H. Huang, *Experiences versus Memories: Should Law & Policy Care More About Your First Love or Your Memories of It?*, August 2011 (on file with author).

transferred to be a second- and third-year law student at Stanford University.⁷⁹ Part III provides a number of first-hand accounts from the perspective of interviewing for⁸⁰ and teaching at various law schools.⁸¹ A conclusion summarizes this Article's main thesis, which is that current mainstream American legal education and tiger parenting share much in common that can and should be improved upon to foster the happiness of law students and children.

II. GROWING UP AS A TIGER CUB

I believe that professor and tiger mom Amy Chua would see my life as exemplifying successful tiger parenting. I am an American-born Chinese, who at age 14 enrolled as a freshman at Princeton University and 3 years later at age 17, after being a University Scholar⁸² graduated Phi Beta Kappa with an A.B. in mathematics. I also earned a Ph.D. in applied mathematics from Harvard University and a J.D. from Stanford University, after having been a first-year law student at the University of Chicago. My Ph.D. thesis advisor was 1972 economics Nobel Laureate and mathematical economic theorist Kenneth Arrow.⁸³ After serving as an economist in the Division of Consumer Protection in the Bureau of Economics of the Federal Trade Commission, I taught in economics departments from coast to coast, including at Stanford University, the University of California Berkeley, and the University of California Los Angeles; in the finance department of the A.B. Freeman business school at Tulane University; and in law schools at Yale University, University of Chicago, University of Pennsylvania, University of Virginia, University of Minnesota, and University of Southern California. I co-authored a book about law and popular culture,⁸⁴ while a member of the Institute for Advanced Study School of Social Science,⁸⁵ during its psycholo-

⁷⁹ See also ALFREDO MIRANDE, *THE STANFORD LAW CHRONICLES: DOIN' TIME ON THE FARM* (2005) (providing a memoir about being a Hispanic student at Stanford Law School).

⁸⁰ Michael J. Higdon, *A Place in the Academy: Law Faculty Hiring and Socioeconomic Bias*, UNIVERSITY OF TENNESSEE LEGAL STUDIES RESEARCH PAPER NO. 176 (Feb. 21, 2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2007934 (arguing that law school faculty appointment committees should emphasize academic pedigree less than most do currently in order to achieve socioeconomically diverse faculties). See also BRANNON DENNING, MARCIA McCORMICK, & JEFF LIPSHAW, *BECOMING A LAW PROFESSOR: A CANDIDATE'S GUIDE* (2010) (offering a soup-to-nuts guide for aspiring legal academics).

⁸¹ See generally Axel Leijonhufvud, *Life among the Econ*, 11 *WESTERN ECON. J.* 327 (1973) (providing a related satirical account of the culture and sociology of academic economists).

⁸² *University Scholar Program FAQs*, PRINCETON UNIVERSITY, http://www.princeton.edu/odoc/special_academic_programs/university_scholar_progra/ (last updated July 22, 2011).

⁸³ *The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 1972*, NOBELPRIZE.ORG, (May 10, 2012), http://nobelprize.org/nobel_prizes/economics/laureates/1972/.

⁸⁴ DAVID RAY PAPKE ET AL., *LAW & POPULAR CULTURE: TEXT, NOTES, & QUESTIONS* (2007).

⁸⁵ INSTITUTE FOR ADVANCED STUDY, SCHOOL OF SOCIAL SCIENCE, <http://www.sss.ias.edu/> (last visited July 18, 2012).

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gy and economics thematic focus academic year.⁸⁶ I am currently the inaugural DeMuth Chair of Business Law at the University of Colorado School of Law,⁸⁷ after holding the inaugural Kohn Chair at Temple University law school.

I might be considered a poster child for exactly what a tiger mom hopes their child to grow up to become as an adult: a chaired professor who was also a math genius. Except for the fact that I am not and never was a genius. I was an Asian American former whiz kid. I purposely choose the phrase whiz kid, meaning a person who is unusually smart or successful, particularly at some young age, and not the word genius, defined to be someone with an IQ above 180.⁸⁸ This is because when I was around five years old, my mother took me to Hunter College Elementary School⁸⁹ so that I could take an IQ test, and my resulting score was not that of a genius. My dad who has a Ph.D. in metallurgy from Berkeley was quite fond of reminding me that my not being a genius had been conclusively and empirically demonstrated by quantitative data based upon a standardized test. Because in China some people are of the view that a baby is a year old upon birth and then everyone ages one year on Chinese new year, my dad also liked to joke that I therefore started Princeton actually at age 16 in Chinese years as opposed to age 14 in American years. My 92 or 93 year-old dad also took pride in his Ph.D. thesis having more pages than mine!

Because my tiger mom and more laissez-faire dad both worked, my “po po” or “waipo,” which is Mandarin for grandmother on one’s mother’s side, played the central role in educating me. She taught me a diverse portfolio of ideas and teachings from Buddhism, Confucianism, and Taoism. In particular, waipo stressed the importance of life-long learning and self-cultivation of virtues. Of course waipo desired that I be a successful person in whatever endeavors I chose for myself. More importantly, she taught me how to have persistence and resilience in the face of inevitable setbacks. Most importantly, she wished for me that I would become a good human being leading a meaningful life that benefited others. I strongly believe that my life would have been different and for the worse had waipo not come to America in 1960 to essentially care for and raise me. She offered a welcome balance to and counterweight for my tiger mom’s parenting. She also provided a safe haven and space for me to question and push back against my tiger mom’s parenting. Finally, waipo became a life-long role model of how to live with grace under pressure and to find humor and joy every-day.

⁸⁶ *Thematic Foci 1973 - Present*, INSTITUTE FOR ADVANCED STUDY, SCHOOL OF SOCIAL SCIENCE, <http://www.sss.ias.edu/activities/past-themes> (last visited July 18, 2012).

⁸⁷ UNIVERSITY OF COLORADO, *supra* note 4.

⁸⁸ *See generally* LETA STETTER HOLLINGSWORTH, CHILDREN ABOVE 180 IQ (STANFORD-BINET): ORIGIN AND DEVELOPMENT (1942, reprint ed., 1975) (being a definitive and classic set of detailed case studies of twelve children having IQ above 180).

⁸⁹ *See generally* HUNTER COLLEGE ELEMENTARY SCHOOL, <http://hces.hunter.cuny.edu/> (last visited July 18, 2012) (providing information about admissions process) and *Admissions Process and Testing*, HUNTER COLLEGE ELEMENTARY SCHOOL, <http://hces.hunter.cuny.edu/?m1=1&m2=1> (last visited July 18, 2012) (providing details about admissions procedure and testing).

I was struck by how much Professor Chua's defiantly self-incriminating, humorous, and tongue-in-cheek memoir became an often misunderstood popular cultural phenomenon and public lightning rod provoking much attention,⁹⁰ backlash,⁹¹ blogging,⁹² controversy,⁹³ criticism,⁹⁴ defense,⁹⁵ discussion,⁹⁶ rebuttal,⁹⁷

⁹⁰ See, e.g., Kate Zernike, *Retreat of the 'Tiger Mother'*, N.Y. TIMES, Jan. 14, 2011 (reporting that Amy Chua's Wall Street Journal article that contained excerpts of her book excerpt provoked over 5,000 comments posted in response to it on the Wall Street Journal's website), available at <http://www.nytimes.com/2011/01/16/fashion/16Cultural.html>.

⁹¹ See, e.g., Melinda Liu, *The 'Chinese Mom' Backlash*, NEWSWEEK, Jan. 18, 2011 (pointing out Chinese mothers in China no longer bring up their kids the way Amy Chua raised hers, but instead are imitating American parents), at <http://www.newsweek.com/2011/01/18/the-chinese-mom-backlash.html>.

⁹² See, e.g., Christine Hurt, *Thanks to Battle Hymn of the Tiger Mother Book Club Participants!*, THE CONGLOMERATE (Feb 22, 2011), <http://www.theconglomerate.org/2011/02/thanks-to-battle-hymn-of-the-tiger-mother-book-club-participants.html>, (providing hyperlinks for 15 posts by law professor moms about Amy Chua's book),.

⁹³ See, e.g., Lac Su, *'Tiger Mothers' Leave Lifelong Scars*, CNN OPINION (Jan. 20, 2011) (blogging about his experiences of being raised by a tiger dad), <http://www.cnn.com/2011/OPINION/01/20/lac.su.tiger.mother.scars/index.html>). See also LAC SU, I LOVE YOU ARE FOR WHITE PEOPLE (2009) (same).

⁹⁴ David Brooks, *Amy Chua Is a Wimp*, N.Y. TIMES, Jan. 18, 2011, at A25, available at http://www.nytimes.com/2011/01/18/opinion/18brooks.html?_r=1&ref=davidbrooks (arguing that Chua is "coddling her children. She's protecting them from the most intellectually demanding activities because she doesn't understand what's cognitively difficult and what isn't" and "[m]anaging status rivalries, negotiating group dynamics, understanding social norms, navigating the distinction between self and group — these and other social tests impose cognitive demands that blow away any intense tutoring session or a class at Yale.")

⁹⁵ See, e.g., Sophia Chua-Rubinfeld, *Why I Love My Strict Chinese Mom*, NEW YORK POST, Jan. 17, 2011, available at http://www.nypost.com/p/entertainment/why_love_my_strict_chinese_mom_uUvfmLcA5eteY0u2KXt7hM_ (offering Amy Chua's eldest daughter's public defense of her mother).

⁹⁶ See, e.g., Joshua Gans, *The Sadness Around A Tiger Child*, GAME THEORIST: MUSINGS ON ECONOMICS AND CHILD REARING (June 17, 2011, 9:43AM) (blog posting about some negative externalities of tiger parenting), <http://gametheorist.blogspot.com/2011/06/sadness-around-tiger-child.html>; Joshua Gans, *Are You a Tiger Parent?*, GAME THEORIST: MUSINGS ON ECONOMICS AND CHILD REARING (Jan. 22, 2011, 11:29AM) (blogging poll question), <http://gametheorist.blogspot.com/2011/01/are-you-tiger-parent.html>; Joshua Gans, *Are You a Tiger Parent? Results*, GAME THEORIST: MUSINGS ON ECONOMICS AND CHILD REARING (Jan. 30, 2011, 3:14PM) (blogging results of poll), <http://gametheorist.blogspot.com/2011/01/are-you-tiger-parent-results.html>. See also Rajeev Darolla & Bruce Wydick, *The Economics of Parenting, Self-esteem, and Academic Performance: Theory and a Test*, 78 ECONOMICA 215 (2011) (developing and testing a theory about how signals that an altruistic parent sends to a child can affect that child's self-esteem, effort, and long-term performance if that parent has better information concerning that child's ability than that child does). See generally JOSHUA GANS, PARENTONOMICS: AN ECONOMIST DAD LOOKS AT PARENTING (2009) (explaining insights based upon economics and incentives applied to parenting).

⁹⁷ See, e.g., Samantha Leese, *A 'Tiger Mother' Rebuttal from across the Ocean*, CNN GO (Jan. 21, 2011) (blogging a rebuttal by a Hong Kong journalist), <http://www.cnn.go.com/hong-kong/life/samantha-leese-138468>.

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and vindication⁹⁸ concerning her and related parenting methods,⁹⁹ philosophies,¹⁰⁰ practices,¹⁰¹ and styles.¹⁰² Upon first hearing of and learning about her book, I remember saying aloud that such a book could only be written by someone who is a Chinese individual born in the United States and who had been influenced by the American spirit of autonomy and independence. A Chinese person born in China would never write a book that discloses from the viewpoint of a traditional Chinese person too much about Chinese parenting and in a manner that is critical and questioning of authority, precedent, and tradition.

Professor Chua said: “I didn’t expect this level of intensity. The book, of course, it’s not a how-to guide, it’s really about my own journey and transformation as a mother.”¹⁰³ Two first-generation Korean-American sisters, one a physician and clinical assistant professor in the department of otolaryngology – head and neck surgery at the University of Pennsylvania, and the other a lawyer and immigration specialist at the Children’s Hospital of Pennsylvania co-authored a how-to guide on raising high achieving kids.¹⁰⁴ They propose that parents can and should instill their children with a desire, love, and passion for learning and education.¹⁰⁵ In the language of character strengths and virtues that positive psychologists Martin Seligman and Christopher Peterson developed,¹⁰⁶

⁹⁸ Eyder Peralta, *Vindication? Tiger Mom's Daughter Accepted To Harvard And Yale*, NPR (Apr. 5, 2011, 1.00PM), <http://www.npr.org/blogs/thetwo-way/2011/04/05/135144956/vindication-tiger-moms-daughter-accepted-to-harvard-and-yale>.

⁹⁹ See, e.g., Charles Q. Choi, *Does Science Support the Punitive Parenting of “Tiger Mothering”?*, SCI. AM. (Jan. 18, 2011),

<http://www.scientificamerican.com/article.cfm?id=tiger-mother-punitive-parenting>.

¹⁰⁰ See, e.g., Charles Q. Choi, *Tame Your Inner Tiger: Controlling Parents tend to Have Children who are Academically Above Average but Depressed*, SCI. AM. (Apr. 15, 2011), <http://www.scientificamerican.com/article.cfm?id=tame-your-inner-tiger>.

¹⁰¹ Gaia Bernstein & Zvi Triger, *Over-Parenting*, 44 U.C. DAVIS L. REV. 1221 (2011) (cautioning that intensive parenting can become over-parenting).

¹⁰² See, e.g., Ruth Chao, *Beyond Parental Control and Authoritarian Parenting Style: Understanding Chinese Parenting Through the Cultural Notion of Training*, 65 CHILD DEV. 1111 (1994). See also Laurence Steinberg, *Parenting Style Index*, <http://www.temple.edu/psychology/lds/docs/PARENTING%20STYLE%20INDEX.pdf> (last visited July 18, 2012).

¹⁰³ Juju Chang, Anna Wild, & Taylor Behrendt, ‘Tiger Mom’ Didn’t ‘Expect This Level of Intensity,’ ABC NIGHTLINE (ABC television broadcast Jan. 26, 2011), <http://abcnews.go.com/US/tiger-mom-amy-chua-controversial-book-parenting-guide/story?id=12767305>.

¹⁰⁴ DR. SOO KIM ABBOUD & JANE KIM, *TOP OF THE CLASS: HOW ASIAN PARENTS RAISE HIGH ACHIEVERS – AND HOW YOU CAN TOO* (2006). See also *TOP OF THE CLASS*, <http://www.topoftheclassonline.com/> (last visited July 18, 2012). Thanks to Kathy Stanchi for remembering that her former law student Jane Kim told Kathy about Jane’s book.

¹⁰⁵ *Id.*, at 5-23 (providing details about how and why to do so). See also JOSEPH S. RENZULLI, *LIGHT UP YOUR CHILD’S MIND: FINDING A UNIQUE PATHWAY TO HAPPINESS AND SUCCESS* (2009) (presenting a practical step-by-step program to foster a life-long passion for learning).

¹⁰⁶ MARTIN E.P. SELIGMAN & CHRISTOPHER PETERSON, *CHARACTER STRENGTHS AND VIRTUES: A HANDBOOK AND CLASSIFICATION* (2004).

it is important for parents to cultivate, foster, and pass on an appreciation of, values that emphasize, curiosity and love of learning.¹⁰⁷

An American journalist, who is a former *Wall Street Journal* foreign affairs reporter, recently wrote another parenting guide book that described how many French children are far better behaved, exhibit greater self-control, and have more patience than American children, all the while being just as boisterous, creative, and curious as American kids.¹⁰⁸ Her book has revived much of the public attention, fervor, and controversy that Professor Chua's book provoked a year earlier.¹⁰⁹ This pair of best-selling books has also raised inevitable comparisons between French parenting and tiger parenting.¹¹⁰ Another journalist compared parenting practices from six cultures in her book.¹¹¹

¹⁰⁷ *Id.*, at 125-41 (analyzing curiosity) and 161-79 (focusing on love of learning).

¹⁰⁸ See generally PAMELA DRUCKERMAN, BRINGING UP BÉBÉ: ONE AMERICAN MOTHER DISCOVERS THE WISDOM OF FRENCH PARENTING (2012) (providing a series of anecdotes illustrating differences in some American and French parenting styles and techniques). See also Pamela Druckerman, *Why French Parents Are Superior*, WALL ST. J. (Feb. 4, 2012) (arguing that some French parents can without all of the anxiety of modern American parents raise happy, well-behaved kids by saying no authoritatively, teaching manners and patience, and entrusting their kids with lots of autonomy, freedom, and time by themselves), available at

http://online.wsj.com/article/SB10001424052970204740904577196931457473816.html?mod=googlenews_wsj.

¹⁰⁹ Susannah Meadows, *Raising the Perfect Child, with Time for Smoke Breaks*, N.Y. TIMES, Feb. 8, 2012, at C1 (reviewing the book negatively); Bonnie Rochman, *Bringing Up Bébé: Are French Parents Really Superior?*, TIME HEALTHLAND (Feb. 8, 2012) (critiquing the book and interviewing the author), available at

<http://healthland.time.com/2012/02/08/53112/?iid=hl-main-lede?xid=gonewsedit>; Gary Rosen, *Why the French Make Better Parents*, WALL STREET JOURNAL ONLINE (Feb. 3, 2012, 8:00PM), http://online.wsj.com/video/why-the-french-make-better-parents/050F4A55-A27A-4A82-A9FF-6698D07EC08F.html?mod=igoogle_wsj_gadgv1 (offering a video interview with Pamela Druckerman about lessons that she drew from French parents).

¹¹⁰ Piper Weiss, *Are French Women the New Tiger Mothers?*, SHINE (Feb. 7, 2011) (pointing out how French parenting can benefit parents with more free time and happiness while it can burden children with the increased likelihood of a major depressive episode, high obesity rates, a vicious cycle of intergenerational corporal punishment, and the world's lowest breast-feeding rate), available at <http://shine.yahoo.com/parenting/french-women-tiger-mothers-203400595.html>. See also Joshua Gans, *Rooster Parenting?*, GAME THEORIST: MUSINGS ON ECONOMICS AND CHILD REARING (Feb. 6, 2012, 9:29AM) (blogging about “national characteristics translated into stereotyped parenting style game”), <http://gametheorist.blogspot.com/>.

¹¹¹ See generally MEL-LING HOPGOOD, HOW ESKIMOS KEEP THEIR BABIES WARM: AND OTHER ADVENTURES IN PARENTING (FROM ARGENTINA TO TANZANIA AND EVERYWHERE IN BETWEEN) (2012) (offering anecdotes concerning parenting customs from six countries). See also AlgonquinBooksTV, *How Eskimos Keep Their Babies Warm by Mei-Ling Hopgood* (Aug. 9, 2011), <http://www.youtube.com/watch?v=3H03O5YQ5dc>; Brigid Schulte, *What's So Bad About American Parents, Anyway?* WASH. POST, Mar. 2, 2012 (discussing the book and related issues).

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Professor Chua believes that,¹¹² “she ‘got caught in this amazing perfect storm,’ which is partially fueled by every parent’s aspiration for and concern over being a good parent in addition to many Americans’ growing concerns about China’s continuing economic and technological ascent.”¹¹³ Some prestigious colleges with race-blind admissions have twice the percentage of Asians at Ivy League colleges. For example, Cal Tech, a private university with race-blind admissions, is about one-third Asian. The University of California-Berkeley is forbidden by state law to consider race in admissions and is more than 40 percent Asian, which is double that before the law passed. As a reference point, 13 percent of California residents have Asian heritage.¹¹⁴

There is a history of anger and fear by some Americans towards Asians. A notable tragic case is that of the Chinese American automotive engineer Vincent Chin being mistaken for being Japanese and therefore killed by repeated blows to his head with a baseball bat at the hands of two unemployed Caucasian automobile workers in Detroit on June 19, 1982.¹¹⁵ A more recent example is that of Alexandra Wallace, a junior political science major at U.C.L.A., who posted on YouTube a three minute anti-Asian rant,¹¹⁶ which went viral and generated national media coverage.¹¹⁷

Another incident that received national media coverage occurred when former Pennsylvania governor Ed Rendell appeared on a sports radio station 97.5 interview show in which he criticized the National Football League (NFL) for its decision at noon before any snow had yet accumulated to postpone for two days a Philadelphia Eagle’s home game versus the Minnesota Vikings one Sunday evening.¹¹⁸ The NFL cited public safety concerns due to a Nor’easter winter

¹¹² Tavis Smiley Staff, *Amy Chua Clears Up “Tiger Mother” Misconceptions*, TAVIS SMILEY STAFF BLOG (Feb. 10, 2011), (blogging about Amy Chua’s appearance on the PBS program Tavis Smiley), <http://www.pbs.org/wnet/tavissmiley/voices/2011/02/amy-chua-clears-up-tiger-mother-misconceptions.html>.

¹¹³ CITIZENS AGAINST GOVERNMENT WASTE, <http://swineline.org/media/> (providing link to a national advertisement by Citizens Against Government Waste depicting a Chinese professor in 2030 AD Beijing, China speaking in Mandarin to a class of Chinese students analyzing the demise of these great nations: the Greek empire, the Roman empire, the British empire, and the United States of America, utilizing English subtitles); CAGWMedia, *Chinese Professor* (Oct. 20, 2010) YOUTUBE, <http://www.youtube.com/watch?v=OTSQozWP-rM> (showing the video spot itself).

¹¹⁴ Jesse Washington, *Some Asians’ College Strategy: Don’t Check ‘Asian’*, YAHOO NEWS, Dec. 3, 2011, available at <http://news.yahoo.com/asians-college-strategy-dont-check-asian-174442977.html> (reporting on this).

¹¹⁵ See, e.g., VINCENT WHO (Asian Pacific Americans for Progress 2009) (providing a documentary about Vincent Chin’s murder and asking how far Asian Americans have come since then and how far they still have to go; *Who Killed Vincent Chin?* (PBS, 1987) (recounting in a documentary the brutal murder of Vincent Chin and the miscarriage of justice that followed).

¹¹⁶ Creasian444, *Asians in the Library* (March 13, 2011), YOUTUBE, http://www.youtube.com/watch?v=x0JKb_Cn1qc.

¹¹⁷ Ian Lovett, *U.C.L.A. Student’s Video Rant Against Asians Fuels Firestorm*, N.Y. TIMES, Mar. 16, 2011, at A21 (reporting on this).

¹¹⁸ The Fanatic in Philadelphia (Dec. 27, 2010).

storm that ultimately dumped a foot of snow on Philadelphia, even though only less than five inches of snow fell before the scheduled kickoff time of 8:20 p.m.:

My biggest beef is that this is part of what's happened in this country. We've become a nation of wusses. The Chinese are kicking our butt in everything. If this was in China do you think the Chinese would have called off the game? People would have been marching down to the stadium, they would have walked and they would have been doing calculus on the way down.¹¹⁹

Even the mostly positive media coverage of the unexpected success of then New York Knicks basketball player Jeremy Lin included actions reflecting ignorance about Asian Americans,¹²⁰ a few racial slurs,¹²¹ and some racist Asian stereotypes.¹²² An episode of NBC's Saturday Night Live satirized the racist aspects of the mostly feel-good "Linsanity" craze.¹²³

Some Americans are anxious about our economy's ability to compete in an increasingly global and technologically sophisticated marketplace. A related concern is that of China overtaking the United States in the science, technology, engineering, and mathematics (STEM) fields. The STEM education coalition supports STEM education programs of the National Science Foundation, the U.S. Department of Education, and other federal agencies.¹²⁴ On the most recent (2009) Programme for International Student Assessment (PISA), a respected international examination of mathematics, reading, and science,¹²⁵ 15 year-olds

¹¹⁹ *Id.* See also THOMAS L. FRIEDMAN & MICHAEL MANDELBAUM, THAT USED TO BE US: HOW AMERICA FELL BEHIND IN THE WORLD IT INVENTED AND HOW WE CAN COME BACK 5-6 (2011) (discussing Rendell's angry comments as being yet another example of the doubts that have become now widespread among many Americans over the future prospects of the United States as compared to China); Adam Lazarus, *Ed Rendell Video: Hear Governor's Comments About Eagles-Viking' Postponement*, BLEACHER REPORT (Dec. 28, 2010), <http://bleacherreport.com/articles/555740-ed-rendell-video-hear-governors-comments-about-eagles-vikings-postponement> (reporting on this and providing audio of Rendell's comments).

¹²⁰ Stuart Leung, *Jeremy Lin Forces National Discussion on Asian Americans*, ASIAN WEEK, Mar. 5, 2012, (detailing such actions by individuals and corporations).

¹²¹ Articleman, *Nixing Racism: Jeremy Lin Gives Us A Teaching Moment, Along with Great Balling*, DAG BLOG (Feb. 19, 2012, 6:24PM), <http://dagblog.com/sports/nixing-racism-jeremy-lin-gives-us-teaching-moment-along-lots-great-balling-13106>.

¹²² Michael McCarthy, *Asian Stereotypes Appearing in Coverage of Knicks' Jeremy Lin*, USA TODAY (Feb. 16, 2012, 4:35PM), <http://www.usatoday.com/sports/basketball/nba/story/2012-02-16/Asian-stereotypes-appearing-in-coverage-of-Knicks-Jeremy-Lin/53120426/1>.

¹²³ *Saturday Night Live: Linsanity Postgame Cold Open* (NBC television broadcast, Feb. 18, 2012), <http://www.nbc.com/saturday-night-live/video/linsanity-postgame-cold-open/1386272>. See also Michael McCarthy, *Video: Watch SNL Spoof Racist Jeremy Lin Stereotypes*, USA TODAY (Feb. 19, 2012), <http://content.usatoday.com/communities/gameon/post/2012/02/video-watch-snl-spoof-racists-jeremy-lin-stereotypes-in-media-new-york-knicks-dallas-mavericks-nbc-saturday-night-live/1#.T0HdxJj5-fS> (reporting on this).

¹²⁴ STEM EDUCATION COALITION, <http://www.stemedcoalition.org/>.

¹²⁵ *Can Deeper Learning Improve American Competitiveness?*, HEWLETT FOUNDATION NEWSLETTER, March/April 2011, <http://www.hewlett.org/newsroom/newsletter/can-deeper-learning-improve-american-competitiveness> (last visited July 18, 2012) (discussing the

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from Shanghai, China earned the highest scores among 65 countries and school systems. It was the first time mainland Chinese students had ever taken PISA, the purpose of which is to measure whether students not only know basic facts, but also can apply such factual knowledge to solve problems in real-world situations.¹²⁶ A pair of economists recently concluded that relatively small improvements in the cognitive skills of a country's population have massive impacts upon their future well-being.¹²⁷ These researchers calculated that under plausible assumptions if U.S. educational policy reforms could increase the average PISA scores of students by only 25 points (on a scale in which 500 is always the international average) that alone would raise America's gross domestic product by \$45 trillion over the lifespan of children born when those reforms began in 2010.¹²⁸

Psychologists Richard Nisbett¹²⁹ and Heidi Grant Halvorson¹³⁰ have separately explained the consistent achievement gap between American and Asian students in mathematics and science primarily in terms of Asian and Asian American students being more persistent and harder working in the face of initial academic setbacks. Asian and Asian-American students persist at and work harder on their studies when they do not initially excel academically because of systematic cultural differences in the beliefs of American versus Asian parents, children, and educators over whether natural ability or effort respectively primarily accounts for (academic) success and failure.¹³¹ Psychologist Carol Dweck

PISA). See also "Foundations": A Q&A with Christopher Shearer, Education Program Officer, HEWLETT FOUNDATION NEWSLETTER, March/April 2011, <http://www.hewlett.org/newsroom/newsletter/foundations-qa-christopher-shearer> (last visited July 18, 2012) (explaining the importance of students achieving "mastery of core academic content, critical thinking and problem solving, collaboration, communication, and learning").

¹²⁶ *Id.*

¹²⁷ Eric A. Hanushek & Ludger Woessmann, *The High Cost of Low Educational Performance: The Long-Run Impact of Improving PISA Outcomes*, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (2010), <http://www.oecd.org/dataoecd/11/28/44417824.pdf>. (utilizing economic modeling to analyze how cognitive skills, as measured by PISA and other international data, are related to economic growth). See also Eric A. Hanushek & Ludger Woessmann, *Education and Economic Growth*, in *ECONOMICS OF EDUCATION* 60 (Dominic J. Brewer & Patrick J. McEwan eds., 2010) (reviewing the role of education in promoting economic growth to conclude there is robust empirical data finding the cognitive skills of a nation's labor force instead of the mere school attainment of that population are strongly related to long-run economic growth).

¹²⁸ Hanushek & Woessmann, *supra* note 127, at 20-24.

¹²⁹ RICHARD E. NISBETT, *INTELLIGENCE AND HOW TO GET IT: WHY SCHOOLS AND CULTURES COUNT* 158-59 (2010) (offering this explanation).

¹³⁰ HEIDI GRANT HALVORSON, *SUCCEED: HOW WE CAN REACH OUR GOALS* 210, 214-15 (2010) (presenting this explanation).

¹³¹ Robert D. Hess, Chih-Mei Chang, & Teresa M. McDevitt, *Cultural Variations in Family Beliefs About Children's Performance in Mathematics: Comparisons Among People's Republic of China, Chinese-American, and Caucasian-American Families*, 79 J. EDUCATIONAL PSYCHOL. 179 (1987) (providing details of research study). See also Ruth K. Chao, *Chinese and European American Mothers' Beliefs about the Role of Parenting in Children's School*

explains why parents and teachers should praise hard work and persistent effort instead of the intellectual abilities and innate talents of children and students.¹³² Psychologist Roy Baumeister and journalist John Tierney explain how an emphasis on the importance of delayed gratification and self-control by Asian and Asian-American culture, parents, and schools accounts for why Asian-Americans comprise just 4% of the American population, yet are 25% of the students at such elite universities as Columbia, Cornell, and Stanford; are more likely than any other ethnic group to earn a college degree; and receive salaries that are 25% above the United States norm.¹³³

A. Not Embarrassing Silicon-Based Life Forms

My grandma was born in China 1898, and passed away in 2003 at the age of 104. She left Taiwan to come to Pittsburgh, Pennsylvania when she was 60 years old to take care of me. We had a daily routine in which I would set the table before dinner, which grandma cooked from scratch, after which I would clear the table, and hand wash the dishes before placing them into the dishwasher. After that, grandma and I watched together on Manhattan cable television serialized soap operas broadcast in Mandarin every night. These shows usually took place in ancient China and detailed how good mythological humans and talking animals, similar to those in such movies as *Kung Fu Panda*¹³⁴ and *Kung Fu Panda 2*,¹³⁵ triumphed over evil villains and warlords by virtue of creative military stratagems, defensive martial arts, and sheer cunning.

My grandma would often also watch American television programs with me despite her neither speaking nor understanding much English. She did this because my mother would let me watch TV if grandma was also watching, even if sometimes grandma fell asleep. One show that we routinely watched was *Star Trek*,¹³⁶ the classic original series. During its first season, when I was eight years old, we saw an episode,¹³⁷ featuring the Horta, an intelligent silicon-based species that was indigenous to a planet called Janus VI. I was fascinated by the idea that life forms could exist based upon elements other than carbon and so asked mom about whether this was possible. Always willing to encourage curiosity and

Success, 27 J. CROSS-CULT. PSYCHOL. 403 (1996) (finding that Chinese mothers reported (1) placing a great value on education, (2) feeling necessity to provide high investment and sacrifice, (3) a more direct intervention approach to learning and schooling of their kids, and (4) belief that parents can have a significant role in success of their kids at school). *But see*, Li, *supra* note 65, at 260 tbl. 1, 266 (2003) (providing some incomplete empirical support for American emphasis upon ability and Asian emphasis on effort).

¹³² *See generally* CAROL DWECK, MINDSET: THE NEW PSYCHOLOGY OF SUCCESS (2006) (providing this explanation based upon developmental and educational psychological research).

¹³³ ROY F. BAUMEISTER & JOHN TIERNEY, WILLPOWER: REDISCOVERING THE GREATEST HUMAN STRENGTH 193-97 (2011).

¹³⁴ KUNG FU PANDA (DreamWorks Animation 2008).

¹³⁵ KUNG FU PANDA 2 (DreamWorks Animation 2011).

¹³⁶ STAR TREK: THE ORIGINAL SERIES: SEASON ONE (REMASTERED EDITION 1966).

¹³⁷ *Star Trek: The Devil in the Dark* (NBC television broadcast, March 9, 1967).

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learning by her # 1 son, she used the opportunity to discuss the questions of what defines life and what is the periodic table of elements.¹³⁸

That weekend my parents took our whole family food shopping at a local supermarket. As we passed by the breakfast cereal aisle, I wanted to buy a sugary cereal because it contained a surprise toy inside the box. Because the particular toy in question was not educational my mother said no. After all, I had received mathematics flash cards from aunt and uncle # 4 as a present for my sixth birthday. (In Chinese, it is customary to number your aunts and uncles by their birth order and there are different words for one's mother's sister and one's mother's brother's wife.) I had very happily and proudly taken those flash cards to school for classroom show-and-tell in first grade at P.S. (Public School) 183. Not surprisingly (but only so in hindsight), later that day I was the subject of much teasing and target practice during dodge ball at playground recess. In exchange, though, I learned a very important life-long lesson, namely that it is okay to be interested in and like things other people may not be as excited about as I am, and that people might make fun of you for your interests, but that is also okay.

That lesson is one, which I tried and hopefully succeeded in conveying to my then 8-year-old niece, K, when she explained that she did not volunteer to do an optional project for her school's science fair because science fair is not cool and is only for weirdoes. She concurred that Uncle Peter is not a weirdo, but expressed surprise when Uncle Peter told her that he always did science fair projects when he was a kid. Then we spoke a little bit about how it was fun to ponder and learn about why Alka-Seltzer Plus orange zest cold formula effervescent tablets fizz, volcanoes erupt with lava, boats do not sink until they take on water, and submarines can go under the ocean and surface again.¹³⁹ After our brief chat, K reluctantly admitted that science might actually be cool, is kind of like magic or playing, is not weird, and could be even useful to study. Another time, she was awed by the approximately ten-foot geysers due to nucleation caused by dropping a roll of Mentos into a two liter plastic bottle of Diet Coke.¹⁴⁰ Finally, when K was 9 years old, she discovered and wanted to repeatedly play the board game of life, enjoying taking on the role of the banker. Her enthusiasm for excelling at the board game of life offered natural opportunities for us to chat about banking,¹⁴¹ business and money,¹⁴² career choices,¹⁴³ decision-making,¹⁴⁴ deposit

¹³⁸ See also Tom Lehrer, *The Chemistry Elements Song*, YOUTUBE (Oct 12, 2007), <http://www.youtube.com/watch?v=DYW50F42ss8&feature=related> (providing a fun way to learn the periodic table of elements).

¹³⁹ See generally WALTER LEWIN, FOR THE LOVE OF PHYSICS: FROM THE END OF THE RAINBOW TO THE EDGE OF TIME - A JOURNEY THROUGH THE WONDERS OF PHYSICS (2011) (providing an awe-inspiring, enthusiastic, impassioned, joyful, lively, and wondrous survey of physics).

¹⁴⁰ *The Science of Coke and Mentos*, EEPY BIRD, <http://www.eepybird.com/featured-video/science-of-coke-mentos/> (last visited July 18, 2012).

¹⁴¹ Mary Poppins (1964), *Mary Poppins on British Bank Stability*, YOUTUBE (Oct. 28, 2008) <http://www.youtube.com/watch?v=C6DGs3qjRwQ> (singing about bank runs and stability).

¹⁴² THE SECRET MILLIONAIRE'S CLUB, <http://www.smkids.com/> (featuring the voice of Warren Buffet).

insurance,¹⁴⁵ markets,¹⁴⁶ and money.¹⁴⁷ K's fascination with doing better at the board game of life provided apt teaching moments to encourage her curiosity and interests about economics,¹⁴⁸ investing,¹⁴⁹ and mathematics.¹⁵⁰ K also loved to play the Deal or No Deal arcade game and because she was curious how Uncle Peter could predict how much the banker would offer after each round of play, we naturally discussed chance,¹⁵¹ probability,¹⁵² creative problem solving,¹⁵³ and how to solve problems involving numbers.¹⁵⁴ Finally, whenever K did not get something that she wanted from her parents, we also talked about how she would some day in the future be able to get whatever she wanted for herself and the importance of developing self-discipline or the ability to delay gratification.¹⁵⁵

¹⁴³ See generally RICHARD SCARRY, *WHAT DO PEOPLE DO ALL DAY?* (abridged ed., 1968) (showing children via entertaining stories and picture drawings the kinds of ways that people can spend their days in various jobs, careers, and professions).

¹⁴⁴ See e.g., Yemini Lahuh, *Game Theory Exercises for Children* INGATHERED (Feb 6, 2010), <http://ingathered.com/2010/02/06/game-theory-exercises-for-children/> (describing four games kids can enjoy playing and learning how to make better decisions).

¹⁴⁵ *The Educational Source for Students, Teachers, and Parents*, FEDERAL DEPOSIT INSURANCE CORPORATION LEARNING BANK

<http://www.fdic.gov/about/learn/learning/index.html>, (last updated April 20, 2004).

¹⁴⁶ MINYANLAND, <http://www.minyanland.com/> (last visited July 18, 2012).

¹⁴⁷ *History in Your Pocket*, THE UNITED STATES MINT, <http://www.usmint.gov/kids/>.

¹⁴⁸ See generally GRADY KLEIN & YORAM BAUMAN, *THE CARTOON INTRODUCTION TO ECONOMICS: VOLUME ONE: MICROECONOMICS* (2010) (introducing fundamental concepts and ideas of microeconomics in an engaging and fun manner). See also STAND UP ECONOMIST, <http://www.standupeconomist.com/videos/> (last visited July 18, 2012) (providing humorous videos of stand-up comedy routines about economics); ECONOMIST WITH MODELS <http://www.economistsdoitwithmodels.com/microeconomics-101/> (last visited July 18, 2012) (providing a series of short instructional videos by Jodie Beggs that cover the principles of microeconomics).

¹⁴⁹ See e.g., DAVID GARDNER, TOM GARDNER, & SELENA MARANJIAN, *THE MOTELY FOOL INVESTMENT GUIDE FOR TEENS: 8 STEPS TO HAVING MORE MONEY THAN YOUR PARENTS EVER DREAMED OF* (2002) (explaining how to achieve personal financial independence); GAIL KARLITZ & DEBBIE HONIG, *GROWING MONEY: A COMPLETE INVESTING GUIDE FOR KIDS* (2010) (teaching about banks, bonds, money, reading financial pages, and stocks).

¹⁵⁰ See e.g., THINK FUN, <http://www.thinkfun.com/mathdice> (last visited July 18, 2012) (building and improving mathematical skills in exciting and fun play).

¹⁵¹ JEAN CUSHMAN, *DO YOU WANNA BET?: YOUR CHANCE TO FIND OUT ABOUT PROBABILITY* (2007).

¹⁵² EDWARD EINHORN, *A VERY IMPROBABLE STORY: A MATH ADVENTURE* (2008).

¹⁵³ BOB EBERLE & BOB STANISH, *CPS FOR KIDS: A RESOURCE BOOK FOR TEACHING CREATIVE PROBLEM-SOLVING TO CHILDREN* (1996).

¹⁵⁴ JOHNNY BALL, *GO FIGURE!: A TOTALLY COOL BOOK ABOUT NUMBERS* (2005) (explaining ideas about numbers and mathematics in an engaging and fun manner, including the well-known Monty Hall problem).

¹⁵⁵ See, e.g., *Joachim de Posada Says Don't Eat the Marshmallow Yet*, TED TALK (Feb. 2009),

http://www.ted.com/talks/joachim_de_posada_says_don_t_eat_the_marshmallow_yet.html. See also Walter Mischel, Yuichi Shoda, & Monica L. Rodriguez, *Delay of Gratification in Children* 244(4907) *SCI.*, 933 (1989) (finding in a longitudinal study that 4-year-old kids who were able to delay gratification longer in certain laboratory settings grew up to become more

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I usually accompanied my grandma to shop for fresh fruits, non-Chinese vegetables, and other groceries. She would buy me candy, potato chips, soda pop, and sugary breakfast cereals, even though she always got up early to cook me a traditional Chinese breakfast of hand made dim sum or wonton noodle soup. She used to joke that I would grow up to marry an heir to a family-owned potato chip business because I loved potato chips so very much. I momentarily forgot that my mother did not approve of junk food, so grandma had to hide the junk food that she bought for me in both of her bedroom closets and under her bed. With my mother, I did what many 8 year-olds in that situation would also have done: I whined in a desperate and futile attempt to get my way and then initiated a sit down in the middle of the cereal aisle. My mother was not amused.

She let her non-amusement be known. In fact, she not only did not buy that box of sugary breakfast cereal with the non-educational surprise toy, but also took the opportunity to let me know that such inappropriate behavior was unacceptable. She told me that I had not only embarrassed myself, but also her, my entire immediate family, all Chinese people, all Asian people, all humans, and in fact all carbon-based life forms. I managed to not embarrass silicon-based life forms only because they are not carbon-based like me. To most Asians, losing face is an unfortunate outcome to be avoided if at all possible. Fear of embarrassment is a great motivator for not engaging in behavior that even slightly risks public humiliation.¹⁵⁶ Telling me that I was embarrassing not just my family, but also the Chinese race and countless assorted carbon-based life forms was a motivating practice that mom often used.

My reaction to such a motivational technique in this particular case was to not voluntarily accompany her on any future (grocery) shopping trips. In general, my sense was that at least for me personally, negative-emotion motivators are not as effective as positive-emotion motivators.¹⁵⁷ More generally, behavioral economists George Loewenstein and Ted O'Donoghue point out that there is a potentially high cost of relying upon negative emotions to motivate behavior:

cognitively and socially competent adolescents, who coped better with frustration and stress in addition to performed better scholastically); Walter Mischel, Yuichi Shoda, & Philip K. Peake, *The Nature of Adolescent Competencies Predicted by Preschool Delay of Gratification*, 54 J. PERSONALITY & SOC. PSYCHOL. 687 (1988) (same). See also John Ameriks, Andrew Caplin, John Leahy, & Tom Tyler, *Measuring Self-Control Problems*, 97 AM. ECON. REV. 966 (2007) (developing a survey instrument for measuring self-control problems).

¹⁵⁶ See generally Peter H. Huang & Christopher J. Anderson, *A Psychology of Emotional Legal Decision Making: Revulsion and Saving Face in Legal Theory and Practice*, Review Essay of MARTHA NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW (2004), 90 MINN. L. REV. 1045, 1060-67 (2006) (analyzing roles that losing and maintaining "face" can and should play in law).

¹⁵⁷ See generally Elizabeth Thompson Gershoff, *Corporal Punishment by Parents and Associated Child Behaviors and Experiences: A Meta-Analytic and Theoretical Review*, 128 PSYCHOL. BUL 539 (2002) (reporting that parental corporal punishment was associated with more immediate compliance and aggression and less moral internalization and mental health). See also Daniel Verdier & Byungwon Woo, *Why Rewards Are Better Than Sanctions*, 23 ECON. & POL. 200, 231 (2011) (proving mathematically in a particular extensive form game-theoretic model that under no circumstances should a sanctioner prefer sanction threats to reward promises).

namely, the shame felt when and if self-control attempts fail, as they invariably often do.¹⁵⁸ Experiencing such negative emotions as shame after failing to achieve some desired behavior is an example of what economists refer to as a deadweight loss.¹⁵⁹ Law professor Clark Freshman in conjunction with psychologists Adele Hayes and Greg Feldman found empirically that for a sample of law students,¹⁶⁰ more of certain positive emotions and emotional habits predicted: (1) success at negotiation, in terms of both greater individual gains and joint gains; (2) success in terms of law school class rank and course grades; (3) success in terms of emotional health, in terms of both fewer symptoms of depression and anxiety, and more mental wellness. They also found that negative emotions and emotional habits had the opposite associated correlations.

My childhood, like that of my two brothers, P2 and P3, and undoubtedly many other people, frequently had unhappy periods. Unhappiness is often the result of perfectionist expectations.¹⁶¹ I remember one time my mom called to say that P3 wanted to attend 10th grade at Horace Mann School,¹⁶² unlike P2 and me who both attended college after completing 9th grade. She feared that P3 had learning issues because she had given birth to P3 when she was six years older than when she gave birth to me. She also was not happy about P3 being constantly on the phone with girls once Horace Mann School had become co-educational. I reassured her that P3 would turn out fine and become socially better-adjusted than I was. I attended 8th grade mixers as a wallflower in the Horace Mann School basketball gymnasium instead of speaking to any 8th grade girls from the neighboring Riverdale Country School,¹⁶³ or the Brearley School, to which my mother wanted to send me to before she was informed that it was an all-girls school.¹⁶⁴ Both P3 and P2 today are the happy fathers of daughters A1 and A2.

Memories of negative emotions help explain my life-long fascination with how to foster such positive emotions as contentment, happiness, hope, and optimism.¹⁶⁵ Professor Martin Seligman, who pioneered the field of positive psy-

¹⁵⁸ See generally George Loewenstein & Ted O'Donoghue, "We Can Do This the Easy Way or the Hard Way": Negative Emotions, Self-Regulation, and the Law, 73 U. CHI. L. REV 183 (2006) (pointing out drawbacks to utilizing negative emotions to self-regulate behavior).

¹⁵⁹ *Id.*, at 190 n. 10, 201, 205 fig. 3, 206 fig. 4.

¹⁶⁰ Clark Freshman, Adele Hayes, & Greg Feldman, When "Not Too Bad" May Not Be Good Enough: A Theoretical And Empirical Exploration of Efficient Emotion and Law Student Success at Grades, Negotiation, and Mental Health (Apr. 9, 2011) (unpublished manuscript) (on file with author).

¹⁶¹ See generally TAL BEN-SHARAR, BEING HAPPY? YOU DON'T HAVE TO BE PERFECT TO LEAD A RICHER, HAPPIER LIFE (2010) (explaining how to let go of unrealistic expectations in order to be happy).

¹⁶² HORACE MANN SCHOOL, *supra* note 33.

¹⁶³ RIVERDALE, <http://www.riverdale.edu/podium/default.aspx?t=22772> (last visited July 18, 2012).

¹⁶⁴ THE BREARLEY SCHOOL, <http://www.brearley.org/> (last visited July 18, 2012).

¹⁶⁵ See generally JONATHAN HAIDT, THE HAPPINESS HYPOTHESIS: FINDING MODERN TRUTH IN ANCIENT WISDOM (2006) (offering insights about emotions, happiness, and meaning). See also HAPPINESS HYPOTHESIS, <http://www.happinesshypothesis.com/> (last visited July 18, 2012) (same).

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chology,¹⁶⁶ advocates that people generally and children particularly are better off if they cultivate, develop, and use their character strengths as opposed to instead working on their weaknesses.¹⁶⁷ In the last chapter entitled “The Politics and Economics of Well-Being,¹⁶⁸ of Seligman’s book about flourishing,¹⁶⁹ he proposed that policymakers evaluate policies via a common metric of well-being in terms of its five components PERMA.¹⁷⁰ Such recent proposals to measure aggregate happiness echo ideas that Senator Robert Kennedy advocated in his inaugural campaign speech on March 18, 1968 at the University of Kansas, challenging the prevailing orthodoxy of how governments measure well-being.¹⁷¹ Seligman has also proposed that business schools offer “positive business” courses to expand what MBAs and corporate America care about from just earning money and making profits to fostering individual and social flourishing.¹⁷² I am a member of a faculty,¹⁷³ who will be teaching an executive master’s program in positive leadership and strategy.¹⁷⁴ Chip Conley, the founder of Joie de Vivre, eloquently argues that we should choose to measure what we value and not just value whatever we happen to measure.¹⁷⁵

B. King Lear’s Question: How Much Do You Love Me?

I can still vividly remember sitting alone in a single dormitory room and crying after my parents dropped me off to become a 14-year old freshman at Princeton University. My folks had written a letter to the dean of students in the spring or summer of 1973 requesting that I not be assigned like other freshman to live in a multi-room suite with other students because my parents were afraid of and concerned about my being exposed to drugs, rock and roll, and sex. The two most prominent items in this tiny room off Nassau Street were: 1) a twin bed with sheets and pillowcases that displayed such Peanuts characters as Charlie Brown and Lucy on them and 2) a metal bookcase which contained the assigned and all of the recommended textbooks for my courses: honors advanced multi-

¹⁶⁶ Popprincess06, *Positive Psychology movie* :=), YOUTUBE (Apr. 20, 2011) http://www.youtube.com/watch?v=X2Dd_gjTp8I, (providing a brief introduction to studying positive affect in the context and history of studying negative affect).

¹⁶⁷ SELIGMAN, *supra* note 43, at 208-46.

¹⁶⁸ *Id.* at 221-41.

¹⁶⁹ SELIGMAN, *supra* note 44.

¹⁷⁰ *Id.* at 239-41.

¹⁷¹ *Robert F. Kennedy challenging GDP*, YOUTUBE (Sept. 11, 08)

<http://www.youtube.com/watch?v=77IdKFqXbUY> (providing audio from that speech augmented by photographs related to ideas of speech).

¹⁷² SELIGMAN, *supra* note 44, at 231.

¹⁷³ *Faculty*, IE UNIVERSITY, <http://exmpls.ie.edu/faculty.php> (last visited July 18, 2012) (listing representative faculty).

¹⁷⁴ IE UNIVERSITY, <http://exmpls.ie.edu/> (last visited July 18, 2012) (describing the program).

¹⁷⁵ Chip Conley, *Measuring What Matters*, TED TALK (Feb. 2010),

http://www.ted.com/talks/lang/eng/chip_conley_measuring_what_makes_life_worthwhile.html.

variable calculus, intermediate German, principles of macroeconomics, and Shakespeare I.

During a visit home to my parents on the upper east side of Manhattan one autumn weekend, my mother inquired about how my classes were going. So, I dutifully reported on each course. Upon hearing that I was reading *King Lear*,¹⁷⁶ she asked for more details. I told her about how in the first scene of the play, King Lear asks each of his daughters how much she loves her parents. My mother apparently believed that this was such a good question that she then asked me how much I loved my parents. I replied by asking her what is love.¹⁷⁷ She proceeded to define love in terms of the following hypothetical fact pattern and related question.

Suppose that on a snowy winter day, on First Avenue in Manhattan, a New York City Metropolitan Transportation Authority M15 transit bus were to suddenly have its brakes fail, run a red light, and careen towards her. Suppose also that she had her back turned to the runaway bus. Suppose finally that because of severe blizzard conditions and the fact that she had wrapped around her ears heavy earmuffs and a thick scarf, she could not hear any verbal warnings to get out of the way. Would I love her enough to be willing to rush out onto First Avenue to push her out of the way of that oncoming bus to save her life... and in so doing be killed by the bus myself?¹⁷⁸ I felt that this was a difficult question to answer truthfully. I knew the answer that my mother hoped to hear was yes, but also found the question to be intriguing and paradoxical because it required making a choice between a pair of tragic decisions.¹⁷⁹

To stall for more time, I countered by asking my mother what she would do if the situation were reversed. She answered that was an easy question and that she would not hesitate to give up her life to save her # 1 son's life. I then responded that because she had revealed that she preferred to give up her life to save mine, in order to respectfully honor her wishes, I would not sacrifice my life to save hers. She was not amused by my literal and logical response. She asked if I'd answer differently if the question had been about my wife or children instead of her. I answered of course I'd sacrifice myself to save my kids or wife, to which my mother responded angrily to my then 14-year old, childless and unmarried self, "So, you admit that love your wife and offspring more than you love your mother!"

King Lear's question brings up issues of how to account for, analyze, compare, and evaluate JDM in general but more particularly those that arise in life and death situations. JDM scholars Jon Baron and John Hershey documented an

¹⁷⁶ WILLIAM SHAKESPEARE, *KING LEAR* (1605).

¹⁷⁷ HADDAWAY, *What is Love* (1993), http://www.youtube.com/watch?v=k_U6mWu1XQA.

¹⁷⁸ See also BRUNO MARS, *Grenade, on DOO-WOPS & HOOLIGANS* (2010), available at <http://www.youtube.com/watch?v=SR6iYWJxHqs>.

¹⁷⁹ See generally GUIDO CALABRESI & PHILIP BOBBIT, *TRAGIC CHOICES* (1978) (examining tensions in tragic choices); Mary Luce Francis, *Decision Making as Coping*, 24 HEALTH PSYCHOL. S23 (2005) (reviewing emotional trade-off difficulties in decision making).

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outcome bias in how people evaluate other's decision-making.¹⁸⁰ Even the process by which to evaluate outcomes resulting from decisions is not always obvious. In many situations, there are such natural metrics as money or the final score of sporting contests to judge results. But even for such outcomes as winning or losing sporting contests, there can be other statistics of interests: margins of victory or loss, individually stellar plays, individual or team records broken or set, and injuries. Usually there are multiple dimensions that decision-makers and others care about in assessing the results of choices. For example, I choose the routes to commute between home and office based upon such variables as the average speed, time, traffic congestion, pleasantness of scenery, and likelihood of road construction work.

King Lear's question also raises what some legal scholars and philosophers call the issue of commensurability. Some people worry that practicing commensurability is hazardous because it inevitably leads to conceptualizing everything as being commensurable with everything else and money in particular via cost-benefit analysis.¹⁸¹ Such universal commensurability concerns these people because they believe that some tradeoffs are or should be taboo. For example, suppose that a stranger offers you a million dollars cash in exchange for your child. You naturally refuse because you love your child. Suppose that when you refuse, that stranger then offers you two million cash. You of course refuse again. Suppose that stranger next offers you three million cash. This can, if the stranger has unlimited funds and if you stick to your principles, continue forever as you never agree to any cash amount offered by that stranger because you simply view money as just not being commensurable with your child. Other similar visceral examples include choices in such films as *Sophie's Choice*¹⁸² and *An Indecent Proposal*,¹⁸³ a scene of which is particularly ironic in its treatment of bargaining, commensurability, and lawyer ethics.¹⁸⁴

C. Texas Tofu and Top Gun Data

I was a visiting assistant professor in the economics department of the University of Iowa during the eighth and final year of being a graduate student in applied mathematics at Harvard. My mom once asked why it took me so long to earn a Ph.D. when in three years, she earned her Ph.D. in biophysics and gave birth to two children? I responded that I am unable to give birth. She did not find this reply amusing.

¹⁸⁰ See generally Jonathan Baron & John C. Hershey, *Outcome Bias in Decision Evaluation*, 54 J. PERSONALITY & SOC. PSYCHOL. (1988) (presenting details about outcome bias in evaluations about others' financial or medical decision-making).

¹⁸¹ See, e.g., JEROME KAGAN, *THE THREE CULTURES: NATURAL SCIENCES, SOCIAL SCIENCES, AND THE HUMANITIES IN THE 21ST CENTURY 197-200* (2009) (analyzing such dangers). But see generally Peter H. Huang, *Dangers of Monetary Commensurability: A Psychological Game Model of Contagion*, 146 U. PA. L. REV. 1701 (1998) (demonstrating possibility of less than universal commensurability).

¹⁸² *SOPHIE'S CHOICE* (Universal Pictures 1982).

¹⁸³ *INDECENT PROPOSAL* (Paramount Pictures 1993).

¹⁸⁴ *Indecent Proposal: Never Negotiate Without Your Lawyer*, YOUTUBE (Oct. 9, 2011) <http://www.youtube.com/watch?v=wJCqOhdzatA>.

In reality, the reason for my not earning a Ph.D. until the ripe old age of 25 was that I went through adolescence during graduate school. In particular, at age 20, I followed my principal dissertation advisor Kenneth Arrow when he moved from Harvard University to Stanford University. Because I have very low tolerance for cold weather, after having endured three picturesque but frosty New England winters, I warmly welcomed a move from chilly Cambridge, Massachusetts to mild and pleasant (though still at night often brisk and even cool) Palo Alto, California.

During the next couple of academic years, I learned to ride a bike, drive a car, date undergraduate females, and play volleyball (for several hours every afternoon mostly on asphalt courts but sometimes on grass). One of the Stanford undergraduates with whom I played volleyball every afternoon and evening in the spring of 1980 was a starting middle blocker on the Stanford University (“Cardinal”) women’s volleyball team. She invited those of us who regularly played volleyball with her to go see her play varsity volleyball during the autumn 1980. From 1980 to 1982, I attended every home and away match of Stanford University’s women’s volleyball team, which played in the Nor-Cal conference before playing in the Pacific-10 conference. Particularly fun and memorable were two of these trips: the first over a Thanksgiving weekend to Hawaii and the other a trip to Stockton, California, for the NCAA Final Four national championships in December 1982.¹⁸⁵ I came to be a visiting assistant professor in the economics department of the College of Business of the University of Iowa during 1983-84 only because a friend who had been a graduate student in economics at Stanford, John Solow,¹⁸⁶ asked me to play on his co-ed and six-man recreational league volleyball teams. In addition to playing volleyball, I would also teach undergraduate courses in two fields of applied microeconomics: industrial organization, which is about antitrust and imperfectly competitive markets, and public finance, which deals with the microeconomics of expenditures and taxation by the government or public sector.

Each year the American Economics Association holds the Allied Social Science Association annual meeting¹⁸⁷ in late December and/or early January that doubles as both a research conference and “meat” or “meet” market where most economics departments, a few economics type departments in business schools or public policy schools, and many federal government agencies conduct half hour job interviews of students in their final year of graduate school.

I had only a visiting appointment in the economics department at the University of Iowa, so attended that academic year’s job market conference and had been invited to interviews by several economics departments and government agencies. Near the conclusion of an interview with members of an economics department of a university in Texas, a Japanese American professor of mathe-

¹⁸⁵ STANFORD UNIVERSITY WOMEN’S VOLLEYBALL ARCHIVES, <http://www.gostanford.com/sports/w-volley/archive/stan-w-volley-archive.html> (last visited July 18, 2012).

¹⁸⁶ John L. Solow, *University of Iowa*, TIPPIE COLLEGE OF BUSINESS, <http://tippie.uiowa.edu/people/profile/profile.aspx?id=195039> (last visited July 18, 2012).

¹⁸⁷ AMERICAN ECONOMIC ASSOCIATION, ALLIED SOCIAL SCIENCES ASSOCIATION ANNUAL MEETING, http://www.aeaweb.org/Annual_Meeting/ (last visited July 18, 2012).

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mational economics asked for any questions about his employer. Really having none, but having been raised to be courteous, I decided to make a polite inquiry about whether he enjoyed living in Texas. He went into professor mode and launched into a lecture that lasted several minutes about being pleasantly surprised that his wife could buy and cook so many different kinds of tofu in Texas, including silken (also known as soft) and regular (also known as Chinese) styles, and both types in soft, medium, firm, and extra firm consistencies. He seemed to genuinely believe that I would be similarly happy to learn about being able to purchase so many varieties of tofu in Texas. His colleagues looked at him in apparent disbelief. His well-intentioned sharing of information that he cared about, information in which most other people had no interest, illustrates the dangers of any person assuming that other people have the same or similar preferences as that person.

The importance of differences in tastes being able to lead to mutually improving and therefore voluntary free trade is emphasized by this anecdote that Joel Waldfogel (currently Frederick R. Kappel Professor of Applied Economics at the Carlson School of Management at the University of Minnesota and formerly Joel S. Ehrenkrantz Family Professor in the business and public policy department at the Wharton School) once related over dinner. He asked his kids and their friends to rank order their candy from Halloween trick-or-treating and had them engage in mutually beneficial trading due to differing tastes over various brands of candy. His kids did not find their dad's request unusual. But, some of their friends expressed concern and unhappiness about having to do math prior to being able to eat candy!¹⁸⁸

Another example of an existing employee assuming that a potential employee already has the same preferences, tastes, or values occurred when I interviewed to join the Center for Naval Analyses (CNA),¹⁸⁹ a defense think tank, similar to the one for which the character Charlotte "Charlie" Blackwood (that Kelly McGillis portrayed) worked at in the movie *Top Gun*.¹⁹⁰ Being able to creatively use applied mathematics to solve real-world problems was personally appealing and I already had visions of working in San Diego participating in the CNA's field program and playing beach (sand) volleyball.¹⁹¹ But during the callback interview at CNA's headquarters in Arlington, Virginia, a CNA research staff member described how excited he was to be able to use real-world data in operations research analysis. Curious to share his excitement, I asked what sort of empirical data? He answered rather nonchalantly, "Casualty figures and death tolls from the Falklands conflict." His brutally honest answer convinced me to find another source of employment. In hindsight, his answer was a very good matching or screening mechanism to identify potential employees who

¹⁸⁸ Joel Waldfogel, *The Deadweight Loss of Christmas*, 83 AM. ECON. REV. 1328, 1331-33 (1993) (estimating deadweight loss from holiday gift-giving is ten percent to a third of gift value). See generally JOEL WALDFOGEL, SCROOGENOMICS: WHY YOU SHOULDN'T BUY PRESENTS FOR THE HOLIDAYS (2009) (arguing holiday gift-giving is economically inefficient and proposing alternatives).

¹⁸⁹ CENTER FOR NAVAL ANALYSIS, <http://www.cna.org/> (last visited July 18, 2012).

¹⁹⁰ TOP GUN (Paramount Pictures 1986).

¹⁹¹ CNA FIELD PROGRAM, <http://www.cna.org/centers/operations-evaluation/field>.

have no qualms about dealing with not just hypothetical, but actual human death or injury statistics on a regular basis.

III. LAW SCHOOL MUSICAL

When my niece K was 6 years old, she asked, “what is your job, Uncle Peter anyways?” Upon being told that Uncle Peter teaches in a law school, K asked, “what is law school anyway?” Upon being told some people attend law school after they go to college, K asked, “what is college?” Upon being told some people attend college after they go to high school, K exclaimed in shock “you mean there is something after high school musical,¹⁹² high school musical 2,¹⁹³ and high school musical 3!”¹⁹⁴

Yes, K, there is law school musical!¹⁹⁵ I am a high school dropout who never finished high school because at age 14, I left Horace Mann School,¹⁹⁶ after the 9th grade before taking a credit of health education, which is a New York state high school graduation requirement.¹⁹⁷ Law school classmates who finished high school uniformly say that law school and high school are quite similar in terms of the ubiquitous anxiety, cliques, dating, drinking, gossiping, gunners, herding, lockers, and loners. This Part of the Article recounts experiences from being a first-year law student at the University of Chicago and thereafter a second- and third-year law student at Stanford University. What these diverse memories have in common is they exemplify very different views of what constitutes appropriate or effective legal education and pedagogy.

A. *Think of a Shorter and More Correct Answer*

Elsewhere,¹⁹⁸ I have already discussed examples of the immodest culture and singular mindset of most faculty members of the University of Chicago (U of C) law school (and economics department). Professors who taught required first-year law classes at the U of C during the academic year 1994-95 practiced

¹⁹² HIGH SCHOOL MUSICAL (Disney Channel Original Movie 2006).

¹⁹³ HIGH SCHOOL MUSICAL 2 (Disney Channel Original Movie 2007).

¹⁹⁴ HIGH SCHOOL MUSICAL 3: SENIOR YEAR (Walt Disney Pictures 2008).

¹⁹⁵ GLAMOROUS LAW SCHOOL: THE MUSICAL, <https://sites.google.com/site/glamorouslawschool/>; Claire Delahome, *Law School is Totally Glamorous -- at least in this CU Musical*, Apr. 12, 2012, <http://blogs.westword.com/showandtell/2012/04/law-school-the-musical.php>; STEPHANIE WEST ALLEN, VIDEOS OF GLAMOROUS LAW SCHOOL: THE MUSICAL, <http://westallen.typepad.com/idealawg/2012/04/videos-of-glamorous-law-school.html> (last visited July 18, 2012).

¹⁹⁶ Horace Mann School, *supra* note 32.

¹⁹⁷ NEW YORK CITY DEPARTMENT OF EDUCATION HIGH SCHOOL GRADUATION REQUIREMENTS, <http://schools.nyc.gov/RulesPolicies/GraduationRequirements/default.htm> (last visited July 18, 2012).

¹⁹⁸ Peter H. Huang, *Emotional Reactions to Law & Economics, Market Metaphors, & Rationality Rhetoric*, in THEORETICAL FOUNDATIONS OF LAW AND ECONOMICS 163, 170-72, 176-78 (Mark D. White ed., 2008).

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Socratic legal instruction. There were quite wide-ranging individual differences in their Socratic abilities, philosophies, practices, and styles. Not surprisingly, the younger professors were kinder and gentler in their Socratic legal instruction. The sole female professor from whom I took a first year class in the law school at the U of C did not employ any Socratic questioning. I also had to petition to get permission to take her seminar titled Social Science Research and Law to satisfy the first-year elective requirement in the spring quarter. The following sequence of moments from being a U of C first-year law student offers an uncensored insider's look into the self-described three cornerstones of the U of C law school's academic culture: the life of the mind, participatory learning, and interdisciplinary inquiry.¹⁹⁹

On the first day of being a first-year law student at the University of Chicago, this exchange took place in my Civil Procedure I class. The assignment posted in the law school for the first day of class had been to read the Federal Rules of Civil Procedure 1 through 12.²⁰⁰

“Mr. Huang, how do you initiate a lawsuit?”

“How do you initiate a lawsuit?”

“No need to repeat the question, simply answer it if you can.”

“Uh, I think that you initiate a lawsuit by hiring an attorney?”

“Mr. Huang, did you know there was a reading assignment for our first class meeting?”

“Yes.”

“Mr. Huang, did you read the Federal Rules of Civil Procedure 1 through 12?”

“Uh, yes.”

“Well then, Mr. Huang, how do you initiate a lawsuit?”

“Uh, you speak to a clerk?”

“No, Mr. Huang, under Federal Rule of Civil Procedure 5(a)(1)(A), you serve a complaint and under Federal Rule of Civil Procedure 5(a)(1)(B), you file a pleading!”

I understandably felt quite embarrassed by this affectively negative faculty-student interaction, which was reminiscent of the opening scene of the film *Paper Chase* in which a first year law student Mr. Hart suffers a similar type of public humiliation from an exchange on the first day of law school with his contracts professor Charles Kingsfield;²⁰¹ and of the movie *Legally Blonde*, where another

¹⁹⁹ ACADEMIC CULTURE, UNIVERSITY OF CHICAGO LAW SCHOOL, <http://www.law.uchicago.edu/prospective/academicculture> (last visited July 18, 2012).

²⁰⁰ Fed. R.Civ.Pro.1-12.

²⁰¹ THE PAPER CHASE (Twentieth Century Fox 1973), YOUTUBE (AUG. 12, 2011) <http://www.youtube.com/watch?v=qx22TyCge7w>.

first-year law student Elle Woods also has an analogous first day of law school experience with her civil procedure professor Stromwell.²⁰² I recalled that just a couple of months earlier from January to June of that calendar year (1994), I had been a visiting assistant professor in economics at Stanford teaching in the winter quarter, “Economics 160: Game Theory and Economic Applications,” and in the spring quarter, “Economics 181: Optimization and Economic Analysis.” How low I’d fallen in such a short amount of time.

My Contracts I & II professor once asked me a question that had a yes or no answer. Upon sensing my uncertainty, he jokingly and nicely pointed out: “You have a 50-50 chance of getting this right, Mr. Huang.” Upon my incorrectly answering yes, he quipped: “Think of a shorter and more correct answer!” I’ve never forgotten how his humor diffused and mitigated an otherwise potentially more embarrassing situation. I’ve always hoped to be able to pass on his generosity by doing the same someday in teaching.

My Torts I & II professor said as politely as possible in one class meeting: “Mr. Huang, you have taken us from tort law to the economics of socially optimal precautions and the assumption of risk to cognitive dissonance of scientists who do not wear radiation badges at nuclear power plants. That’s all very interesting. But, we must now get back to actual torts.”

In one class of a required course titled Elements of the Law that only the University of Chicago law school offers, my section’s professor, the prolific legal scholar and current Office of Information and Regulatory Affairs Administrator Cass Sunstein,²⁰³ provided more time to answer his question by “stalling” through asking a rhetorical question about what a darter snail looks like.

My Property I & II professor who had no formal graduate school-level training in economics, but did have a Ph.D. in medieval history, stated during one class that “we now come to Coase’s theorem, the most overrated result in all of law and economics.” The student who sat behind me whispered, “aren’t you going to speak up and defend Ronald Coase?” to which I whispered back: “I believe that his Nobel Prize speaks for itself.”²⁰⁴

In January 1995, there was no school holiday on Martin Luther King Day and that morning before the first class of the day another former economics professor and first year law student mentioned that she was very happy there had been less traffic during her drive into school compared to a typical weekday on Lakeshore Drive. My response was that it was amazing how much she had lowered her expectations after just one quarter of law school. I suggested that instead of being yippy skippy about her light commute, she perhaps could question why the University of Chicago law school deemed it educationally necessary and socially appropriate to have classes on a day set aside to commemorate a slain civil rights pioneer.

²⁰² Phillygan, *Legally Blonde- Great Clip*, (Apr. 7, 2008).

²⁰³ OFFICE OF MANAGEMENT AND BUDGET, ABOUT OIRA, http://www.whitehouse.gov/omb/inforeg_administrator; <http://www.law.yale.edu/faculty/DKahan.htm>. (last visited July 19, 2012).

²⁰⁴ NOBELPRIZE.ORG, THE SVERIGES RIKSBANK PRIZE IN ECONOMIC SCIENCES IN MEMORY OF ALFRED NOBEL 1991, http://nobelprize.org/nobel_prizes/economics/laureates/1991/; (last visited July 19, 2012).

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One day in the spring quarter, the list of upper-level courses we could take came out. On that list was a new course titled Compassion and Mercy that a new professor Martha Nussbaum would be teaching. Upon seeing this new offering, a number of classmates expressed anger, disappointment, and shock. They said that they wanted to enroll in courses for which the U of C law school is famous, namely those in business law generally and corporate law and securities regulation particularly. They were unhappy over the U of C law school offering such a touchy feely course as Compassion and Mercy instead of “a more rigorous and serious class,” such as economics analysis of any particular area of law. Their discomfort with and disdain for emotions is part of what many students believe it means to think like a lawyer.

In an anthropological study of first-year contracts classes at eight law schools,²⁰⁵ law professor and senior fellow of the American Bar Foundation Elizabeth Mertz found that being taught to think like a lawyer caused students to lose their sense of self as they developed analytical and emotional detachment,²⁰⁶ resulting from the discounting of personal moral reasoning and values,²⁰⁷ as they learned to substitute purely analytical and strategic types of reasoning in place of personal feelings of compassion and empathy.²⁰⁸ It is actually the case that empathy is an important and practical skill, which lawyers can and should learn.²⁰⁹

I found my former U of C first-year classmates amusingly and sadly close-minded and so jokingly suggested that at least one of them should enroll in Compassion and Mercy, so that he (they were all male) could learn all the details about compassion and mercy and thus construct better anti-compassion and anti-mercy legal arguments. He did not view the suggestion to be a joke and instead thought it a seriously great idea.

A former first-year classmate from the U of C law school whom I’ll refer to as Mr. X came to Palo Alto in the autumn of 1996 for a call-back interview with the law firm of Wilson Sonsini Goodrich & Rosati and told me that one day he actually said “pass” upon being randomly called upon to answer a question in his Environmental Law class. His professor, Cass Sunstein, who had taught both of us in the class Elements of the Law during our first year of law school, said that in all of his years teaching at the U of C law school, no other student had ever said “pass” upon being called upon. Sunstein went on to say that he was not sure what that meant about previous U of C law school students in comparison with this current class. When Sunstein called on another student in that class to answer his question, that student also passed. After a third student passed, Sunstein said: “See, Mr. X, look at the precedent that you have set.” Mr. X confided that he was afraid to ask Sunstein to be a reference because of that incident.

²⁰⁵ELIZABETH MERTZ, *THE LANGUAGE OF LAW SCHOOL: LEARNING TO “THINK LIKE A LAWYER”* (2007).

²⁰⁶*Id.* at 99.

²⁰⁷*Id.* at 1, 6.

²⁰⁸*Id.* at 6, 95.

²⁰⁹See Ian Gallacher, *Thinking Like Nonlawyers: Why Empathy Is a Core Lawyering Skill and Why Legal Education Should Change to Reflect Its Importance*, 8 *LEGAL COMM. & RHETORIC* 109 (2011) (analyzing pedagogical implications of lawyers communicating a lot with such non-lawyers as clients, jurors, and witnesses).

B. *Law School on the Farm in Paradise*

I was one of around thirteen or so transfer students to Stanford Law School (SLS) during the 1995-1996 academic year. There was an orientation meeting in which we were asked to go around the room and introduce ourselves and say why we transferred. Most people said love or warmer weather. I said the love of warmer weather.

Because the U of C required two quarters of the first-year classes of Civil Procedure, Contracts, Criminal Law, and Torts, the subject of Constitutional Law was an upper-level course instead of being a first-year class as it is at most other American law schools. Upon transferring to SLS, I was able to choose a section of Constitutional Law I in the spring semester. I chose to enroll in a section taught by a nationally prominent scholar and professor of constitutional law, Kathleen Sullivan, whom I had seen on the ABC late night news program *Nightline*. She called all students by their first names, assigned us to be on weekly panels, and invited those students on call for a week to the front of the classroom to chat with her at end of that week's last class session. She was not only an expert in U.S. Constitutional law, but also a masterful classroom teacher able to elicit passionate student participation.

Unlike at the U of C, SLS students knew and used each other's first names. There was a laid-back culture not infused and permeated with anxiety, fear, and hierarchy as there was at the U of C (although it must be said that a boot camp mentality of "we're all in this together, being abused" can be a strong bonding force). The law school registrar once said jokingly that it is appropriate that SLS faculty teach in gardening clothes because they are fertilizing legal minds. U of C law school professors dressed in suits as their official costumes. There were many opportunities for SLS students to interact outside of class informally with each other and with professors. One semester, an e-mail offering free lunches with SLS faculty for small groups of SLS students who signed up jokingly included the admonition that gunners need not and should not apply.

After an on-campus interview with the law firm of Sullivan Cromwell LLP,²¹⁰ I was invited to attend the reception that Sullivan Cromwell was hosting that evening in a Palo Alto restaurant. Upon arriving, I went over to some other SLS students and introduced myself.

One of them said, "all of us already know who you are, Peter."

I was puzzled and said, "I don't know any of you, though."

Another student said, "Oh, yeah, you're in biz ass, volunteer always, and speak out a lot."

I said, "I'm sorry about monopolizing our class time."

A third student chimed in, "Don't be and thanks for doing that for two reasons: first it means there is less chance and time for the rest of us to

²¹⁰ SULLIVAN & CROMWELL LLP, <http://www.sullcrom.com/> (last visited July 19, 2012).

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be called upon and second we don't have to pay attention to what you are saying. So, please keep up the good job.”

My Taxation I professor asked just before the start of the first class after autumn break if that week's panel members wanted to be questioned about doctrine or policy. Both I and the other student on panel that week (who also had transferred from the U of C) enthusiastically and quickly said “policy” because we correctly figured to have a better chance of constructing policy rationales to support any tax regulation than remembering the intricate details of cases (read over a week ago) involving the federal tax code.

I primarily enrolled in seminars, including Advanced Health Law, Corporate Law Theory, Cyberspace, Decision Analysis, Entertainment Industry Law, Fiduciary Investing, High-Tech Crime, Income Distribution, Law & Economics, and Legal Studies Colloquium. This meant I did not enroll in the large upper-level classes for subjects covered on the California Bar exam, such as Criminal Procedure, Evidence, Remedies, and Trusts and Estates. Every seminar I enrolled in required writing term papers, which I have subsequently revised and published in law reviews. For example, a revision of my term paper for a seminar titled Advanced Health Law: Ethical, Legal, and Social Implications (ELSI) of Genetics subsequently was invited to be part of and published in a law review symposium issue.²¹¹

I was a Stanford Center for Conflict and Negotiation (SCCN) fellow in 1996, which meant being able to meet one of the founders of behavioral economics, psychology Professor Amos Tversky,²¹² before his untimely passing. SCCN fellows had the opportunity to share a meal with guest speakers from other universities who presented their research to an interdisciplinary colloquium about decision-making. Speakers included law professors, business school professors, economists, and psychologists. It was a fun experience to learn from behavioral decision-making researchers and be able to interact with them first-hand.

IV. LIFE AMONG SOME LAW SCHOOL TRIBES

My previous experiences in legal academia consist of having been a tenure-track assistant professor of law at the University of Pennsylvania, a visiting professor of law at the University of Southern California, a visiting assistant professor of law at the U of C, a visiting assistant professor of law at the University of Virginia, a tenured associate professor of law at the University of Minnesota, a chaired professor of law at Temple University, and a visiting lecturer in law at Yale University.

²¹¹ Peter H. Huang, *Herd Behavior in Designer Genes*, 34 WAKE FOREST L. REV. 639 (1999).

²¹² Paul Brest, *Amos Tversky's Contributions to Legal Scholarship: Remarks at the BDRM Session in Honor of Amos Tversky, June 16, 2006*, 1 JUDGMENT & DECISION MAKING 174 (2006) (summarizing legal applications of Amos Tversky's behavioral decision-making research).

A. *Trick-or-Treating for Faculty*²¹³

Each year, the Association of American Law Schools (AALS)²¹⁴ holds a job market recruitment conference in Washington, D.C usually around Halloween. As law professor Nancy Levit says, “we go trick-or-treating for faculty colleagues.” In October of 1996, during my third and final year as a law student at Stanford University, I rushed off after an antitrust law class and was in such a hurry to catch a flight into Reagan National airport that I forgot to change shoes and so arrived after nine p.m. in D.C. wearing sneakers. I asked the hotel concierge if there was any place open to buy some men’s dress shoes. His response was that this was D.C., not Manhattan. I had scheduled back-to-back half-hour interviews for the next two days that started with 8 a.m. breakfast interviews and ran each day until 5 p.m. with a one-hour break at lunchtime. I got up early to check on possible places to buy a pair of men’s dress shoes, to no avail.

While checking to see if I’d received any messages left on a (physical as opposed to virtual) bulletin board for job candidates (this was back in 1996), I ran into another interviewee who introduced himself after commenting on my choice of shoes. He said that he thought it was a bold shoe choice to wear sneakers to signal independence and non-conformity. I replied it was not a conscious fashion statement, but instead an unconscious and unintentional sign of being rushed and not being mindful. He asked me what size were my feet and upon being told a size 10 and 1/2 wide, he offered to lend me his cowboy boots that he had brought along just for casual wear. I gratefully and readily accepted his most generous offer. During a number of the interviews that morning, several law professors commented on how they were impressed by the cowboy boots as being a signal of a desire to live in the southwestern United States or California. Since then, a number of law professors who interviewed me confirmed they had made similar judgments. A similar event happened when I interviewed at University of San Diego Law School earlier that October and did not realize I’d forgotten to bring a tie until just before an interview dinner that evening. I had half an hour, so I rushed and found a panda tie, which was a big hit and conversation topic at dinner because of its being perceived to be a signal of desiring to live in San Diego and being able to visit a panda on a regular basis at the San Diego Zoo.

On the start of the second day of AALS interviews, I slept through the hotel wake-up call and a hotel alarm clock ringing at 7 a.m. because this was before iPhone alarm apps. A University of Pennsylvania law school professor called at 8:15 a.m. to ask if I’d forgotten an 8 a.m. scheduled breakfast interview. I said no, rushed to it, and was told that she interpreted my being late as a good sign that I was human after all. When I showed up during a callback interview at the University of Pennsylvania law school wearing a Winnie-the-Pooh tie, that same law professor commented on how her kids love Pooh and even though she did not understand my job market paper’s content or even its title, *A Real Options*

²¹³ Thanks to Nancy Levit for suggesting this wonderful phrase.

²¹⁴ ASSOCIATION OF AMERICAN LAW SCHOOLS, <http://www.aals.org/> (last visited July 19, 2012).

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Analysis of Multipliers for Damages in Civil Rights Litigation,²¹⁵ she concluded that any adult who wears a Winnie-the-Pooh tie must be approachable as a teacher and comprehensible as a speaker. I don't know how much input she had as a member of the appointments committee but I received and accepted an offer to be an assistant professor at the University of Pennsylvania law school.

One of my half-hour interviews at AALS had as its audience two professors from the University of Virginia law school: call them Polite and Not Silent (both are no longer there). Not Silent started the interview by announcing that the University of Virginia law school has a very busy faculty whose time is extremely valuable. In particular Not Silent said that Not Silent and Polite had many demands on their limited time. Therefore Not Silent asked how I felt about Not Silent's brilliant idea of requiring that faculty candidates pay an interview fee to compensate interviewers for the high value of their scarce time. I responded that although Not Silent's proposal made sound economic sense, it raised an issue of symmetry because those being interviewed are likely to also believe that their time is valuable. In my opinion, my time is more valuable to me than is Not Silent's time. Therefore, in response to Not Silent's proposed interview fee, I'd have to also institute an interview surcharge for my time spent that exceeds Not Silent's interview fee. Thus, Not Silent could just pay me the difference between our two interview fees. Not Silent did not have a response but just moved on to ask some other similar types of hypothetical scenario questions.

I actually thought about but did not additionally say that unless every law school chose or were required by the government or some other organizational authority (such as the Association of American Law Schools) to set the same interview fee, faculty candidates may interpret whatever interview fee a law school charged to be a signal about some characteristic of that law school. Possible attributes that a faculty candidate may infer about law schools include their self-perceived arrogance or importance, comfort level or pride in applying simplistic microeconomics to personnel decisions, lack of social etiquette, and their amount of comfort in violating commonly accepted professional and social norms. Upon the conclusion of the half-hour interview, Polite finally spoke up and said: "I'm not sure who was the winner of this verbal ping-pong or tennis match, but it was interesting to be a spectator and you two at least seemed to enjoy it."

B. PA Law

I was told by a senior University of Pennsylvania law school professor that each autumn on the first day of class in her first year course, she always started her class by randomly picking on some male student and engaging him in a Socratic dialogue. No matter what answers he provided to her questions, she would keep asking more questions of him involving more complex hypothetical variations on the case under discussion until he invariably contradicted himself. She explained that her annual fall ritual served to powerfully communicate on the

²¹⁵ Peter H. Huang, *A New Options Theory for Risk Multipliers of Attorneys' Fees in Federal Civil Rights Litigation*, 73 N.Y.U. L. REV. 1943 (1998).

first day of the semester that she took no prisoners, and was in full control! She recommended following her example to set a tone for the semester. I thanked her for her “wonderful” suggestion and proceeded to not follow her example, which is reminiscent of a scene depicting the first day of a civil procedure class at Harvard law school as portrayed in the film *Legally Blonde*.²¹⁶

I was asked by another senior University of Pennsylvania law school professor whether it was proper for an Ivy League law school to be offering such a frivolous sounding course as Law and Popular Culture, as opposed to a more appropriate, serious, and traditional sounding course like Law and Literature, upon my having proposed and taught a seminar titled Law and Popular Culture at the University of Pennsylvania law school. Many other University of Pennsylvania law school faculty and students often used the phrase, an Ivy League law school, which is curious because the Ivy League is an intercollegiate athletic conference founded in 1954 that consists of eight member schools: Brown University, Columbia University, Cornell University, Dartmouth College, Harvard University, the University of Pennsylvania, Princeton University, and Yale University.²¹⁷ Of these, only five of them have law schools, namely Columbia University, Cornell University, Harvard University, University of Pennsylvania, and Yale University. Those five are consistently ranked in this order by the *U.S. News & World Report* annual law school rankings: Yale law school, Harvard law school, Columbia law school, University of Pennsylvania law school, and Cornell law school.²¹⁸

That same senior University of Pennsylvania law school professor stated on another occasion that he would purposely turn in his course grades late so as to have a smaller number of students enroll in his classes than if he turned in his course grades early or even on time! He was quite proud of his clever scheme to influence the course selection behavior of law students by changing the incentives they faced in terms of getting tardy versus timely grades.

On another occasion, we had a conversation about how and why the University of Pennsylvania law school was able to so quickly and steadily move up in the *U.S. News & World Report* annual law school rankings from number twelve to number eight in just a couple of years. At the University of Pennsylvania, the Wharton School is the crown jewel that is consistently ranked among the top five business schools, while the law school has not once ranked among the top five law schools. I once joked that Yale law school is always stuck at number one, even though it desperately wants to go past being ranked number one to become ranked negative five.

The senior University of Pennsylvania law school professor asked how I thought the University of Pennsylvania law school records the following set of hypothetical transactions: Suppose that a rich alum donates a gift of \$200,000 to

²¹⁶ LEGALLY BLONDE, *supra* note 201.

²¹⁷ THE IVY LEAGUE, ABOUT THE IVY LEAGUE, <http://www.ivyleaguesports.com/history/overview>; THE IVY LEAGUE, HISTORY OF THE IVY LEAGUE, <http://www.ivyleaguesports.com/history/timeline/index> (last visited July 19, 2012).

²¹⁸ U.S. NEWS & WORLD REPORT, BEST LAW SCHOOLS, <http://grad-schools.usnews.rankingsandreviews.com/best-graduate-schools/top-law-schools/law-rankings> (last visited July 19, 2012).

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the University of Pennsylvania law school, which in turn passes that onto the University of Pennsylvania, which levies a “tax” of 10% on the University of Pennsylvania law school, and so gives back to the University of Pennsylvania law school a net contribution of \$180,000. My answer was of course that the University of Pennsylvania law school has increased its assets by \$180,000 and thus can also increase its expenditures by that same amount of \$180,000.

He said that was incorrect. Instead, he stated that the correct answer was that the University of Pennsylvania law school assets had increased by the sum of \$200,000 and \$180,000; in other words, \$380,000. By the fundamental accounting identity, this means that the University of Pennsylvania law school can hence self-report spending \$380,000 more in aggregate expenditures on such things as instructional resources, library acquisitions, and academic support services. This in turn means that the University of Pennsylvania law school has a higher number for expenditure per student, which is one of the statistics that *U.S. News & World Report* uses to compute its annual law school rankings.²¹⁹ Upon my stating the obvious that such creative arithmetic involves double counting, his reply was that data that are reported to *U.S. News & World Report* do not have to comply with generally accepted accounting principles.²²⁰ In fact, no guidelines specify what may and may not count as part of expenditure per student, a category that accounts for only 1.5% of the overall ranking.²²¹ Some law schools have chosen to include taxes and utilities in computing expenditure per student,²²² and one law school uses an estimated value for Lexis/Nexis and Westlaw legal services instead of actual incurred costs.²²³

This professor went on to say that he believed that peer law schools of the University of Pennsylvania law school, such as Yale and Harvard, must also have engaged in similar accounting practices. Upon my response that whether all those law schools that are perennially higher ranked than the University of Pennsylvania law school engage in similar accounting practices or not, “peers do it” has never been, is not, and should not be a legitimate defense to engaging in such behavior, his response was that in his professional expert opinion as a law professor with an economics Ph.D., innovative accounting of numerical data reported to *U.S. News & World Report* was neither prohibited, nor even unethical given his eminently reasonable belief that other peer law schools engaged in similar practices. His entire argument and reply aptly illustrates the difference between teaching students ethics as opposed to values, a difference that Professor Seligman illustrates nicely when he points out that: “[e]thics are the rules you apply to get what you care about. What you care about--your values--is more basic than ethics.”²²⁴

²¹⁹ U.S. NEWS & WORLD REPORT, LAW SCHOOL RANKINGS METHODOLOGY, <http://www.usnews.com/education/best-graduate-schools/articles/2011/03/14/law-school-rankings-methodology-2012?PageNr=2> (last visited July 19, 2012).

²²⁰ U.S. NEWS & WORLD REPORT, LAW SCHOOL RANKINGS METHODOLOGY, visited July 19, 2012).

²²¹ Alex Wellen, *The \$8.78 Million Maneuver*, N.Y. TIMES, July 31, 2005, § 4A, at 18.

²²² *Id.*

²²³ *Id.*

²²⁴ SELIGMAN, *supra* note 43, at 229.

I have verbally told some people of the above conversation including my mother, who said that the professor did what he thought would make him, his dean,²²⁵ the president of the University of Pennsylvania, alumni, faculty, and students happy, namely being part of a higher ranked law school. My response was this quote: “no man chooses evil because it is evil; he only mistakes it for happiness, the good he seeks.”²²⁶ My tiger mom admitted there is a difference between authentic versus fraudulent happiness.

Finally, during an admissions committee meeting another senior University of Pennsylvania law school professor actually suggested that the University of Pennsylvania law school should actively encourage the application of students who had absolutely no chance of being admitted by waiving their application fees. This would result in the University of Pennsylvania law school appearing to be more selective than it was because it would mean a larger denominator in the acceptance rate fraction that is computed by dividing the number of accepted students by the number of applicants. That fraction in turn is one of the statistics that *U.S. News & World Report* uses to compute its annual law school rankings.²²⁷ I jokingly proposed that why should we stop there? Why not adopt a default rule that whenever motorists obtain or renew their driver’s licenses in the state of Pennsylvania, they are also automatically applying to the University of Pennsylvania law school, unless they explicitly opt out of doing so?

C. *Almost a Legal Consultant on Bull*

I was an Olin Fellow in law and economics and visiting professor at the University of Southern California law school during the autumn of 2000, teaching Securities Regulation. That summer, a new television show premiered called *Bull*.²²⁸ It was the cable network TNT’s first dramatic series and focused on some investment bankers and stock traders who form their own Wall Street securities brokerage firm. In an early class of Securities Regulation, I mentioned that on the television show *Bull* a character was mistaken about whether the Securities Exchange Commission or the Commodity Futures Trading Commission had jurisdictional authority to regulate futures contracts that are written on the value of major stock indices. After that class, a student came up and mentioned that she was dating a producer of the program *Bull*. She asked if I’d like to meet her boyfriend and perhaps be a financial and legal consultant for the show *Bull*. That sounded like fun, so after our last class meeting in December 2000, I asked that

²²⁵ MORGAN CLOUD & GEORGE B. SHEPHERD, *LAW DEANS IN JAIL*, (2012), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1990746 (analyzing how law schools and their deans who submitted false information about law schools’ expenditures to U.S. News & World Report may be guilty of such federal felonies as mail and wire fraud, conspiracy, racketeering, and making false statements).

²²⁶ MARY WOLLSTONECRAFT SHELLEY, *A VINDICATION OF THE RIGHTS OF MEN* 54 (1790, Reissue ed., 2009).

²²⁷ FEDERAL ACCOUNTING STANDARDS ADVISORY BOARD, <http://www.fasab.gov/accounting-standards/authoritative-source-of-gaap/> (last visited July 19, 2012) (Generally Accepted Accounting Principles).

²²⁸ *Bull: In the Course of Human Events* (TNT television broadcast, Aug. 15, 2000).

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student about meeting her producer boyfriend. She unfortunately was no longer dating him (it was after all Los Angeles and three months later)!

Just a few facts about the University of Southern California law school sum up its collegial culture and welcoming nature. First, the faculty lounge had a vending machine that dispensed free cans of soda. Second, almost every week-day, a friendly group of law professors met at 11:45 a.m. on the fourth floor of the law school building to walk ten minutes across campus to eat lunch at the international food court of University Village, a nearby shopping center. Conversations covered the gamut of law and non-law related topics including but not limited to current events, movies, teaching, research, sports, and traffic. Third, there was a petting zoo for the kids of law school faculty at the autumn 2000 start-of-the-year faculty and staff party held at the law school dean's home in Pasadena! Fourth, law professors were more than happy to share course Power-Point presentation slides with one another. Fifth, a colleague invited me to attend a U.S.C. home football game and the dean invited me to watch a U.S.C. home basketball game.

D. A 70 Degree December Day in Chicago?

It was December 15, 2000 and I had just returned from having a yummy lunch from dim sum carts with a University of Southern California colleague in Monterey Park, California. There was a voice mail on my office phone from then Dean Daniel Fischel of the University of Chicago law school asking me to call him back. When I did, he asked how was the weather in L.A. I told him that it was a typical mild and sunny day in the greater Los Angeles area with the temperature being in the 70-75 degree range. He said that it was also 70 degrees there in Chicago. I questioned really? He then admitted that it was 70 degrees inside the U of C law school building.

Fischel then communicated a so-called look-see visiting offer for autumn 2001 teaching Federal Regulation of Securities. Law schools typically make one of two types of visiting offers: 1) look-sees that are in essence on-the-job interviews lasting for at least one semester and possibly an entire academic year, and 2) podium fillers, which do not involve any stated possibility of a permanent employment offer. I asked to confirm that it was a look-see offer and he claimed that it was indeed one. Only later that summer after accepting the alleged look-see offer, but prior to driving to Chicago did I learn from a fellow University of Pennsylvania law school professor that while she was serving on a AALS committee with a U of C law school professor that summer she had mentioned to him that I was excited about visiting at the U of C due to having been a first-year law student there. He said oh, well the U of C needed someone to cover securities regulation that fall and if they were honest about it being a podium visit I'd be likely to decline their offer.

Fischel concluded the phone conversation by asking if I had any other questions regarding his offer, the University of Chicago law school, or the city of Chicago. I informed him that I had been a U of C first-year law student, which surprised him only because of his failure to perform any due diligence. He said "okay, then, we're all set," to which I said that I'd have to ask the dean at the University of Pennsylvania law school. Fischel's response was that in the big

leagues that is not necessary. My response was that in any league it seems polite and prudent to inform if not ask your current employer about accepting a visiting offer.

When I drove to the U of C two days after 9/11/2001, the U of C dean was no longer Fischel. Instead it was someone who used to be at the University of Virginia law school and who had been one of four external candidates to be dean at the University of Pennsylvania law school. On Friday, September 14, 2001, that new dean informed me that there was a long-standing tradition of a (proper) subset of U of C law professors having lunch at a round table in the U of C faculty club on every Monday, Wednesday, and Friday. The only rule was that one was not allowed to speak about any topic about which one has specialized knowledge. He told me that I could not speak about applied mathematics, business law, derivatives, economics, finance, popular culture, and securities regulation. So, these lunches were in essence the uninformed leading the informed!

One day my office door neighbor, a prolific law and economics scholar, and one of the most important and influential legal thinkers of modern times according to a poll of almost 5,000 readers of *Legal Affairs*,²²⁹ Richard Epstein, dropped by to ask if I'd like to join him for lunch. Incidentally, he was one of only two professors to do so during the whole autumn quarter. The other was former Dean Douglas G. Baird, who had taken me to lunch once each quarter already when he was dean in 1994-95 and I was a first-year law student there.

While Epstein who had the office next door to mine was putting on his raincoat, he asked, "can anyone teach Federal Regulation of Securities?"

I replied: "of course, anyone can teach Federal Regulation of Securities ... badly; but a more relevant question is can anyone teach Federal Regulation of Securities well or just effectively, to which the answer is no."

University of Chicago law school permanent faculty members who attended their law and economics workshop behaved as if they were conducting emergency room triage. If a professor from another law school presented a purely empirical paper, then someone in the audience would complain there was no theory and therefore ask what was the theoretical framework? If a professor from another law school presented a purely theoretical paper, then someone in the audience would complain there was no empirical evidence and therefore ask where was the data? If a professor from another law school presented an empirical and theoretical paper, then someone in the audience would complain that this was really two separate papers, an empirical one and a theoretical one and so ask why the presenter did not separate them?

E. How is Law School like Doing Laundry and Flossing?

A couple of facts about the University of Virginia law school summarize its organizational culture. Upon my being denied tenure at the University of Pennsylvania law school, the then University of Virginia law school dean John Jefferies, Jr. and the current University of Virginia law school dean Paul Mahoney

²²⁹ WHO ARE THE TOP 20 LEGAL THINKERS IN AMERICA?, <http://www.legalaffairs.org/poll/> (last visited July 19, 2012).

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invited me to dinner with them. They both expressed their condolences and reassured me that I would have been granted tenure had I been a tenure-track junior faculty member at the University of Virginia law school. I laughed and told them that unfortunately I did not even receive a call-back on-site interview from the University of Virginia law school after the AALS hiring conference with Polite (who was still at Virginia law school then and who had become a supporter) and Not Silent (who had gone to become dean at the U of C law school at the time).

When a second Supreme Court Justice visited in the spring of 2003, I noted that in the seven years that I had been at the University of Pennsylvania law school just one Supreme Court Justice visited. Mahoney joked that if there were a bullet train from Charlottesville to Washington, D.C., the University of Virginia law school would be in the top five.

During a class meeting of securities regulation early in the spring semester of 2003, a student asked if they really had to do the assigned readings in the required casebook and if so, then could they do the readings just before the final exam. I explained that keeping up with the assigned course readings is like doing laundry and flossing because all three activities can be accomplished on a regular basis without much burden. Yet if one delays and procrastinates doing these activities on a regular basis, they become quite burdensome and can lead to unpleasant consequences. That Friday, in the University of Virginia law school student paper's column of notable quotes was one from Professor Huang stating that: "law school is like doing laundry and flossing." That was it, end of sentence and full stop with no commentary or explanation.

At another class meeting of securities regulation, I covered section 28 of the Securities Act of 1933 entitled General Exemptive Authority.²³⁰ This is a section that provides the Securities and Exchange Commission (S.E.C.) with the authority to promulgate regulations and rules that exempt any person, security, or transaction from any securities laws if such an exemption is appropriate or necessary for the public interest and consistent with investor protection. The reason for the adjective "general" in the title of section 28 is to contrast this grant of broad authority to the S.E.C. to craft exemptions from securities laws from other sections of the Securities Act of 1933 that provide for limited exemptions from particular securities laws, such as registration requirements for companies that are going public. The word "general" led to a lively discussion about General Tso's chicken, tofu, etc. and the questions of whether General Tso was a real historical Chinese figure and was he famous for his cowardice, culinary skills, or military acumen? Upon finishing the class and returning to my office, I'd already received a number of e-mails with answers to all of those questions time stamped during the class session!

F. Weekly Commutes between Philly and the Twin Cities

I taught at the University of Minnesota (U of M) law school during the academic year 2004-2005, flying every Thursday from Minneapolis to Philadelphia and flying back every Monday. My weekly commute meant not being as inte-

²³⁰ 15 U.S.C. § 78mm (2010).

grated into the U of M law school than had I been there on a daily basis. Two facts indicate the U of M law school's culture and norms that academic year. First, there were cookies and lemonade at efficiently run, quickly completed, and infrequently held faculty meetings. Second, I was asked to and agreed to serve on the law school's appointments committee. Lunches were free to all professors who were members of committees, which met at noon. It was a real pleasure to be a member of an entry and lateral appointments committee that collegially and effectively implemented one shared goal: namely to identify faculty candidates who are the best of those likely to accept offers to join the U of M law school, invite them for on-campus job talks, and recommend to the law school faculty that our dean make offers to some of them as quickly as possible. This experience contrasted with my being on the University of Pennsylvania law school's entry-level appointments committee while I was on a pre-tenure sabbatical in spring 2001. The University of Pennsylvania law school pursued the objective of competing for junior faculty with its self-described peers of Harvard and Yale law schools, resulting in the accomplishment of losing in those contests and so not hiring any entry-level faculty, or belatedly scrambling to hire the best of who was then left on that market. Entry-level law school faculty recruiting starts by appointments committee members conducting a review of the AALS Faculty Appointment Register (FAR), standardized online questionnaire forms that prospective assistant professors complete by mid-July of each year.²³¹ Most law schools look for the same objective indicia of academic potential on the FAR forms, namely the current or past *U.S. News & World Report* ranking of the law school from which a faculty candidate graduates, law school grades, law review membership, prestigious judicial clerkships, and any publications. The U of M did all that and also looked for people who were diamonds in the rough and not obvious choices that other schools would also identify. For example, the U of M identified law school professors who had not been granted tenure at higher ranked law schools as possible lateral hires if the U of M independently believed that those individuals deserved tenure at the U of M. The U of M also focused on people who lived in the Midwest, had family there, or had spouses who wanted to live there.

G. Why One Should Be a Podium Visitor at Columbia Law School

A professor who held an endowed chair at Temple law school had been offered a podium visit at Columbia law school. Upon being informed of this offer, Temple law school's former dean asked that endowed chair holder why he or anyone would even want to be a podium visitor at Columbia law school. Apparently, there were some mysterious costs that the former dean of Temple law school saw as clearly trumping and outweighing the personal and professional benefits of being even a podium visitor at Columbia law school and the institutional prestige that it could bring Temple law school to have one of its faculty visit at Columbia law school.

²³¹ FACULTY RECRUITMENT, ASSOCIATION OF AMERICAN LAW SCHOOLS, http://www.aals.org/services_recruitment.php and <http://www.aals.org/frs/faq.php> (last visited July 19, 2012).

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H. Amtrak between New Haven and Trenton

I was a visiting lecturer at Yale Law School (YLS)²³² and co-taught a seminar titled Neuroscience and the Law with Elizabeth K. Dollard Professor of Law, Dan Kahan,²³³ during the autumn of 2009. Dan's areas of research include criminal law, evidence, and risk perception. So we covered the limits and potential of applying neuroscience to criminal law, evidence, and regulation of risk, in addition to business law, investing, mindfulness, and paternalism. We scheduled the seminar to meet on Monday afternoons so that I had the option to attend the faculty workshop series. As one of the presenters nicely stated during a visit to his office, the workshops have a very Senatorial quality to them, where various of his colleagues launch into not brief soliloquies during the question and answer period and append onto the end of their monologues a phrase to the effect of "please comment."²³⁴

All of the YLS students in our neuroscience and law seminar were, as one would expect, articulate, intelligent, and well-prepared. Our discussions were uniformly thought-provoking and wide-ranging. I was intrigued that most of the seminar students felt discomfort and unease with the neuroscience data finding that meditation changes the neural structures of meditators' brains.²³⁵ When Dan and I asked why, they said that changing people's brains was dangerous. We replied that education is about changing people's brains and minds. They were not convinced by our analogy. It was a fun exchange of ideas though. Our seminar students organized an end-of-semester get-together at Rudy's and invited Dan and me to share with them drinks and frites with various dipping sauces.

I. A Mile High and Loving It!

I presented a paper on October 8, 2010 in the Midwest Law and Economics Association annual conference, held that year at the University of Colorado at Boulder law school. I was immediately and lastingly awed by the postcard-like view of the Flatirons rock formations near Boulder, the healthy lifestyle in Boulder, the number and variety of vegetarian eateries, and the impressive Wolf Law Building.²³⁶ I have been here now since mid-August of 2011 and each of these factors continues to be inspirational.

²³² YALE LAW SCHOOL, FACULTY, PETER HUANG, <http://www.law.yale.edu/faculty/PHuang.htm> (last visited July 19, 2012).

²³³ YALE LAW SCHOOL, FACULTY, DAN M. KAHAN, <http://www.law.yale.edu/faculty/DKahan.htm>. (last visited July 19, 2012).

²³⁴ Pierre Schlag, *The Faculty Workshop*, 60 BUFF. L. REV. 807 (2012) (satirizing how faculty workshops reproduce legal academic hierarchy and norms).

²³⁵ See e.g., Heleen A. Slagter, Richard J. Davidson, & Antoine Lutz, *Mental Training as a Tool in the Neuroscientific Study of Brain and Cognitive Plasticity*, 5 FRONTIERS IN HUMAN NEUROSCI. Article 17 (2011) (examining how meditation cultivated systematic mental training can induce process specific learning).

²³⁶ WOLF LAW BUILDING, <http://www.colorado.edu/law/about/wolf/>. (last visited July 19, 2012). See also ALAN DE BOTTON, *THE ARCHITECTURE OF HAPPINESS* (2006).

I participated this academic year in the second iteration of a curricular innovation known as Telos, which is an optional, no credit, and ungraded two-semester consideration of how to understand, reflect upon, and navigate the professional acculturation process of being a first-year law student. Telos introduced a range of mindsets and practices, including mindfulness, self-reflection, and creativity.²³⁷ My Telos sessions discussed happiness interventions, emotional intelligence, and emotional styles.²³⁸ I also participated in a related homecoming ethics CLE panel, titled Happiness and Professional Satisfaction for Lawyers.²³⁹ I spoke about implications for legal education and practice of recent empirical research about happiness as background before I interviewed three remarkable Colorado law school alumni about their personal experiences and reflections about what makes a satisfying career and life: Heather Ryan,²⁴⁰ Manuel Ramos,²⁴¹ and Alice Madden.²⁴²

People often ask professors why they chose to be teachers and of course there are many answers. One of the most eloquent, inspiring, and thought-provoking set of responses comes from Peter G. Beidler, the Lucy G. Moses Distinguished Professor of English at Lehigh University,²⁴³ who wrote that, teaching confers “the only kind of power worth having, the power to change lives.”²⁴⁴ I continue to be awed, humbled, and touched to hear law students volunteer that learning about JDM, happiness, emotional intelligence, and signature strengths changed their personal and professional lives for the better. It is all the more bittersweet and poignant when those students also say that they only wish they had learned (more) about JDM, happiness, emotional intelligence, and signature strengths sooner in (or even before) law school.

For example, a student in a course titled Media, Popular Culture, and Law that I taught in the autumn of 2011 sent this e-mail after having seen the movie entitled *Happy*,²⁴⁵ which I recommended by e-mail to students in that course:

²³⁷ See also Carrie Menkel-Meadow, *Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97 (2000) (analyzing teaching JDM and creativity in law schools).

²³⁸ RICHARD J. DAVIDSON & SHARON BEGLEY, THE EMOTIONAL LIFE OF YOUR BRAIN xi-xv, 4-6 (2012) (defining six emotional styles).

²³⁹ COLORADO LAW, HOMECOMING SCHEDULED OCTOBER 21 -23, 2011,

<http://lawweb.colorado.edu/news/showArticle.jsp?id=670> (last visited July 19, 2012).

²⁴⁰ 3cgCU, *Reinventing Governance Conference: Heather Ryan - Alternatives to Trials*, YOUTUBE (Jul. 7, 2011), <http://www.youtube.com/watch?v=RVPC5anvkHA>.

²⁴¹ Manuel Ramos, *An Occasional Blog from an Occasional Writer*, BLOGSPOT (April. 18, 2006, 6:09 PM), <http://manuelramos.blogspot.com/>.

²⁴² THE WIRTH CHAIR IN SUSTAINABLE DEVELOPMENT, UNIVERSITY OF COLORADO, DENVER, <http://www.ucdenver.edu/academics/colleges/SPA/BuechnerInstitute/Centers/WirthChair/About/Pages/AliceMadden.aspx>. (last visited July 19, 2012).

²⁴³ LEHIGH DEPARTMENT OF ENGLISH, PETE BEIDLER, <http://www.lehigh.edu/~indrown/people/beidler.html> (last visited July 19, 2012) (providing biographical details).

²⁴⁴ PETER G. BEIDLER, WHY I TEACH 11 (2002).

²⁴⁵ HAPPY (Emotional Content 2011); HAPPY THE MOVIE. THE MOVEMENT, <http://www.thehappy.com/> (last visited July 19, 2012) (providing information about this film from its official website).

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Professor Huang,

Per your recommendation, I saw the 9pm showing of the "Happy" film yesterday evening. I loved it! Leaving the theater I was the happiest I have felt in a long time!

I was very attracted to the concept of happiness as a skill that should be practiced over time, and as a muscle in the brain that should be exercised and challenged. Overall it was a very intriguing film, and it has really got me thinking about little changes I can make to become a happier person.

Thanks for the recommendation and have a great weekend!

Sincerely,²⁴⁶

A graduate student in the journalism and mass communication department also in that same course volunteered this e-mail,

I wanted to let you know I did go see *Happy* on Friday, October 14th. I felt it was incredibly inspiring as far as how simple some of the ways to increase happiness can be: simple acts of kindness and a few weeks of meditation among other things... however, I did feel most of the ways to increase dopamine levels were "common sense" and are often known by people but just not followed. If anything, this movie was a good reminder to what humans are capable of doing for themselves and others as reasonable and rational beings, but are clearly forgotten within materialistic, capitalist societies that we find ourselves in today. Thanks again for sparking interest in this field of study...I find it incredibly relevant and important to my work which focuses on what human needs and desires are met (or created) through emerging communication technology--namely relationships.²⁴⁷

V. CONCLUSIONS

This Article has critically reflected upon Professor Chua's memoir about being a tiger parent by offering a complementary personal memoir about growing up as a tiger cub. In so doing, the Article has examined some of the pros and cons of tiger parenting. I was fortunate to be able to excel in school when my tiger mom pushed me. But, what if she had been wrong in her belief that I had the mental "horsepower" to excel? Another potential downside of tiger parenting is that its focus on playing by the rules and being disciplined, hard-working,

²⁴⁶ E-mail from Student in a course titled Media, Popular Culture, and Law to Peter H. Huang, Professor and DeMuth Chair, University of Colorado Law School (Oct. 14, 2011, 3:30 pm MST) (on file with author).

²⁴⁷ E-mail from A Graduate Student, Journalism & Mass Communication Department, to Peter H. Huang, Professor and DeMuth Chair, University of Colorado Law School (Oct. 23, 2011, 10:41 pm MST) (on file with author).

humble, reserved, respectful, shy, and unassertive feeds into stereotypes that Asians excel as worker bees, but not as leaders, managers, or supervisors.

The Article made three assumptions. First, a central goal of legal pedagogy and parenting should be to develop and improve JDM skills because they are crucial to achieving career and life satisfaction. Unfortunately, tiger parenting and traditional doctrinal law school classes spend much time on developing certain JDM skills and spend little time on improving other JDM skills. Second, the Article has assumed that law professors can reform legal education and parents can improve how they raise their kids by teaching more about emotions and emotional intelligence. Third, it has assumed that education about character strengths, ethics, and professionalism is crucial to achieving lasting career satisfaction and sustainable personal happiness.

This Article was written in a narrative and personal form because of the compelling, emotional, and memorable nature of stories.²⁴⁸ The stories offer a particular set of data points. They provide qualitative anecdotal evidence about certain experiences at particular times at specific law schools. Whether similar experiences would occur today at even those same law schools is an open question because of institutional and personnel changes over time.

Finally, there are many additional stories about growing up as a tiger cub that are less closely related to legal education and therefore have not been included as parts of this Article. A fellow member of the Institute for Advanced Study School of Social Science during its psychology and economics thematic focus year, neuroscientist Read Montague²⁴⁹ and his friend, who is another neuroscientist Greg Berns,²⁵⁰ have suggested that many of those other stories could be an entertaining book.²⁵¹ Those stories will have to wait for another place and time.

Leonard Riskin, the Chesterfield Professor of Law at the University of Florida, who is a pioneer in championing the benefits of practicing mindfulness for lawyers and judges,²⁵² has written several excellent personal essays.²⁵³ Upon my asking him to e-mail them, he commented that while he loved to write them, he felt they seemed too self-centered.²⁵⁴ I replied that his response was reminiscent

²⁴⁸ Lea B. Vaughn, *Feeling at Home: Law, Cognitive Science, and Narrative*, 43 MCGEORGE L. REV. (2012, forthcoming) (explaining why narratives work in legal practice and teaching).

²⁴⁹ READ MONTAGUE, *YOUR BRAIN IS (ALMOST) PERFECT: HOW WE MAKE DECISIONS* (2008).

²⁵⁰ GREG BERNs, *ICONOCLAST: A NEUROSCIENTIST REVEALS HOW TO THINK DIFFERENTLY* (2008); GREG BERNs, *SATISFACTION: THE SCIENCE OF FINDING TRUE FULFILLMENT* (2005).

²⁵¹ Read Montague suggested a title of ABCnomics (ABC being an acronym for American Born Chinese) named after the international best-seller: STEVEN D. LEVITT & STEPHEN J. DUBNER, *FREAKONOMICS: A ROGUE ECONOMIST EXPLORES THE HIDDEN SIDE OF EVERYTHING* (2009).

²⁵² See, e.g., Leonard L. Riskin, *Awareness and the Legal Profession: An Introduction to the Mindful Lawyer Symposium*, 61 J. LEGAL EDUC. 634 (2012).

²⁵³ See, e.g., Leonard L. Riskin, *Unsportsmanlike Conduct*, N.Y. TIMES MAGAZINE, Jan. 22, 1989, at 14.

²⁵⁴ E-mail from Leonard L. Riskin, University of Florida law school to Peter H. Huang, Professor and DeMuth Chair, University of Colorado Law School (Aug. 8, 10:39 am MST) (on file with author).

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of these quotes about autobiographies: “All autobiography is self-indulgent”²⁵⁵ and “[a]utobiography is only to be trusted when it reveals something disgraceful.”²⁵⁶ Since then, financial economist Andrew Lo wrote, “[i]t’s become a truism that one should read memoirs by people at the center of great historical events with a careful eye towards score-settling, self-justification and, more rarely, self-blame.”²⁵⁷ This truism also applies to memoirs by those not at the center of great historical events, as in the present case.

I conclude by illustrating how once a tiger cub, always a tiger cub. I e-mailed my tiger mom the SSRN hyperlink to an initial draft of this Article with some concern and trepidation about how she would react. She stayed up to read it twice and carefully enough to notice and point out a typo (tiger brother P2 noted two more typos and pointed out that the character lon of the dim sum xiao lon bao means bamboo steamer instead of dragon). A former mutual colleague also forwarded that same SSRN hyperlink to Professor Chua who, upon reading it immediately, sent a gracious e-mail, stating in part: “I found your article moving, insightful -- and *funny*! I also think many of my law students would benefit enormously from the piece, and will spread the news.”²⁵⁸ Since then, I have exchanged several e-mails with Professor Chua providing helpful tiger mom type of advice related to my being invited to present based upon this Article the Asian Pacific American Heritage Month Commemorative Lecture at Syracuse University.²⁵⁹ At least surprising to me, writing this Article has brought me closer to my tiger mom and resulted in my essentially adopting yet another tiger mom!

²⁵⁵ DAPHNE DU MAURIER, *MYSELF WHEN YOUNG: THE SHAPING OF A WRITER* xix (1997, Virago Modern Classics ed., 2004).

²⁵⁶ George Orwell, *Benefit of Clergy: Some Notes on Salvador Dali*, in 3 *GEORGE ORWELL: AS I PLEASE, 1943-1945: THE COLLECTED ESSAYS, JOURNALISM AND LETTERS* (Sonia Orwell & Ian Angus eds., 1978).

²⁵⁷ Andrew W. Lo, *Reading About the Financial Crisis: A 21-Book Review*, 50 *J. ECON. LIT.* 151, 170 (2012).

²⁵⁸ E-mail from Amy Chua, Professor, Yale Law School to Peter H. Huang, Professor and DeMuth Chair, University of Colorado Law School. (Nov. 12, 2011, 12:54 MST) (on file with author).

²⁵⁹ *Peter Huang Press Release*, SYRACUSE LAW SCHOOL (Apr. 2, 2012)

http://www.law.syr.edu/_assets/documents/student-life/PeterHuangPressRelease.pdf; See also Kathleen Haley, *Mindset, Happiness and Law School*, SYRACUSE UNIVERSITY NEWS (Aug. 22, 2012) <http://news.syr.edu/?p=39391>.

The Efficient Secret: How America Nearly Adopted a Parliamentary System, and Why It Should Have Done So

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ABSTRACT

The American presidential system, with its separation of powers, plausibly imposes enormous costs on the economy without compensating gains, as seen in the current gridlock over the debt crisis. Modern parliamentary systems of government, such as those in Britain and Canada, seem to handle such problems more efficiently. Regretfully, however, the principle of separationism has been extended in Supreme Court decisions and in the Senate filibuster, in part because of the mistaken idea that this is what the Founders intended. A close examination of the preferences of the delegates to the Philadelphia Convention of 1787 tells a very different story. Had they voted on our present regime of presidential elections, they almost certainly would have rejected it. This conclusion is buttressed by an empirical analysis of delegate voting patterns.

The prejudice of Englishmen, in favor of their own government ... arises as much or more from national pride than reason.

Thomas Paine, COMMON SENSE

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I. INTRODUCTION

The delegates who met in Philadelphia in the summer of 1787 drafted Article II of the Constitution, which as amended governs modern presidential elections. What they had in mind, however, was a different form of government than our present one, a government with a weaker separation of powers between the executive and legislative branches and very different ideas about presidential elections. Getting the history right is important, for at least two reasons.

First, the sentimental appeal of separationism owes much to the simple patriotism Americans feel for the Framers of the Constitution, a patriotism shared by scholars and political leaders.¹ Separationism is an icon of American national identity. “The American Constitution is unlike any other,” said historian Hans Kohn. “It represents the lifeblood of the American nation, its supreme symbol and manifestation.”² Other countries had their common cultures or religions. What America had was an idea. Robert Penn Warren wrote, “To be American is not...a matter of blood; it is a matter of an idea.”³ And just what was the idea? Not simply liberty or liberty under law, for those were also English ideas. The special American contribution, which defined the nation itself, is the idea of a constitutional order that prominently includes the separation of powers.

The second reason why getting the history right matters is because the Framers’ intent is the touchstone of constitutional interpretation for an increasing number of Originalists. An “Original intent” Originalism of this kind must be distinguished from an “original meaning” Originalism. The former looks only to the Framers for guidance, while the latter would interpret the Constitution as the intelligent reader of 1787 would have done.⁴ The former kind of Originalism is plausibly more compelling.

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¹ See, e.g., CONG. RECORD, 112th Cong. S5155-56 (Sen. Reid, Aug. 1, 2011).

² HANS KOHN, AMERICAN NATIONALISM: AN INTERPRETIVE ESSAY 8 (1957).

³ ROBERT PENN WARREN, THE LEGACY OF THE CIVIL WAR: MEDITATIONS ON THE CENTENNIAL, 78 (1961).

⁴ See Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 620 (1999); Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923, 928 (2009).

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The latter form of Originalism was an attempt to respond to criticisms made about the difficulty of identifying the intent of the Framers as a group. Such concerns, while eminently sensible when addressed to the 536 people who are called on to deliberate over a statute, are overstated when it comes to the 53 delegates who drafted the Constitution. Moreover, the best evidence of what ordinary educated Americans of the time would have made of Article II comes from what the delegates had to say about it at the Convention, and not at subsequent state ratifying conventions. What they drafted was a take-it-or-leave-it Constitution which the ratifying conventions could only adopt or reject, without amendments.

In ascertaining original intent, what matters most is what the Framers thought was the function or purpose which a provision was meant to serve. Otherwise, one might argue that the meaning of a term remained the same even if the use to which it was put had changed utterly. That doesn't seem right, if a delegate presented with the current regime of presidential elections would have protested "that's not what we meant at all!"⁵ A study of the debates in their entirety can also correct a narrow Originalism which ignores the broader context when examining particular questions of constitutional interpretation. For example, the assertion that the President has an unfettered authority to wage war under the Constitution,⁶ independently of Congress, ignores the hostility many delegates expressed to a strong executive, and to the way in which the delegates sought to make the President accountable to Congress by giving it the power to appoint him, a story I tell here.

The serious Originalist must therefore be troubled by the fact that the Constitutional regime which now governs Americans is very different from what the Framers intended. While they have been taken to have devised the current system of separation of powers, one who closely examines what they thought, as Lincoln did in his 1860 Cooper Union speech, will discover that they wanted something very different. They very nearly adopted a system not unlike the parliamentary regimes of Great Britain and Canada. The presidential system was a near-run thing, decided only on day 105 of a 116 day Convention. The delegates debated the selection of the president on 21 different days and took more than 30 votes on the subject.⁷ In 16 roll calls they voted on how to select the president. On six of these (once unanimously), they voted for a president appointed by Congress, which would have closely resembled a parliamentary regime. Once they voted 8 to 2 for a president appointed by state legislatures, which would also have greatly weakened the separation of powers. On one thing they were wholly clear: they

⁵ Cf. Ronald Dworkin, *Comment*, in ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW*, 115-27 (1997) (distinguishing between semantic and expectations originalism).

⁶ A theory most closely associated with John Yoo. See John C. Yoo, *War, Responsibility, and the Age of Terrorism*, 57 *STAN. L. REV.* 793 (2004).

⁷ The records on the deliberations were edited by Max Farrand in a four volume set originally published in 1911, and comprise the sketchy notes of the Convention's secretary as well as notes made by the delegates, principally James Madison. See MAX FARRAND, *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, (rev. ed., 1937) [hereafter "*Records*" cited by volume number and page]. On the accuracy of the records, see James H. Hutson, "Introduction," *Records*, IV.xv ff.

did not want a president elected by the people. That question was put to them four times, and lost every time.

When the delegates finally settled on the language now found in Art. II of the Constitution, few thought that they were agreeing to the present presidential regime. What they had agreed to was a compromise, and like a good compromise it was nicely balanced, with so many concessions to every side that everyone might have thought they had won the day. The nature of the compromise has been obscured by the passage of time and the development of the modern presidential system. These were changes the delegates did not anticipate, for their Constitution was not our Constitution. Their Constitution featured an electoral system in which the electors had real choices to make, where state legislatures chose the electors, and where the choice of president would generally fall on the House of Representatives.

The present constitutional regime is one in which the president is elected by popular ballot, through an electoral system in which electors are automatons who lack a will of their own. But the delegates mistrusted democracy and that's not what they thought would happen. Instead, they believed that the electors would exercise an independent judgment. They would be better informed than the average voter and would pick whomever they thought was the best candidate.

States' rights supporters were strongly represented at the Convention, and a core of them wanted state legislatures to choose the president. On one roll call, they persuaded a majority of the states to go along with them. These delegates would then have taken heart from Art. II § 2, under which the method of choosing electors is left to state legislators. A state might permit the choice to be made by popular election, but it might also reserve the choice to the state legislature, and that's just what many states did in the Republic's early years.

Many delegates were fearful of presidential power and wanted Congress to appoint the president, that he might be better controlled. And that is what they thought would happen under Art. II § 3, which provides that the choice is taken from the electors if majority of them fail to agree on a candidate. Few delegates thought that, after George Washington, candidates with national appeal would emerge. Instead, each state would vote for a favorite son and no candidate would gain a majority of electoral votes. The electors would scatter their votes, and the House would choose from amongst the top five vote-getters, which amounted to virtually a free choice. Moreover, each state would be given one vote in the House, a further bone for the states' rights delegates.

The modern presidential system was not invented by the Framers. They had a different understanding of the separation of powers, one in which more power was reposed in the legislature and less in the Executive than is the case today. Our current understanding of the division of powers owes less to the Framers, and to the homage Originalists might pay to them, than it does to a living constitution which is detached from the Framers' intentions.

II. SEPARATIONISM'S INEFFICIENCIES

Standard & Poor's downgraded America's public debt on August 5, 2011, and life went on. The stock market fluctuated widely, then returned to prior lev-

els. The dollar dropped in value, until investors realized that it remained the only game in town. And yet the downgrade is an event of the first magnitude, whose effects will be felt for a long time to come.

Given America's public debt overhang, other rating agencies might join Standard & Poor's in downgrading U.S. debt. On the same day as the Standard & Poor's downgrade, Moody's Investor Services warned that the federal government needs to stabilize the debt-to-GDP ratio to 73 percent by 2015 to ensure that it keep its AAA rating.⁸ That doesn't seem on the cards, and Standard & Poor's itself didn't see any quick fixes for America. The budget deal to which Republicans and Democrats had agreed a few days before wasn't sufficient to resolve the crisis, which would only get worse with time. The problem was the American system of separation of powers between branches of government under the Constitution, and the gridlock which results from divided government and polarized political parties.

Standard & Poor's noted that a future election might give one party the White House and both houses of Congress, ending divided government and bringing a resolution to the debt crisis. Hat tricks of this kind have happened more often than one might think, 40 percent of the time since the Second World War. Even without this, the two parties have been able to work out compromises. In the recent past, as many bills were passed in periods of divided government as when one party controlled all three branches of government.⁹ However, politics have now become much more ideological. The smoke-filled backrooms of American politics are no more, their place taken by the energized grass-roots of democratized parties, and divided government is more likely to result in gridlock today. There will be fewer deals between the parties, and fewer solutions to long-term problems. The gridlock which the debt crisis revealed seems likely to continue as a permanent feature of American government.

The costs of the separation of powers in America, so evident today, have long been recognized by political theorists, many of whom expressed a preference for a parliamentary form of government, with its weakened separation of powers. Woodrow Wilson was there first, in a little book he published in 1885 called *Congressional Government*. The fastidious Wilson wrinkled his nose at the *ton* of American politics. Congressmen read banal speeches to an empty house, with nothing like the drama, the wit, the sharp exchanges of a parliamentary debate in Westminster. Americans had no Gladstones and Disraelis, no Arthur Balfours or Charles Stewart Parnells, and sent mediocrities to Congress.

One who today compares Question Period in the House of Commons of a parliamentary system with speeches in Congress, or who listens to a presidential press conference, might possibly agree with Wilson. And ask, so what? What matters is whether one is well-governed, not wittily governed. But Wilson did not think Americans were well-governed. Because power is divided, in an American-

⁸ Jennifer Depaul, *New Debt Ratio Signals Out-of-Control Spending*, FISCAL TIMES, (Aug. 5, 2011), <http://www.thefiscaltimes.com/Articles/2011/08/05/New-Debt-Ratio-Signals-Out-of-Control-Spending.aspx#page1>.

⁹ See DAVID R. MAYHEW, *DIVIDED WE GOVERN: PARTY CONTROL, LAWMAKING, AND INVESTIGATIONS, 1946-2002* (2005).

style separation of powers, the government's strength is weakened. Things happen more slowly, if at all, and when things don't happen, or happen poorly, there is no one person to hold responsible. By contrast, Walter Bagehot's *The English Constitution*, a book much admired by Wilson, described a rival system which offered promptness where speed was needed and accountability when things went wrong. This Bagehot attributed to the absence of a separation of powers in a system where the House of Commons was all powerful, which he said was the "efficient secret" of the English constitution.¹⁰

American separationism came in for similar criticism from the progressives in the last century. These were liberals in a hurry, and what they objected to was the glacial slowness of legal change in America. In England, a major piece of legislation could be enacted simply, through an act of Parliament passed by a Labour government holding a majority of seats. The progressives saw a need for major reforms, and it gnawed at them when this was blocked by divided government. They looked back fondly to the first hundred days of the Roosevelt Administration in 1933, when the executive drafted bills which Congress rubber-stamped without debate. That was the closest that America ever came to a parliamentary system, and progressives thought that that was how government should work.¹¹

After the budgetary impasse of July 2011, many have begun again to question the value of separationism. President Obama blamed the tortured negotiations and the risk that Congress would fail to raise the debt ceiling on the gridlock produced by the American political system. "We didn't have a AAA political system to match our AAA credit rating," he said.¹² Presumably the imbalance has now been corrected, with a downgraded fiscal system to match a second-rate political system.

It might seem pointless to enquire whether a better constitutional regime might be imagined, if one could never get there. To the extent that separationism is enshrined in the Constitution, that's not about to change. However, the separation of powers has taken on a life that transcends the detailed requirements of the Constitution. It has become a foundational norm of American constitutionalism which justifies and even requires features of American government which are not expressly mandated by the Constitution.¹³

Where there is some ambiguity about the power of a branch of government, the principle of separation of powers is often invoked to settle the matter. For example, in *Clinton v. City of New York* the Supreme Court ruled that presidents

¹⁰ WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 11 (2001).

¹¹ See generally JAMES L. SUNDQUIST, *CONSTITUTIONAL REFORM AND EFFECTIVE GOVERNMENT*, ch. 1 (1992); Thomas O. Sargentich, *The Limits of the Parliamentary Critique of the Separation of Powers*, 34 WM. & MARY L. REV. 679 (1993).

¹² At <http://www.whitehouse.gov/blog/2011/07/29/president-obama-calls-american-people-make-their-voices-heard>.

¹³ For a criticism on the idea that separationism should be thought a grundnorm of Constitutional interpretation, see John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939 (2011) (arguing that no such overarching principle can be found in the disparate provisions of the Constitution).

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lacked line-item veto powers to zero out part only of a bill.¹⁴ The line-item veto might have been a salutary way to address problems of overspending and corruption in Congressional earmarks, but the Supreme Court held that it violates the Constitution's Presentment Clause of Article I, section 7:

Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary ... shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him, or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

Did this mean that the President's only option is to sign or veto a bill in its entirety? The clause was less than clear, but the ambiguity was resolved against the line-item veto in order to vindicate the principle of separationism. "Separation of powers was designed to implement a fundamental insight: concentration of power in the hands of a single branch is a threat to liberty."¹⁵

Similarly, the court held, on separationist grounds, that Congress lacked the power to restrict presidential authority through a legislative veto by one house of Congress. In a legislative veto, Congress makes a broad grant of authority to the Executive and subsequently clips its wings by vetoing Executive regulations to which it objects. Since it takes both branches of Congress to pass a bill, a one-branch legislative veto might be thought effective if the relevant legislation so provides. Regrettably, however, the Supreme Court has held that the one-house veto violates the structure of separation of powers in the Constitution.¹⁶

Congress' gridlock problem is worsened by the Senate's procedural rules, particularly the filibuster, which since 1975 has permitted 41 senators to limit debate. Obviously, the filibuster is anti-democratic, since it prevents democratic majorities from enacting legislation. Nevertheless, it has been defended on the grounds that it enhances the doctrine of separation of powers at the core of the U.S. Constitution by erecting one more obstacle to majoritarian reforms. That, however, is precisely the problem.

Some might nevertheless prefer the present regime, with its gridlock, to a parliamentary system. We have been taught to think that American separationism, with all its inconveniences, is a bulwark of liberty. So James Madison said, in *Federalist* 47. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of

¹⁴ *Clinton v. City of New York*, 524 U.S. 417 (1998).

¹⁵ *Id.* at 450 (Kennedy J., concurring).

¹⁶ *I.N.S. v. Chadha*, 462 U.S. 919 (1983). While the decision sought to protect the authority of the executive branch, it plausibly has the opposite effect. A one-branch legislative veto, if effective, would encourage Congress to enact broadly-worded laws which leave smaller points to be settled at the discretion of the Executive. If that discretion were abused, Congress could reverse the decision with a one-branch veto. Since such vetoes are ineffective, however, Congress is more likely to micromanage the Executive through over-long legislation that specifies what is to be done in excruciating detail. See *Chadha*, 462 U.S. at 968 (White, J., dissenting).

tyranny.” That’s not been our historical experience, however. There are a good many more presidents-for-life than prime ministers-for-life.¹⁷ For example, nearly every country from the former Soviet Union which adopted a presidential system has moved in the direction of autocracy. But for Lithuania, only the parliamentary systems remain full democracies. The U.S. Constitution seemingly was not made for export. If it has not led to autocracy, was that because it was American, and not because of the separation of powers?

Gridlock might also be thought to make for better government by systematically screening and excluding bad legislation that does not survive the winnowing process of separationism. That was Hamilton’s argument for the separation of powers in *Federalist* 73. “The oftener [a] measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must be the danger of those errors which flow from want of due deliberation, or of those missteps which proceed from the contagion of some common passion or interest.” If the government legislates less under the separation of powers, then, that is no bad thing if good laws survive and bad laws don’t. The downside is the problem of reversibility: if the separation of powers makes it more difficult to pass bad laws, it also makes it harder to repeal them.

At a time of fiscal crisis, reversibility would appear to trump the benefits of pre-enactment screening in a separation of powers regime. Canada was able to put its fiscal house in order in the mid 1990s when a majority government, unhampered by the gridlock problems of the separation of powers, took decisive action to cut spending.¹⁸ Reversibility would also seem systematically superior to pre-enactment screening because it is easier to identify bad laws with the benefit of hindsight. Bad laws, based on bad ideas, with what are conceded to have bad consequences, are enacted everywhere. In dictatorships, bad laws are often bad from the start. In democratic regimes, bad ideas are typically recognized only after the fact. When one Parliament reverses a prior Parliament, it does so with more information than the prior enacting parliament. It will know better what works and what doesn’t. In America, by contrast, the benefit of hindsight is greatly diminished, since it is so much harder to reverse course. What separationism gives us is a one-way ratchet in which bad ideas are adopted and then turned into the laws of the Medes and the Persians.

As a matter of fact, there doesn’t seem to be much more pre-enactment screening in the United States than in comparable parliamentary systems. In Congress, major amendments are quietly inserted at the last moment, escaping

¹⁷ The evidence is reviewed in PIPPA NORRIS, *DRIVING DEMOCRACY: DO POWER-SHARING INSTITUTIONS WORK?*, Ch. 6 (2008). See also ADAM PRZEWORSKI ET AL., *DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950-1990* 128-36 (2000). For evidence that presidential regimes are associated with higher levels of political corruption, see Jana Kunicova & Susan Rose-Ackerman, *Electoral Rules and Constitutional Structures as Constraints on Corruption*, 35 B. J. POL.S. 573 (2005).

¹⁸ See F.H. BUCKLEY, “REVERSING,” in *THE AMERICAN ILLNESS: ESSAYS ON THE RULE OF LAW* (New Haven: Yale U.P., forthcoming 2013) (discussing the additional benefits of parliamentary regimes).

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the scrutiny of regulators charged with overseeing the bill.¹⁹ Bills are also significantly longer than their counterparts in a parliamentary system, in part as a consequence of the competition between branches of government in a separation of powers system. At the extreme, a statute might be so lengthy as to greatly reduce any possibility of meaningful pre-enactment screening. One might have expected the Chairman of the House Judiciary Committee to have had something to say about the Patient Protection and Affordable Care Act, whose constitutionality is now before the courts. John Conyers' difficulty was that it's a little hard to have an opinion about a bill one has not read. One can't be unsympathetic, however. "What good is reading the bill if it's a thousand pages," said Conyers, "and you don't have two days and two lawyers to find out what it means after you've read the bill?"²⁰

III. THE CONVENTION

The delegates who gathered in Philadelphia in the summer of 1787 were, in the popular imagination, a set of brilliant political philosophers who produced what a hundred years later Gladstone called "the most wonderful work ever struck off by the brain and purpose of man."²¹ For the British Prime Minister, the delegates were the supreme political theorists, who produced a compelling system of government to rival that of Westminster. While taking a rather more sober view of things, many modern accounts of the Convention emphasize the high theory of republican government.²² However, the theorists amongst the delegates, people such as Madison and Alexander Hamilton, were few in number, and when the Convention was over both men left Philadelphia less than happy with the result. It was better than the alternative of the Articles of Confederation, but was nevertheless a missed opportunity.

¹⁹ For example, the cost which the housing crash imposed on the federal government was greatly increased by an obscure amendment inserted by Senator Dodd (D. Ct.) which made FDIC emergency financing available to insurance companies, most of whom were located in the Senator's state. GRETCHEN MORGENSON & JOSHUA ROSNER, RECKLESS\$ ENDANGERMENT: HOW OUTSIZED AMBITION, GREED, AND CORRUPTION LED TO ECONOMIC ARMAGEDDON 40-41 (2011).

²⁰ Abby Schachter, *Quick Fix for Congress: Speak English!*, N.Y. POST, Dec. 15, 2010.

²¹ THOMAS W. HANDFORD, WILLIAM EWART GLADSTONE: LIFE AND PUBLIC SERVICES 323 (Chicago: Dominion, 1899). Amongst the best recent books on the Convention are RICHARD BEEMAN, PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION (2009); CAROL BERKIN, A BRILLIANT SOLUTION: INVENTING THE AMERICAN CONSTITUTION (2003); and DAVID O. STEWART, THE SUMMER OF 1787: THE MEN WHO INVENTED THE CONSTITUTION (2007). The best-known earlier popular accounts are CATHERINE DRINKER BOWEN, MIRACLE AT PHILADELPHIA: THE STORY OF THE CONSTITUTIONAL CONVENTION MAY TO SEPTEMBER 1787 (1966) and CLINTON ROSSITER, 1787: THE GRAND CONVENTION (1966).

²² In particular, as expressed by Madison. For one example of the enormous Madison-lehr literature, see Jack N. Rakove, *The Madisonian Moment*, 55 U. CHI. L. REV. 473 (1988).

The Constitution was more the work of lesser known men, who possessed a larger fund of practical wisdom and, compared to Madison, a much greater ability to compromise. And compromise was what was needed, for there was nothing like a consensus about the form the government would take. In particular, there was no agreement about the scope of executive power. Pennsylvania's James Wilson remarked "This subject has greatly divided the House, and will also divide people out of doors. It is in truth the most difficult of all on which we have had to decide."²³

The delegates sought to create something entirely new, a charter for a republican government to be formed from states loosely united under the Articles of Confederation. For models they had nothing wholly serviceable. They admired the virtues they saw in the ancient world, but saw a hodgepodge of confusing institutions when they examined the constitutions of republican Greece and Rome. They admired the constitution of Great Britain, with which they were more familiar, but they had fought a revolution to replace it and most thought it ill-suited for what they called the genius of America. They had the Articles of Confederation, which provided for what passed as a central government from 1781 to 1788, but these had proven unsatisfactory and the purpose of the Convention was to correct their defects. Finally, they had the constitutions of the states, most of which were reformed during the Revolution, but the delegates thought them flawed, and they were in any event of limited assistance in designing a constitution for a compound republic composed of all the states.

What nearly all of the delegates knew, however, was that they had come to the end of the line with the Articles of Confederation. This had created a "firm league of friendship" amongst sovereign, free and independent states, with the thinnest of central governments. Congress could not levy taxes directly on the people, nor could it compel the states to pay their share of national expenses. It could issue paper currency which rapidly proved almost worthless, giving us the expression "not worth a Continental." Europe today, with all its troubles, is more of a country than America was under the Articles.

At their Convention, the Framers complained that government under the Articles had broken down. Important decisions were left unmade, and it was increasingly difficult to assemble a quorum in Congress. If gridlock is good, it didn't get much better than that. Whatever government might exist, said Hamilton, it was "dissolving or already dissolved."²⁴ It was also difficult to raise funds for investment projects because the states had treated creditors shabbily, and the country was in a depression. "In every point of view," wrote Madison in 1785, "the trade of this Country is in a deplorable Condition."²⁵ This the delegates attributed to the mercenary new men who now inhabited the state houses in America. A good part of the colonial elite had been exiled by the Revolution, and

²³*Records*, II. 501. Madison recalled "tedious and reiterated discussions" about the presidency in a letter to Thomas Jefferson on Oct. 24, 1787. 10 *THE PAPERS OF JAMES MADISON* 208 (Robert A. Rutland et al., eds. 1962-77) [hereafter "PJM"]. The delegates met in Committee of the Whole, which freed them to return to subjects previously discussed and undo prior resolutions.

²⁴*Records*, I.291.

²⁵To R.H. Lee, July 7, 1785. 8 PJM 315.

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many of those who were left served as delegates at the Philadelphia Convention or in the Continental Congress in New York. That left what the delegates saw as a second string of ill-educated populists to serve in the state legislatures.²⁶ What would be needed, many thought, was a strong national government to correct these ills.

IV. THE VIRGINIA PLAN

The impetus for the Philadelphia Convention had come from Virginia, the largest and most populous state. Under the Articles of Confederation the national government lacked the power to regulate interstate commerce, and after the Revolution the states began to levy tariffs on each other's goods. Virginians, including George Washington, wanted to open the Potomac up to trade, but the river lay almost entirely within the borders of Maryland and navigation rights were disputed between the two states. A trade agreement made sense, and delegates from the two states met in Alexandria, Virginia in March 1785 to relax trade barriers (even though the Articles of Confederation prohibited interstate treaties).

The conference was so successful that, when it ended at Mount Vernon, the Virginia delegates proposed a further conference of all thirteen states. This was held in Annapolis in September 1785. However, eight states stayed away and five states was too small a group for a national agreement. A third conference would be needed, to be held on May 14, 1787 in Philadelphia.

The Virginians arrived in Philadelphia before any of the other out-of-state delegates. James Madison was there on May 5 and the rest of the Virginians arrived by May 17. A quorum of seven states was not in place until May 25. Had everyone arrived on time the Convention would likely have begun cautiously, but as they arrived early the Virginians used their time to steal a march on the other delegates. They met as a group for two or three hours a day to prepare a plan for a new Constitution.²⁷

The first day of substantive business was May 29. The delegates assembled in the Assembly Room of the Pennsylvania State House (now Independence Hall), where eleven years before eight of them had signed the Declaration of Independence. At 10:00 am, the door was closed behind them by sentries who stood watch to ensure that none but the delegates could enter. Washington had been unanimously elected the president of the Convention, and he ascended the dais to open the session. Next to him James Madison took his seat to take notes of the proceedings. Stately, plump Edmund Randolph, Virginia's Governor, stood up, and Washington nodded at him to speak. What Randolph would read came to be known as the Virginia Plan. It proposed to scrap the Articles of Confederation, and the debate over it dominated the Convention for its first six weeks.

²⁶ GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 250 (1991).

²⁷ *Records*, III.23.

Few of the other delegates were prepared for the Virginia Plan. When Congress had joined the call for the Convention in February 1787, it proposed that the delegates meet “for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal government adequate to the exigencies of Government and the preservation of the Union.”²⁸ This was a call to tinker with the Articles, nothing more. Some delegates argued that, as it exceeded the mandate from Congress, the Virginia Plan was out of order. As the Convention continued, bitter words were exchanged. Several delegates threatened to walk out in protest, and some indeed did so.

Nevertheless the delegates continued talking. The prestige of the Virginia delegation, and the presence of Washington, made it difficult to ignore the Virginia Plan. It was also, that which had sorely been lacking, a plan, a serious attempt to amend the defects of the Articles of Confederation, prepared by the thoughtful James Madison. It was also backed by a core of nationalists from Virginia and Pennsylvania, the two largest states.

Madison had outlined his thoughts about government in an essay entitled the *Vices of the Political System of the United States*, written a month before the Convention began,²⁹ and the imprint of the essay can be seen throughout the Virginia Plan. The problem, he argued, was that government under the Articles was both too decentralized and too democratic. The ultimate authority rested with the states, and the decisions of Congress were little more than recommendations. In addition, state governments were excessively democratic and the honest delegate too often “the dupe of a favorite leader, veiling his selfish views under the professions of public good, and varnishing his sophistical arguments with the glowing colours of popular eloquence.” Too often, the voice of (ahem) “individuals of extended views, and of national pride” were silenced by the demagogues.

For an answer to these ills, Madison borrowed two ideas from David Hume, whom he had studied at Princeton.³⁰ Hume had proposed, in a 1754 essay on the *Idea of a Perfect Commonwealth*, a highly artificial scheme of government that

²⁸ Report of Proceedings in Congress; February 21, 1787, The Avalon Project: Documents in Law, History and Diplomacy, http://avalon.law.yale.edu/18th_century/const04.asp; quoted in WINTON U. SOLBERG, *THE FEDERAL CONVENTION AND THE FORMATION OF THE UNION OF THE AMERICAN STATES* 64 (1958).

²⁹ 9 PJM 348. Madison arrived at his views on the presidency sometime between an April 8 letter he sent to Edmund Randolph and an April 16 letter he sent to George Washington. 9 PJM 368; 9 PJM 382.

³⁰ David Hume, *Idea of a Perfect Commonwealth*, in *POLITICAL ESSAYS* 221 (Cambridge U.P., 1994). Douglass Adair is credited as the person who first identified Hume as the source of Madison’s thoughts on government. See Douglass Adair, “*That Politics May Be Reduced to a Science: David Hume, James Madison, and the Tenth Federalist*,” in *FAME AND THE FOUNDING FATHERS: ESSAYS BY DOUGLASS ADAIR* 132 (Trevor Colbourn, ed., 1998); DOUGLASS ADAIR, *THE INTELLECTUAL ORIGINS OF JEFFERSONIAN DEMOCRACY: REPUBLICANISM, THE CLASS STRUGGLE, AND THE VIRTUOUS FARMER* 130-39 (1964 [1943]); Mark G. Spencer, *Hume and Madison on Faction*, 59 WM. & MARY Q. (3d Series) 869 (2002).

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began with a division of Great Britain and Ireland into 100 counties, each with 100 parishes, and built up from there with parish meetings, county-town assemblies, county magistrates and senators. It would be difficult to imagine anything more at odds with Hume's empiricism, with his belief that political arrangements were the product of messy historical quarrels that owed more to contingent conventions and accidental arrangements than to abstract reasoning, and one is permitted to wonder whether the essay was only half-serious and meant in part as a satire on political theorizing, a possibility that surely would have escaped the humorless Madison.

And yet Hume's essay was something more than a satire too. He believed that some constitutions were better than others,³¹ and that speculations about the best kind of constitution were "the most worthy curiosity of any the wit of man can possibly devise." It would be foolish to propose radical changes to existing benign constitutions, like that of Britain, he thought. But what if the opportunity to start afresh arose elsewhere, "either by a dissolution of some old government, or by the combination of men to form a new one, in some distant part of the world"? When Madison read this, he must have heard Hume speaking to him directly. The time had come to dissolve the old government, and the combination of delegates in Philadelphia now had the responsibility to devise a new one.

Hume had suggested two principles of constitutional governance in his essay, both of which Madison thought admirably suited to America. The first was a theory of refinement or *filtration* of representatives, in which higher levels of representatives would be chosen by those at lower levels, rather than elected by the people. Ordinary voters would elect local representatives, who would then elect a higher level of representatives, and so on up the ladder. Madison adopted the filtration theory in his *Vices* essay, which envisaged "a process of elections" designed to ensure that the most senior places in government would be occupied by "the purest and noblest characters" in society. Such a system would "extract from the mass of the Society" those who "feel most strongly the proper motives to pursue the end of their appointment, and be most capable to devise the proper means of attaining it." In the Convention he described this as a "policy of refining the popular appointments by successive filtrations."³²

Hume offered a second thought on the problems of democracy, and Madison seized on this as well. The public good is more likely to be promoted in large republics, said Hume, and Madison saw this as an argument to transfer power from the states to the *extended republic* of a national American state. Hume had turned on its head an argument which Montesquieu had made in *The Spirit of the Laws*. Montesquieu believed that republics should be small in size because he thought that powerful interest groups would promote their private ends in large states.³³ Just the opposite, said Hume. Large republics are protected from "tumult

³¹ HUME, *POLITICAL ESSAYS*, *supra* note 30, at 4.

³² *Records*, I.50. Other delegates subscribed to the filtration theory: I.133 (Wilson); I.136 (Dickinson); I.152 (Gerry); II.54 (G. Morris). Hamilton subsequently endorsed it in the New York ratifying debates. June 21, 1788, 5 *THE PAPERS OF ALEXANDER HAMILTON* 41 (Harold C. Syrett and Jacob E. Cooke, eds., 1962).

³³ MONTESQUIEU, *THE SPIRIT OF THE LAWS* 124, at VIII.16 (Cambridge U.P., 1989).

and faction,” since the very size of the country makes it harder for factions or interest groups to unite in a common plan. “The parts are so distant and remote, that it is very difficult, either by intrigue, prejudice, or passion, to hurry them into any measures against the public interest.”³⁴

Madison had seen corrupt voters back in Orange County, Virginia, and experienced the “turbulence” of small state politicians in the state’s House of Delegates. He expected something better from a national American government, and eagerly adopted Hume’s defense of extended republics. With Hume, he recognized that a well-organized state would seek to prevent a majoritarian faction from oppressing a minority; and this, he thought, a large state could do more easily than a small one. In his essay he wrote that, in an extended republic,

the Society becomes broken into a greater variety of interests, of pursuits, of passions, which check each other, whilst those who may feel a common sentiment have less opportunity of communication and concert. It may be inferred that the inconveniences of popular States contrary to the prevailing Theory, are in proportion not to the extent, but to the narrowness of their limits.

Madison had added a wrinkle to Hume’s theory. Hume had thought that a majoritarian faction could never assemble in a large state. Madison agreed with this, but said that it wasn’t the size of the state that prevented this. Rather, it was the multiplicity of the factions and their ability to check each other.³⁵

In the Convention, Madison dropped the extended republic theory from his essay into a speech he made to answer Connecticut’s Roger Sherman. As a states’ rights supporter, Sherman had wanted state legislatures and not the voters to choose members of the House of Representatives, and as a nationalist Madison opposed this. In a large nation, argued Madison, members of the lower House might safely be elected by the people. There is a danger of majoritarian oppression, but this is less likely in an extended republic:

The only remedy is to enlarge the sphere, & thereby divide the community into so great a number of interests & parties, that in the 1st place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and in the 2^d place, that in case they sh^d have such an interest, they may not be so apt to unite in the pursuit of it.³⁶

That gives us two methods of dealing with the problems of democracy—filtration and an extended republic—and as E.E. Schattschneider noted this might

³⁴ HUME POLITICAL ESSAYS *supra* note 29, at 232.

³⁵ Hume had argued elsewhere for the need for a constitution in which private interests check each other in his essay *Of the Independence of Parliament*, HUME, POLITICAL ESSAYS, *supra* note 30, at 14.

³⁶ *Records*, I.136. Martin Diamond unpersuasively argued that this speech converted the other delegates to Madison’s theory of extended republics. However, the theory was not mentioned elsewhere in the Convention, and there is little evidence to support Diamond’s claim. MARTIN DIAMOND, *THE FOUNDING OF THE DEMOCRATIC REPUBLIC* 37 (1981). See Christopher Wolfe, *On Understanding the Constitutional Convention of 1787*, 39 J. POL. 103 (1977); James H. Hutson, *Riddles of the Federal Constitutional Convention*, 44 WM. & MARY Q. (3d Series) 411, 421-22 (1987).

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seem like one method too many.³⁷ If democracy is not to be feared in an extended republic, why should presidents and senators be filtered by having them chosen by elected representatives and not by the people? That was a point which supporters of democracy would grasp in time, but Madison was yet not one of them.³⁸ Instead, he thought the two strategies would reinforce each other and that both were necessary.

The Virginia Plan incorporated Madison's filtration principle: the idea that superior men will reach the exalted seats of power in government when they are appointed from lower bodies rather than elected by the people. The Plan provided for a separation of powers, with executive, legislative and judicial branches, but democratic excesses would be minimized by interposing layers of representatives between the people and their political leaders. The "first" or lower house, today's House of Representatives, would be popularly elected, and would be "the grand depository of the democratic principle of the government," according to George Mason. "It was, so to speak, to be our House of Commons."³⁹ The second or higher branch, our Senate, would be co-equal in power, but its members would be selected by the first branch from a list of nominees provided by the state legislatures. Together, the two branches would elect the President, called the "national executive." This was spelled out in the Plan's Resolution Seven:

Resolved that a National Executive be instituted; to be chosen by the National Legislature for the term of ___ years, to receive punctually at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made so as to affect the Magistracy, existing at the time of increase or diminution, and to be ineligible a second time; and that besides a general authority to execute the National laws, it ought to enjoy the Executive rights vested in Congress by the Confederation.⁴⁰

Resolution Seven would also have limited the president to a single term. That might have seemed an uncontroversial fetter on the office, since term limits were a feature of the Virginia Constitution, which Madison had drafted along with Mason and Jefferson, and governors are still term limited in Virginia. However, the restriction expressed a concern about presidential power, even beyond the filtration principle.

When compared to the Constitution which the delegates finally adopted, the Virginia Plan limited the President's power in yet another way. The Constitution grants the president the power to veto bills for any or no reason, subject to an override by a two-thirds vote of Congress. In Resolution Eight of the Virginia

³⁷ See E.E. SCHATTSCHEIDER, *PARTY GOVERNMENT* 6 (2004).

³⁸ After responding to Sherman on June 6, Madison must have voted in favor of a Congressionally-appointed president in roll calls 45, 46 and 167, on June 11 and 12 and July 17, respectively. Madison continued to support a filtration theory of government on June 26 (the people and many representatives "were liable to err ... from fickleness and passion"). *Records*, I.422. While the filtration theory had been nearly swallowed up in Federalist 10 by the manner in which the defects of democracy would be cured in an extensive republic, Madison continued to insist on the need for "auxiliary precautions" in Federalist 63, the last of the papers he authored.

³⁹ *Records*, I.48.

⁴⁰ *Records*, I.21.

Plan, however, the presidential veto power was much more restricted, and shared with a quasi-judicial Council of Revision:

Resolved, that the Executive and a convenient number of the National Judiciary, ought to compose a council of revision with authority to examine every act of the National Legislature before it shall operate, & every act of a particular Legislature before a Negative thereon shall be final; and that the dissent of the said Council shall amount to a rejection, unless the Act of the National Legislature be again passed, or that of a particular Legislature be again negatived by ___ of the members of each branch.⁴¹

The idea of a president sharing his veto power with members of the Supreme Court will seem strange to us. It made sense to Madison, however, since he did not have a thick conception of executive power or of a separation of powers in which the president might routinely oppose the will of Congress. He did think the veto might be employed to strike down the debtor relief schemes he feared, “those unwise & unjust measures which constituted so great a portion of our calamities.”⁴² Nevertheless, the structure of the Virginia Plan would not lead one to expect this to happen very frequently, for the reasons Madison gave in his *Vices* essay. Pro-debtor factions would be weaker in an extended republic than in state governments, and the appointed senate would wisely constrain immoderate measures from the House, as an application of Madison’s filtration theory.

If Madison wanted judges on the Council of Revision, then, it was because he saw the veto more as a judicial than a political act, to be employed when the legislature overstepped its constitutional bounds. Maryland’s Luther Martin recognized that the courts would pass on the constitutionality of legislation,⁴³ but the doctrine of judicial review lay in the future and what Madison saw in its place was the Council of Revision.

Madison’s Council of Revision was not adopted. Instead, the delegates compromised on a full veto power, which might be exercised in any case of political disagreement, but one which a super-majority in Congress could override. Nevertheless, the president’s veto power was understood in constitutional terms for much of the nineteenth century. Madison gave an example of this in his last act before leaving office, in vetoing legislation for internal improvements because he thought the federal government’s Commerce Power could not include the power to build roads and canals.⁴⁴ Similarly, near the end of the century,

⁴¹ *Id.* Randolph presented the Virginia Plan on May 29. On the same day, South Carolina’s Charles Pinckney tabled his own plan of government. A record of its contents was not kept but New York’s Robert Yates reported that Pinckney stated that it was grounded on the same principles as the Virginia Plan. A draft of the plan which Pinckney subsequently provided featured a Congressionally-appointed president. *See Records*, III.604-09. Pinckney is a less than reliable witness about his role in the Convention, but there is no reason to suppose that he differed from Randolph on how the president was to be chosen.

⁴² *Records*, II.74.

⁴³ *Records*, II.76.

⁴⁴ Veto Message to Congress. JAMES MADISON, WRITINGS 718 (1999).

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Grover Cleveland vetoed a farm relief bill for which he said he could find no warrant in the Constitution.⁴⁵

In sum, the Virginia Plan would have created an Executive very different from the one we know today. Appointed by Congress, the president would be its creature, charged with doing its will but seemingly with little discretion about how to do so. He would have a veto over legislative acts, but this would be shared with members of the bench and for the most part limited to passing on the constitutionality of bills. The crucial power would vest in the House of Representatives, Mason's "House of Commons" which would appoint the members of the Senate, and which with the Senate would appoint the president, who would thus be doubly insulated from the people. If anything, Madison's president would have lacked the power of a modern prime minister in a parliamentary system, who typically dominates his party and parliament.

The fear of executive misbehavior led some delegates to propose an extraordinary further limitation on the office: a three-man presidency. The Virginia Plan contemplated a single president, but Edmund Randolph argued that a troika could better represent what were then the three sections of the country: New England, the middle states and the south. Besides, said Randolph, a single executive is "the fœtus of monarchy."⁴⁶ Madison opposed this and the Convention voted it down, but George Mason agreed with Randolph, as did another ten delegates.⁴⁷ At the end of the Convention, Mason and Randolph refused to sign the Constitution, in part because they feared executive power.

V. WHY DID THEY WANT PARLIAMENTARY GOVERNMENT?

Presidential government is taken for granted by Americans. Why then were the Framers so attracted to what today more closely resembles a parliamentary system? The simplest answer is that this was the system with which they were most familiar. Save for Connecticut, all of the states adopted new constitutions after the Revolution, and in nearly every case they featured a governor chosen by the legislature. The most influential state constitution, and the first one to be adopted, was that of Virginia, and this provided for a governor, or chief magistrate, to be chosen annually by joint ballot of both houses of the legislature.⁴⁸ Only in New York, Massachusetts and New Hampshire were governors elected directly by the people.

Many constitutions, like that of Virginia, formally provided that the legislative, executive and judicial powers were to be separate, and that legislators could

⁴⁵ Grover Cleveland: "Veto Message," February 16, 1887. Available at <http://www.presidency.ucsb.edu/ws/index.php?pid=71489#axzz1TzmvIGZj>.

⁴⁶ *Records*, I.66.

⁴⁷ FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 240-41 (1985).

⁴⁸ A procedure recommended in 1776 by John Adams. See JOHN ADAMS, *Thoughts on Government in THE PORTABLE JOHN ADAMS* 233 (2004).

not serve as governors. This, however, this was the thinnest kind of separation of powers, one that scarcely deserves its name. In every state but New York the legislature appointed an executive council which could countermand the governor's decisions. "The Executives of the States," noted Madison, "are in general little more than Cyphers; the legislatures omnipotent."⁴⁹ For the delegates, then, parliamentary government was the default position.

The parliamentary form of government was also one with which the delegates had become familiar during the colonial period. And while they might have abhorred government *from* Westminster before the Revolution, once it was over they fell over themselves in praise of the government *of* Westminster. Conservatives such as Hamilton, Dickinson and South Carolina's Charles Pinckney confessed their admiration of Britain's constitutional monarchy,⁵⁰ and even their opponents saw the virtues of the British system. "There is a natural inclination in mankind to Kingly Government," observed Franklin.⁵¹ Only a republican system of government would do for the United States, said Randolph; otherwise, he said, he might well be prepared to adopt the British system in America.⁵² North Carolina's Hugh Williamson saw an American monarchy as inevitable,⁵³ and some delegates such as Hamilton and Gouverneur Morris might have welcomed this.⁵⁴ Maryland's John Mercer copied out a list of 20 delegates who, he laughingly said, favored an American monarchy. Mercer was an opinionated 28 year-old who saw monarchists under his bed, but some delegates took him seriously.⁵⁵ As Gordon Wood notes, monarchy prevailed almost everywhere else, and "we shall never understand events of the 1790s until we take seriously, as contemporaries did, the possibility of some sort of monarchy developing in America."⁵⁶

Some delegates wanted a parliamentary government for a reason that seems very dated today. If a president were popularly elected, would voters know much about a candidate from outside their state? "Of the affairs of Georgia," said Madison, "I know as little as those of Kamskatska."⁵⁷ That was an argument for a Congressional appointment, said Sherman, since legislators would know the presidential candidates better than the voters.⁵⁸ All this would soon change, and indeed was changing, with changes in transportation and communication tech-

⁴⁹ *Records*, II.35. See CHARLES C. THACH, JR., *THE CREATION OF THE PRESIDENCY, 1775-1789: A STUDY IN CONSTITUTIONAL HISTORY* ch. 2 (2007); BERNARD BAILYN, *THE ORIGINS OF AMERICAN POLITICS* 78-79 (1970).

⁵⁰ *Records*, I: 299 (Hamilton), I.86-87 (Dickinson), I.398 (Pinckney).

⁵¹ *Records*, I.83.

⁵² *Records*, I. 66.

⁵³ *Records*, II.101.

⁵⁴ See LOUISE DUNBAR, *A STUDY OF "MONARCHICAL" TENDENCIES IN THE UNITED STATES FROM 1776 TO 1801* 60, 91 (1922).

⁵⁵ *Records*, II.191-92.

⁵⁶ GORDON S. WOOD, *REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT* 50 (2006).

⁵⁷ Letter to Thomas Jefferson Aug. 12, 1786, 9 PJM 95.

⁵⁸ *Records*, II.29.

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nology.⁵⁹ On August 22, John Fitch made the first successful trial of a steamboat on the Delaware River, in the presence of delegates to the Convention. Nevertheless, the delegates did not foresee these changes, or the rise of national parties that would shortly address the problem of voter ignorance.

There were two additional and more important reasons why many delegates opposed a democratically elected president: first, they were fearful of democracy; and second, they were apprehensive of presidential power. Put the two together, in the form of a democratically elected president, and one had the fetus of monarchy of which Randolph had complained.

Nearly all of the delegates mistrusted democracy, and given a choice between the popular election of the president and a Congressional appointment they preferred the latter. Like Madison, they liked the idea of a selection filtered by an intermediate level of elected officials. The defects of the Articles period could be traced, they thought, to an “excess of democracy,”⁶⁰ with its “turbulence and follies.”⁶¹

The delegates had decided to keep their deliberations secret, and for the most part adhered to this. This made it easier to express a contempt for democracy which at times made them seem like French aristos peering through their lorgnettes at *la canaille*. Elbridge Gerry, fresh from Shays’ Rebellion in western Massachusetts, observed that “the worst men get into the Legislature. Several members of that body have lately been convicted of infamous crimes. Men of indigence, ignorance and baseness, spare no pains, however dirty to carry their point against men who are superior to the artifices practiced.”⁶² Roger Sherman agreed. “The people ... immediately should have as little to do as may be about the Government. They want information and are constantly liable to be misled.”⁶³ For his part, George Mason thought that “it would be as unnatural to refer the choice of a proper character for chief Magistrate to the people, as it would, to refer a trial of colours to a blind man.”⁶⁴

Madison had spent the previous winter boning up on the republics of antiquity, a study which did nothing to reassure him about democracy. He feared “the transient impressions into which [the people] might be led,” and wondered whether they might propose land reform schemes like those of the Gracchi in republican Rome.

An increase of population will of necessity increase the proportion of those who will labour under all the hardships of life, & secretly sigh for a more equal distribution of its blessings. These may in time outnumber those who are placed above the feelings of indigence. According to the equal laws of suffrage, the power will slide into the hands of the former. No agrarian attempts have yet been made in this Country, but symptoms of a leveling spirit, as we

⁵⁹ See DANIEL WALKER HOWE, *WHAT HATH GOD WROUGHT: THE TRANSFORMATION OF AMERICA, 1815-1848* (2007) (explaining how new technologies in travel and communication helped shape the movement towards popular sovereignty).

⁶⁰ *Records*, I.48 (Gerry), I.301 (Hamilton).

⁶¹ *Records*, I.51 (Randolph).

⁶² *Records*, I.132.

⁶³ *Records*, I.48.

⁶⁴ *Records*, II.31.

have understood, have sufficiently appeared in a certain quarters to give notice of the future danger.⁶⁵

What were they thinking, we are tempted to ask. Without the support of the ordinary people they now denigrated, America would not have won its independence a few years before. However, the Patriot's passionate attachment to absolute liberty during the Revolution had led to lawlessness and violence, and while this was condoned and even encouraged when directed against Loyalists, it was quite another thing when the mob turned its attention to the new American governments.

Serious rioting broke out in many of the major American cities in the 1780s. The Revolution had clothed public protests with a mantle of legitimacy, and state authorities, which had relied on extralegal groups during the Revolution, were reluctant to resist the same groups when the war was over.⁶⁶ Knowing this, the delegates feared that what popular suffrage would produce was the Massachusetts election of May 1787, when conservative James Bowdoin had lost his bid for reelection as governor of the state because he had called up the militia to suppress Shays' rebellion. Madison told the delegates that "the insurrections in Massachusetts admonished all the States of the danger to which they were exposed."⁶⁷

In the midst of their deliberations, the delegates were treated to a vivid example of mob rule when an elderly woman was stoned to death not five blocks from their meeting place. The widow Korbmacher, as she was called, had been set upon as a witch on May 5, before the delegates arrived. On July 10, the mob struck again, shouting insults, carrying her through the streets and pelting her with stones. She died of her injuries on July 18,⁶⁸ the day after the delegates voted 9 to 1 against the popular election of the president on roll call 165.⁶⁹

Some delegates knew mob violence at first hand. In 1779, James Wilson narrowly escaped death at the hands of a mob after he defended Loyalists whose property had been seized. Wilson barricaded himself in his house, two blocks from Independence Hall, with twenty or so of his colleagues (including two delegates to the Philadelphia Convention, Robert Morris and Thomas Mifflin). The mob was in the process of aiming a cannon at the house when they were dispersed by the arrival of the cavalry led by the military commandant of Philadelphia, Benedict Arnold. The mob had been whipped up by the state's populist governor, who himself lived in a house that had been confiscated from a Loyalist. Six people died in the affair, but the rioters were afterwards pardoned. Wil-

⁶⁵ *Records*, I.422-23.

⁶⁶ Gordon S. Wood, *A Note on Mobs in the American Revolution*, 23 *WM. & MARY Q.* 635 (1966); Arthur M. Schlesinger, *Political Mobs and the American Revolution, 1765-76*, 99 *AM. PHIL. SOC.* 244 (1955).

⁶⁷ *Records*, I.318.

⁶⁸ RICHARD BEEMAN, *PLAIN, HONEST MEN: THE MAKING OF THE AMERICAN CONSTITUTION* at 77, 226-27 (2009).

⁶⁹ *Records*, II.24. The delegates agreed that votes would be taken by state, with a majority of states deciding an issue, and a majority of delegates within each state deciding how the state would vote.

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son had to flee Philadelphia for a few weeks, and his house came to be called “Fort Wilson.”⁷⁰

The fear of democracy was especially pronounced when the subject of a popularly elected president arose. Roger Sherman argued that “an Independence of the Executive on the supreme Legislative, was ... the very essence of tyranny.”⁷¹ Similarly, George Mason argued that “if strong and extensive powers are vested in the Executive, and that Executive consists only of one person, the government will of course degenerate (for I will call it a degeneracy) into a monarchy.”⁷² What delegates feared was that a president elected by the people would threaten liberty more than a hereditary monarch who lacked the legitimacy conferred by a popular election. “We are not indeed constituting a British Government,” said Mason, “but a more dangerous monarchy, an elective one.”⁷³

Sherman wanted Congress to impose severe limits on the president’s authority. The president, he said, in a nasal accent which grated on the ears of Southern delegates, should be nothing more than the legislature’s agent. His job is to execute the laws passed by the legislature without exercising much or any discretion about how this is done.⁷⁴ This was a theory of separation of powers, though not one now familiar to us. The legislature would make the laws but not apply them and the executive would apply them but not make them, and the separation of the two powers would preserve liberty and the rule of law.⁷⁵

This was a very old-fashioned view of executive authority. A hundred years before, John Locke had argued that the executive should have broader powers. Under the royal prerogative, the King had the discretion to interpret or even vary legislation when the public good so demanded, and Locke thought this a valuable

⁷⁰ Pauline Maier, *Popular Uprisings and Civil Authority in Eighteenth-Century America*, 27 WM. & MARY Q. (3d series) 29, 33-34 (1970); John K. Alexander, *The Fort Wilson Incident of 1779: A Case Study of the Revolutionary Crowd*, 31 WM. & MARY Q. (3d series) 589 (1974).

⁷¹ *Records*, I.68.

⁷² *Records*, I.113.

⁷³ *Records*, I.101. Mason was echoing Thomas Jefferson. “An *elective despotism* was not the government we fought for.” Thomas Jefferson, *Notes on the State of Virginia*, query 13, in THE WRITINGS OF THOMAS JEFFERSON, 245 (1984). See BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* (2010).

⁷⁴ Sherman proposed other measures to curtail the president’s power. He would have permitted Congress to remove the president at its pleasure (*Records*, I.85). He also wanted Congress to appoint a council of advice which, like the executive councils of state governments, could veto the president’s decisions (*Records*, I.97). He opposed a presidential veto over the legislature (*Records*, I.99), and would even have approved a multiple presidency with the number of co-presidents left blank, so that Congress might appoint additional co-presidents should it want to overrule a president to whom it objected (*Records*, I.65).

⁷⁵ Sherman’s ideas about the prerogative seem to have been taken from Jean-Jacques Rousseau, amongst others. See J.-J. ROUSSEAU, *SOCIAL CONTRACT* II.ii. See Roger Sherman Boardman, *Roger Sherman: Signer and Statesman (The Era of the American Revolution)* 259 (1971). Even John Adams, in his 1776 *Thoughts on Government*, *supra* note 48, at 237, wanted a governor who was elected annually by the legislature and who was “stripped of most of those badges of domination called prerogatives.”

right, since legislators are not “able to foresee, and provide by laws, for all that may be useful to the community.”⁷⁶ However, Sherman and others of the Framers hearkened back to even earlier theories of the prerogative which had their origins in the English Civil War and parliamentary jealousy of the use Charles I had made of the prerogative to dispense with parliament and rule autocratically.

Sherman’s views about the prerogative were those of a member of a “Country” party, in contradistinction to a “Court” party, with the distinction between the two parties derived from the Court and Country parties of early modern British history. During the English Civil War, the Court party favored the crown prerogative, at the expense of parliament, while the Country party sought to restrict the royal prerogative and saw Parliament as the guarantor of English liberties. The two parties also differed on the need for civic virtue in a republic. Country party members thought that republican government could not be preserved unless the citizens had a disinterested desire to promote the public good, shorn of any attachment to their private or factional interests. “Cabal,” “corruption” and “faction,” where private interest trumped the public good, were seen as mortal ills for a state.⁷⁷ By contrast, Court party members scoffed at the idea of a special kind of republican virtue. With Hume they agreed that “all plans of government, which suppose great reformation in the manners of mankind, are plainly imaginary.”⁷⁸

Apart from Sherman, Country party members likely included Elbridge Gerry of Massachusetts, John Lansing and Robert Yates of New York, Benjamin Franklin and Jared Ingersol of Pennsylvania, Gunning Bedford and Richard Bassett of Delaware, Luther Martin, Daniel Jennifer and John Mercer of Maryland, Virginia’s Edmund Randolph, Hugh Williamson of North Carolina, Pierce Butler, John Rutledge and Charles Cotesworth Pinckney of South Carolina, and Abraham Martin and William Few of Georgia.⁷⁹ The Court party was represent-

⁷⁶ JOHN LOCKE, *SECOND TREATISE ON GOVERNMENT* ch. xiv § 159.

⁷⁷ Luxury was also an enemy, since it made citizens focus on their self-interest and wealth, and as a member of the Country party Mason proposed that Congress be given the power to enact sumptuary laws against luxury goods. “No Government can be maintained unless the manners be made consonant to it,” he argued (*Records*, II.344). “Let those who seek distinction be channeled into ways more conducive to the public welfare.” The motion failed (roll call 319, *Records*, II.340), but received support from Delaware, Maryland and Georgia.

⁷⁸ HUME, *POLITICAL ESSAYS*, *supra* note 30, at 222.

⁷⁹ A list that overlaps somewhat with that of McDonald, *supra* note 47, at 200. Many of the Framers do not fall neatly on one side or other of the Country-Court divide. For example, John Dickinson seemed in some respects a Country party member, but he also admired Hume and believed that all history proved “that trade and freedom are nearly related to one another” (Letter V from a Farmer) available at http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=690]. Country party ideals could also coexist with a realistic understanding of human shortcomings. Washington, than whom no one better represented republican virtue, had his nose rubbed in it when he sought to persuade his soldiers to re-enlist or requested supplies for his troops from Congress. From his experiences he concluded that “the few . . . who act upon Principles of disinterestedness are, comparatively speaking, no more than a drop in the Ocean.” Letter to John Hancock, Sept. 24 1776, in 6 *THE WRITINGS OF GEORGE*

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ed by Hamilton, Gouverneur and Robert Morris and James Wilson of Pennsylvania, and John Rutledge of South Carolina.⁸⁰

Madison may also be counted as a member of the Court party at the Convention. His *Vices* essay argued that self-interest would blind voters to the common good or even their long term interest. "Place three individuals in a situation wherein the interest of each depends on the voice of the others, and give to two of them an interest opposed to the rights of the third? Will the latter be secure?" As an answer, Madison devised a constitutional regime whose purpose was to blunt the majoritarian excesses of an unconstrained democracy. In *Federalist* 51 Madison famously expanded on the idea that republican virtue would not suffice. Men are not republican angels, he said, but self-interested seekers of private gain, and government should channel self-interest in such a way that it serves the public good.⁸¹ "Ambition must be made to counteract ambition," so that the overweening pursuit of advantage by one group is checked by other groups in the competition for power.

One would expect a Country party member to prefer a Congressionally-appointed president who was closely accountable to Congress, and a Court party member to want a powerful president who might on occasion defy Congress. Country party members would also be expected to want to limit the president to a single term of office, and Court party members to oppose term limits. In general, Country party members wanted a relatively weak executive and opposed a popularly elected president, while Court party members preferred a president elected by the people, recognizing that this would clothe him with political legitimacy. However, the distinction between the two parties blurs over an influential group of delegates, such as Washington, who adhered to Country party ideas about republican virtue but who nevertheless wanted a strong national government and who, sooner or later, saw a popularly elected president as a way to strengthen the national government. And then there was Madison, a Court party nationalist whose filtration principle nevertheless led him to propose a Congressionally-appointed president. How he and the Country party nationalists were led to support the method of electing presidents in Article II of the Constitution, and what they understood this to mean, is one of the greatest and least understood dramas of the Convention.

WASHINGTON FROM THE ORIGINAL MANUSCRIPT SOURCES (John C. Fitzpatrick ed. 2001), <http://etext.virginia.edu/toc/modeng/public/WasFi06.html>.

⁸⁰ *Records*, II.364.

⁸¹ Garrett Sheldon traces Madison's rejection of republican virtue to the Calvinist influence of James Witherspoon. See GARRETT WARD SHELDON, *THE POLITICAL PHILOSOPHY OF JAMES MADISON* (2001). See also JOHN PATRICK DIGGINS, *THE LOST SOUL OF AMERICAN POLITICS: VIRTUE, SELF-INTEREST, AND THE FOUNDATIONS OF LIBERALISM* (1984).

VI. THE DELEGATES VOTE

The delegates came from very different backgrounds. Some were conservative, some not; some were rich, some not. Surprisingly, it was the conservative or wealthy delegates — Hamilton, James Wilson, Gouverneur Morris and John Dickinson — who wanted a president elected by the people, while those whom one would have expected to be most sympathetic to popular elections — Roger Sherman, George Mason and John Rutledge — sought an appointed executive. As Hamilton observed, “the members most tenacious of republicanism ... were as loud as any in declaiming against the vices of democracy.”⁸²

James Wilson had most cause to fear the “excesses of democracy,” after the Battle of Fort Mifflin. Like Hamilton, Wilson wanted a strong central government; unlike Hamilton, however, Wilson sincerely believed in popular sovereignty, and subscribed to that most benign of legal fictions, the idea that in America sovereignty vests in the people.⁸³ Of all the delegates, he came closest to championing the present constitutional regime, one with a popular election of members of both houses of Congress as well as the president. He had signed the Declaration of Independence and served on the Supreme Court, but deserves to be remembered principally for his role at the Convention.⁸⁴

What Wilson had recognized, before anyone else, was how a democratically elected president would strengthen the strong national government he yearned to see. An elected president would be the only member of the government chosen by all the people of the United States, and would provide the leadership to resist parochial parties from different states. That was not a politic thing to say before the defenders of states’ rights at the Convention, but Wilson could be more candid at the Pennsylvania ratifying convention later that year. The president, he said, would be “THE MAN OF THE PEOPLE,” and as such would “consider

⁸² *Records*, I,288.

⁸³ See Randolph G. Adams, *Introduction in* SELECTED POLITICAL ESSAYS OF JAMES WILSON 180 (Randolph G. Adams ed., 1930), citing Wilson’s speech at the Pennsylvania Ratifying Convention, Nov. 24, 1787). Yet it was more than a legal fiction to Wilson, who employed his theory to impugn the doctrine of sovereign immunity which the state of Georgia had invoked when sued by a private citizen from another state. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793). The ruling in the case was subsequently reversed by the Eleventh Amendment, which removed such cases from federal courts. On the difficulties of current attempts to give life to Wilson’s theory, see Henry Paul Monaghan, *We the Peoples, Original Understanding, and Constitutional Amendment*, 96 COLUM. L. REV. 121 (1996) (responding to Akhil R. Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994); Akhil R. Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988)).

⁸⁴ Albeit one recognized as such only in recent years. See William Ewald, *James Wilson and the Drafting of the Constitution*, 10 U. PA. J. CONST. L. 901 (2008). Like Robert Morris, Wilson speculated wildly in land development schemes and ended up in a debtor’s prison. His leading role in the Convention remained hidden from view until Madison’s notes were published in 1840, and by then the country had moved on.

himself as not particularly interested for any [one part of the United States], but will watch over the whole with paternal care and affection.”⁸⁵

Wilson recognized that, for most delegates, a direct election of the president was a bridge too far. Nevertheless, the idea of democracy might be made more palatable if presidential electors were interposed between the president and the people, and what Wilson proposed was an electoral college: voters would elect members of the electoral college who would then choose the president. This was a clever method of addressing the fears of democracy, since it suggested that the electors might exercise an independent judgment if the voters chose poorly. However, Wilson’s motion was defeated 7 to 2 in roll call 11,⁸⁶ with only Pennsylvania and Maryland supporting it. The delegates then voted 8 to 2 for a president appointed by the legislature.⁸⁷ Wilson had failed, but over the course of the Convention he and his allies would create a coalition of nationalists who supported a strong presidency.⁸⁸

A second group of delegates, led by Elbridge Gerry, opposed the Virginia Plan’s proposal of a Congressionally-appointed president. These were states’ rights supporters who were troubled by the degree of centralization implicit in both Wilson’s democratically elected president and Madison’s Congressionally-appointed president, and who wanted the states to appoint the president.⁸⁹ A Congressional appointment, argued Gerry, would lead to “corruption.”⁹⁰ For Country party members, this was a code word for pampered fops trading favors at the feet of a monarch, and Gerry said the Virginia Plan would result in the same kind of underhanded deals between the president and legislators. Finally, said Gerry, a state-appointed presidency would give us better presidents than those whom the people would elect, as an application of Madison’s filtration principle.

⁸⁵ MERRILL JENSEN, JOHN P. KAMINSKI ET AL., 2 THE DOCUMENTARY HISTORY OF THE RATIFYING CONSTITUTION, RATIFICATION BY THE STATES: PENNSYLVANIA 452 (Madison: Wisconsin Historical Society, 1976 ff.) [hereafter DHRC].

⁸⁶ *Records*, I.79.

⁸⁷ *Records*, Roll call 12, at I.79. Wilson’s subsequent motion for a senate elected by the people fared even worse. Only his state supported the motion and it was voted down 10 to one. Roll call 31, at I.149.

⁸⁸ THACH, *supra* note 49, at 67-68. It is sometimes suggested that Washington’s presence at the Convention helped persuade the delegates to support a popularly elected president, since everyone expected that he would also be the first president. If it were thought that a popularly elected president might abuse his powers, he must have seemed a reassuring figure. South Carolina’s Pierce Butler thought that the delegates would not have been so willing to repose their confidence in the executive “had not many of the members cast their eyes toward General Washington as President; and shaped their Ideas of the Powers to given to a President, by their opinions of his Virtue.” Letter to Weedon Butler (May 5, 1788, in *Records*, III.302). And yet the delegates voted down a popularly elected president again and again.

⁸⁹ *Records*, I.80 (Gerry). See also I.154 (Sherman).

⁹⁰ *Records*, I.175-76. See also I.152, where Gerry argued for state-appointed senators for this reason.

On June 7 the delegates voted unanimously for a Senate appointed by state legislatures,⁹¹ but two days later voted 10 to 1 against a president appointed by state governors.⁹² They were, at this point, still wedded to a Congressionally-appointed president. On June 11 and 12 they voted to approve the Virginia Plan,⁹³ and when William Paterson presented the New Jersey Plan to the delegates on June 15 it also featured a president appointed by Congress.⁹⁴

The New Jersey Plan was a bombshell. When it was tabled John Dickinson turned to Madison and said “you see the consequence of pushing things too far.”⁹⁵ The Plan was proposed by “small state” delegates as more decentralized and less nationalistic alternative to the Virginia Plan. It modified the Articles of Confederation, but unlike the Virginia Plan did not junk them. Congress would have a taxing power, but would continue as a unicameral house, with each state given a single vote. The “large state” delegations from Virginia and Pennsylvania had caucused together. Behind the scenes, so too had the small state delegations from New Jersey, Connecticut and Delaware, along with Robert Yates and John Lansing from New York and Luther Martin from Maryland. There were now two radically different plans on the floor, and the debate between them would consume the deliberations and passions of the delegates for the next month.

To resolve the crisis, on July 2 the delegates appointed a Committee of Eleven, with one member from each state, to settle on a compromise. At Franklin’s suggestion, the committee proposed the plan of representation now found in the Constitution: representation by population in the House of Representatives and equal representation for states in the Senate. Delegates from the large states objected to this but were outvoted on July 7,⁹⁶ and on July 16 the Convention ratified the entire Committee’s proposal.⁹⁷ This came to be called the Connecticut Compromise, but the label is misleading, for it was less a compromise than a defeat for the large state delegates. The large state delegates met the next morning to see whether their plans for the Senate might be salvaged, but decided the game was lost.⁹⁸

When they met on July 17 the small state delegates pressed their advantage again, this time to defeat another of Madison’s pet ideas, a Congressional veto over state laws. On Madison’s extended republic theory, the national government

⁹¹ *Records*, Roll call 32, at I.149.

⁹² *Records*, Roll call 36, at I.175.

⁹³ *Records*, Roll call 45, at I.195; and roll call 46, at I.213-14.

⁹⁴ Paterson had seemingly subscribed to Madison’s filtration argument, but turned it around to argue for senators filtered by state legislatures. *Records*, I.251.

⁹⁵ *Records*, I.242.

⁹⁶ *Records*, Roll call 120, at I.549.

⁹⁷ *Records*, Roll call 156, at II.15. In an extraordinarily short time the delegates in Philadelphia and in Congress at New York arrived at two of the most momentous decisions in American history. Sixteen of the Philadelphia delegates had left for New York at the end of June to represent their states in Congress, which on July 13 passed the Northwest Ordinance that abolished slavery north of the Ohio River and prepared the way for the admission of six new states.

⁹⁸ “The time was wasted in vague conversation,” wrote Madison. *Records*, II.19-20.

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would be less prone to factions and interest group inefficiencies than state governments, and the Virginia Plan's Resolution Six would therefore have given Congress the power to "negative" or veto state laws which it thought contravened the Constitution. On June 8, Madison had taken this further and seconded a motion to extend the veto to every case in which Congress objected to the state law, whether or not it was thought to violate the Constitution.⁹⁹ The delegates had voted down the Congressional veto on June 8,¹⁰⁰ and lest any doubt remain the subject was brought to a vote again on July 17. Madison argued for the veto power, but even the Pennsylvanians threw in the towel and the motion failed 7 to 3.¹⁰¹

Now, however, the Pennsylvanians would counterattack over the presidency. Up to that point there had been a broad agreement that the president should be appointed by Congress. If anything, the New Jersey Plan tilted more strongly in the direction of parliamentary governance, since it reopened the question whether there should be more than one president at a time, and would have permitted Congress to remove the president at any time on the application by a majority of state governors.¹⁰²

Gouverneur Morris moved that the president be elected by popular suffrage. When it came to a vote, however, only Pennsylvania supported the resolution.¹⁰³ Maryland's Luther Martin then proposed that the president be chosen by electors appointed by state legislatures, but the delegates were still wedded to a Congressional appointment and voted 8 to 2 against, with only Delaware and Maryland in the minority.¹⁰⁴ Finally, the delegates voted unanimously for a Congressionally-appointed president.¹⁰⁵ Even the dissenters had given up, and everyone must have thought that the issue was finally settled.

That afternoon the delegates broke early and a group of them, led by Washington, visited Gray's Ferry, where one could observe the exotic plants of Bartram's Garden, drink tea or fish in the Schuylkill.¹⁰⁶ The leafy walks may have prompted reflection about the office Washington soon would hold, for two days later, on July 19, the delegates suddenly reversed themselves. On a motion by Gouverneur Morris, they unanimously agreed to reconsider the presidency.

Morris was a representative of the rising merchant class and a member of the Court party. He was as fearful of democracy as any delegate, but now he sought to persuade Country party members to support a democratically elected president. What Morris wanted was a president who, clothed with the authority

⁹⁹ *Records*, Roll call 34, at I.163. This was what Madison had wanted all along. See Letter of George Washington, April 16, 1787, 9 PJM 382. After the Convention was over, he continued to regret the absence of a Congressional veto over state legislation. See Letter to Thomas Jefferson, Oct. 24 1787, 10 PJM 206.

¹⁰⁰ *Records*, Roll call 34, at I.163.

¹⁰¹ *Records*, Roll call 163, at II.24.

¹⁰² *Records*, I.244 (Res. 4).

¹⁰³ *Records*, Roll call 165, at II.24.

¹⁰⁴ *Records*, Roll call 166, at II.24.

¹⁰⁵ *Records*, Roll call 167, at II.24.

¹⁰⁶ *Records*, IV.172.

conferred by a popular election, would strengthen the national government.¹⁰⁷ That was not an argument that would appeal to Country party or states' rights delegates, however. Instead, Morris astutely argued that the lower classes needed a tribune of the people, and this could only be the president. Congress would come to represent the rich and powerful, and if it appointed the president "legislative tyranny" would ensue. What was needed, therefore, was a separation of powers between the executive and legislative branches. "If the Legislature elect," said Morris, "it will be the work of intrigue, of cabal, and of faction."¹⁰⁸

Morris had cleverly sought to appeal to several different constituencies amongst the delegates. The "tribune of the people" would appeal to the pro-debtor crowd, who wanted a new Tribune Gracchus. Morris also sought to enlist the support of Country party members, with the buzz words of intrigue and cabal. The reference to Congressional tyranny would also appeal to states' rights supporters, notably Elbridge Gerry, who had spoken of corrupt bargains if the legislature appointed the president.¹⁰⁹ Finally, Morris sought to appeal to that man of theory, James Madison, whom Morris knew would hear echoes of Montesquieu in an argument for separation of powers.

The two men had known each other for some years. They did not overlap in the Continental Congress, but both were in Philadelphia in the early 1780s. For the first month of the Convention they saw little of each other. Though he was present at its start, Morris left after a few days and returned only on July 2, when he wasted no time in making up for his absence by launching into a patronizing speech in favor of a senate composed of American aristocrats.¹¹⁰ In his brashness, he had failed to take the measure of the delegates, and Madison was especially annoyed. On July 11 he admonished Morris for continually insisting on the "political depravity of men, and the necessity of checking one vice and interest" against another.¹¹¹ It wasn't so much what Morris had said, however, as the way he had said it. Madison didn't think men were angels, but Morris had spoken like a brassy New Yorker and this had irritated the Virginian.

This was a trying time for Madison. When he heard of the New Jersey Plan, he had felt "serious anxiety."¹¹² Before the Connecticut Compromise of July 16, the delegates feared the Convention might end in failure and tempers were running high. Within a few days, however, the crisis had passed, and he seems to have made up his differences with Morris. Years later he remembered Morris not unfondly. "To the brilliancy of his genius, [Morris] added, what is too rare, a candid surrender of his opinions, when the lights of discussion satisfied him, that they had been too hastily formed, and a readiness to aid in making the best of

¹⁰⁷ Hamilton too was no democrat, but as a nationalist recognized that a popularly elected president would change the balance of power between the states and federal government. Before anyone else, he recognized that the day would come "when every vital interest of the state will be merged in the all-absorbing question of *who shall be the next PRESIDENT.*" Letter from Hamilton to Governor Lewis, *Records*, III.410.

¹⁰⁸ *Records*, II.29-31.

¹⁰⁹ *Records*, I.80.

¹¹⁰ *Records*, I.517.

¹¹¹ *Records*, I.584.

¹¹² *Records*, I.242.

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measures in which he had been overruled.”¹¹³ Evidently Morris had confessed his error of July 2 to Madison (who also came appreciate the need to check one interest against another, in *Federalist* 10).

At the same time, Morris brought Madison around to the idea of a popularly elected president. When he arrived in Philadelphia Madison had subscribed to Hume’s theory of government, with its appointed executive, but without investing the deepest thought or feeling on the subject. A month before the Convention he confessed his uncertainties to Edmund Randolph. “A national Executive will also be necessary. I have scarcely ventured to form my own opinion yet, either of the manner in which it ought to be constituted, or of the authorities with which it ought to be clothed.”¹¹⁴ It was now prudent to drop Hume’s theory, but Madison needed a new theory to do so, and that was what Morris handed him, by invoking the separation of powers. At some level, Madison must have recognized, with the Pennsylvanians, that the nationalist cause he supported would be served by a powerful presidency, one who could stand up to the states as American presidents have done since then. But practical considerations were little more than an empty breeze to Madison, who yearned for the rock of a good hard theory. Happily, Madison was a supple theorist who could amend his theories when the need arose.¹¹⁵

The penny, so carefully inserted by Morris, now dropped. Madison had authored the Virginia Plan’s proposal for a Congressionally-appointed president, but after listening to Morris he did a nimble volte-face. As a nationalist, Madison was dismayed by the Connecticut Compromise and senators appointed by state legislatures, and as a nationalist he was now brought around to the idea of a popularly elected president. Like Morris, he recognized that a president so elected would strengthen the national government, and like Morris he veiled his argument in separationist rather than nationalist terms. A separation of powers between legislative, executive and judicial powers was essential to preserve liberty, and the three branches could be separate only if they were independent of each other. “A dependence of the Executive on the Legislature, would render it the Executor as well as the maker of laws; & then according to the observation of

¹¹³ Letter to Jared Sparks, April 8, 1831, in 3 THE WRITINGS OF JAMES MADISON, 500 (Gaillard Hunt ed. 1910).

¹¹⁴ April 8, 1787, 9 PJM 368.

¹¹⁵ It is not easy to reconcile the Madison of 1787, with his Congressional veto of state legislation, with the Madison of 1798, with his Virginia Resolution which argued that states had the right, when confronted with “dangerous” and unconstitutional federal laws, “to interpose for arresting the progress of the evil, and for maintaining within their respective limits, the authorities, rights and liberties of the states.” Years later an embarrassed Madison sought to distinguish this from Calhoun’s nullification doctrine. “Notes on Nullification,” in JAMES MADISON, THE MIND OF THE FOUNDER: SOURCES OF THE POLITICAL THOUGHT OF JAMES MADISON, 417 (Marvin Meyers ed., 1973). Madisonian apologists, notably Lance Banning and Jack Rakove, have nevertheless argued for the inner truth and consistency of Madison’s beliefs. LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE AMERICAN REPUBLIC (1995); JACK RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION (1996). But for the patriotic impulse to elevate Madison as an original thinker on the level of a Montesquieu or Hume, this would not matter.

Montesquieu, tyrannical laws may be made that they may be executed in a tyrannical manner.¹¹⁶

Morris had consolidated the nationalist faction at the Convention. Until that point the nationalists had differed amongst themselves on democratic elections and the presidency. Some had supported the Congressionally-appointed president of the Virginia Plan, others wanted a popularly elected president. Now the nationalists would present a united front in favor of a popularly elected president.

Morris and his allies moved cautiously. On July 19 Connecticut's Oliver Ellsworth and Maryland's Jacob Broom moved that the president be appointed by electors. This was an ambiguous motion. It might lead to a motion that the electors be elected by popular ballot, as James Wilson had proposed on June 2.¹¹⁷ Alternatively, it might be tacked on to a motion that the electors be chosen by state legislatures, as Elbridge Gerry had suggested,¹¹⁸ and as Maryland's Luther Martin and Jacob Broom had proposed.¹¹⁹ What Morris, Ellsworth and Broom sought to create was a coalition of all those opposed to a Congressional appointment, for they only had no use for electors.

The tactic succeeded. The motion passed by 6 to 3, with only the three southernmost states holding out for a Congressional appointment.¹²⁰ Ellsworth and Broom were states' rights supporters, and they next moved that the electors be chosen by state legislatures. This passed 8 to 2 in roll call 183, with Madison's Virginia in dissent and Morris' Pennsylvania voting yes.¹²¹ The Pennsylvanians had bowed to what they saw as inevitable, a states' rights coalition that had won one trick after another that month.

What would a presidency have looked like, had the choice fallen to state legislatures? The states would have been stronger, of course. There would have been a much weakened separation of powers, since state legislatures would ap-

¹¹⁶ *Records*, II.34. In a note he wrote afterwards Madison said that this speech was meant to defend Dr. McClurg's suggestion of a president appointed without a fixed term during good behavior. *Id.* In making the suggestion, McClurg had invoked the separation of powers. However, it is much more likely that, in adopting separationism, Madison was influenced by Gouverneur Morris than he was by Dr. McClurg, who had been picked from obscurity and whose talents were unsuited for political debate. It took two days for Madison to come fully around to separationism, from July 17 to July 19. See *Records*, II.56.

William Riker's reliance on McClurg's motion as a peg from which to hang an account of strategic voting seems considerably overdrawn. See William H. Riker, *The Heresthetics of Constitution-Making: The Presidency in 1787, with Comments on Determinism and Rational Choice*, 78 AM. POL. SC. REV. 1, 6 (1984).

McClurg was a naif who very likely did mean his motion seriously, adopting it from a similar suggestion Hamilton had made at I.292. Other delegates seemed to take McClurg seriously also, as four states supported his motion on roll call 169 at II.24. Madison continued to think well of McClurg's proposal for an unlimited presidential term. See Letter to Thomas Jefferson Oct. 24, 1787, 10 PJM 208.

¹¹⁷ *Records*, Roll call 11, at I.79.

¹¹⁸ *Records*, I.80 and II.57.

¹¹⁹ *Records*, Roll call 166, at II.24.

¹²⁰ *Records*, Roll call 182, at II.51.

¹²¹ *Records*, Roll call 183, at II.51.

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point both the president and the Senate. The party structure of American politics would be based at the state level, and this would likely have carried over to elections for the House of Representatives. For the most part the gridlock which characterizes the federal government today would be absent.

Table I *The Delegates Vote for a President Appointed by the States*

Roll Call, Date, Page	Resolution (Movers)	Outcome	Aye	No	Divided
36 June 9 I.175	State governors appoint (Gerry)	0-10-1 (NH absent)		MA CT NY NJ PA MD VA NC SC GA	DE
166 July 17 II.24	State legislatures appoint (Ellsworth, Broom)	2-8 (NH, NY absent)	DE, MD	MA CT NJ PA VA NC SC GA	
182 July 19 II.51	Substituting an election by electors in place of a Cong. appointment (Ellsworth)	6-3-1 (NH, NY absent)	CT, NJ, PA, DE, MD, VA	NC SC GA	MA
183 July 19 II.51	State legislatures appoint (Ellsworth)	8-2 (NH, NY absent)	MA, CT, NJ, PA, DE, MD, NC, GA	VA SC	

In short order, the delegates had voted twice against what we understand as the separation of powers, in both cases by overwhelming margins. On July 17 in roll call 167 they voted unanimously for a Congressional appointment of the president. Two days later they voted 8 to 2 in roll call 183 for a president appointed by electors appointed by state legislatures. In both cases they rejected the popular election of the president and affirmed his dependence on the legislative branch.

That should have been an end to it. However, on July 24 a Georgia delegate argued that it would be difficult to find capable men to serve as electors in distant states and moved that the president be appointed by Congress. This passed 7 to 4 in roll call 215, with Virginia and Pennsylvania voting no.¹²² Roll call 215 might have seemed decisive, but the delegates remained troubled and the next day they considered a proposal to split the difference. The president would be appointed by Congress for his first term, but if he ran again would be appointed by electors appointed by the states. This failed, seven votes to four.¹²³ That left the Virginia Plan on the table. On July 26 George Mason moved that the president be appointed by Congress, and this passed 6 to 3 in roll call 225, with Washington and Madison voting no.¹²⁴

At this point the delegates had voted six times for a Congressionally-appointed president. Its supporters had assembled a caucus composed of those, such as Randolph, Sherman, Mason and Charles Pinckney, who thought liberty best defended by the legislature and feared that a strict separation of powers would make a monarch of the president.¹²⁵ It also included those, such as Gerry, Sherman and Pinckney, who simply didn't think that the people were up to the task of electing a president.¹²⁶ Finally, it included the three southernmost states of North and South Carolina and Georgia, which as slave states had their own special reasons to fear a concentration of power in the national government. They were opposed by a smaller group of states, composed of Pennsylvania and (depending on who showed up that day) Maryland, Delaware and Virginia.

The delegates now thought they were nearly done. At the end of the day they turned over the draft constitution, with its appointed president, to a Committee of Detail for fine tuning and adjourned for ten days. The Committee reported back to the Convention on August 6, with a draft constitution that departed significantly from the Virginia Plan, but which still retained a Congressionally-elected president.¹²⁷ That question, it was thought, had been settled.

¹²² *Records*, II.98.

¹²³ *Records*, Roll call 218, at II.109.

¹²⁴ *Records*, Roll call 225, at II.118.

¹²⁵ I.66 (Randolph); I.68 (Sherman); I.113 (Mason), I.101, I.113; II.30 (Pinckney).

¹²⁶ I.48, I.132 (Gerry); I.154, II.29 (Sherman), II.30 (Pinckney).

¹²⁷ *Records*, II.171, II.185.

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Table II The Delegates Vote for a President Appointed by Congress

Roll Call, Date, Page	Resolution (Movers)	Outcome	Aye	No	Divided
12 June 2 I.79	For an appointment by Congress	8-2 (NH absent)	MA, CT, NY, DE, VA, NC, SC, GA	PA, MD	
45 June 11 I.195	For the Virginia Plan (Randolph)	6-5 (NH absent)	MA, PA, VA, NC, SC, GA	CT, NY, NJ, DE, MD	
46 June 12 I.213-14	For the Virginia Plan (Randolph)	6-3-2 (NH absent)	MA, PA, VA, NC, SC, GA	CT, NY, NJ	DE, MD
167 July 17 II.24	For an appointment by Congress	10-0 (NH, NY absent)	MA, CT, NJ, PA, DE, MD, VA, NC, SC, GA		
215 July 24 II. 98	For an appointment by Congress (Houstoun, Spaight)	7-4 (NY absent)	NH, MA, NJ, DE, NC, SC, GA	CT, PA, MD, VA	
218 July 25 II.108	Cong. appoints for the first term, state legislatures appoint for subsequent terms (Ellsworth)	4-7 (NY absent)	NH, CT, PA, MD	MA, NJ, DE, VA, NC, SC, GA	
225 July 26 II. 118	Cong. Appoints, 7 year term, term limits, impeachable on malpractice (Mason)	6-3-1 (MA, NY absent)	NH, CT, NJ, NC, SC, GA	PA, DE, MD	VA

It wasn't, though. On August 24 the delegates returned to the question. Daniel Carroll of Maryland, one of the two Catholics at the Convention and an ardent democrat, proposed that the president be elected by the people and not the legislature, but only Pennsylvania and Delaware supported the motion and it failed 9 votes to 2 in roll call 355.¹²⁸ The coalitions which had been assembled

¹²⁸ *Records*, II.399.

for roll calls 11 and 215 continued to hold, if less strongly than before. But then Gouverneur Morris spoke up to warn of legislative tyranny if the president were dependent on the support of Congress, and proposed that the president be appointed by electors themselves elected by the people. This gained three more votes, including that of Virginia, but the motion still failed, 6 to 5 in roll call 359.¹²⁹

Table III The Delegates Vote Against a Popularly Elected President

Roll Call, Date, Page	Resolution (Movers)	Outcome	Aye	No	Divided
11 June 2 I.79	Election by electors elected by the people (Wilson)	2-7-1 (NH, NJ absent)	PA, MD	MA, CT, DE, VA, NC, SC, GA	NY
165 July 17 II.24	Election by the People	1-9 (NH, NY absent)	PA	MA, CT, NJ, DE, MD, VA, NC, SC, GA	
355 Aug. 24 II.399	Election by the people (Carroll, Wilson)	2-9 (NY absent)	PA, DE	NH, MA, CT, NJ, MD, VA, NC, SC, GA	
359 Aug. 24 II.399	Election by electors elected by the people (G. Morris, Carroll)	5-6 (NY absent)	CT, NJ, PA, DE, VA	NH, MA, MD, NC, SC, GA	

This was the high tide of strict separationism at the Convention. Morris had won Connecticut and New Jersey over to his side, but had still not assembled a winning coalition. There were now three proposals on the table: one for a Congressional appointment, one for an appointment by the states, and a third for an election by the people. The first two proposals had secured majority support in various roll calls. Only the third, with its popularly elected president, failed to pass every time it was put to the delegates.

That still left the question up in the air. A motion to postpone the issue failed, as did a motion to refer the matter to a committee of all the states. Gou-

¹²⁹ *Records*, II.399.

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verneur Morris then proposed that the president be chosen by electors, as an abstract matter. The delegates would have understood that the electors might either be democratically chosen or appointed by the states. Had the motion passed, it would have amounted to a rejection of a Congressionally-appointed president, which was the plan then on the table. However, the delegates were split 4 to 4 and the motion was taken to have failed.¹³⁰

VII. AN EMPIRICAL STUDY

The delegates arrived at their final compromise two weeks later, on September 6, in what became Article II of the Constitution. Two narratives might be offered to explain how they finally settled on the manner of choosing a president. The first is that the democrats amongst them persuaded their colleagues to accept a popularly elected president by appealing to the need for popular elections and a separation of powers. This is the commonly accepted view of the Convention, but I think it mistaken.

A fair reading of the Framers' debates reveals a different understanding of what they intended and what they expected from the Constitution they drafted. The preferences and coalitions which had emerged over the first three months of the Convention were too strong for what would have been a radical change of heart. What the delegates agreed to on September 6 was not our modern presidential system, but a compromise in which each of the different coalitions walked away with the belief that their side had won the day. The debate, moreover, was primarily between a core of nationalists and states' rights supporters, in which the doctrine of separation of powers assumed at best a supporting role.¹³¹ In the end the two sides compromised in a constitution which offered something for everyone.

To understand how the delegates arrived at their final compromise, I examined the coalitions that emerged over the first three months of the Convention. In an empirical study of delegate votes to this point, appended as Appendix A, I regressed how they voted on choosing a president on variables measuring their ideologies, background and state characteristics, and found that three things principally influenced the delegates: nationalism, personal wealth and a desire for constraints on presidential power.

I hypothesized that a nationalist would want a popularly elected president, as this would increase his political authority in his dealings with states. For examples of this, think of Lincoln in 1861 or Eisenhower's decision to send federal troops to enforce integration in Little Rock in 1957.

Wealthy delegates had a greater stake in the revival of the economy, as well as a greater understanding of the costs of state laws that weakened credit mar-

¹³⁰ *Records*, Roll call 361, at III.399. William Riker mischaracterized this as a vote for the popular election of the president. See Riker, *supra* note 116, at 6.

¹³¹ In this I agree with William Riker, *supra* note 116 who nevertheless tried too hard to fit the debate into a procrustean bed of agenda-setting. The delegates were too sophisticated to be manipulated in this way.

kets. More than most delegates, they would have wanted a powerful national government to emerge from the Convention. They would then have supported the popular election of the president, as this would result in a stronger national government, one which would draw forth power from the states which were seen as the source of the country's financial problems.

If those who wanted a strong president supported a popular election, those who wanted to weaken the president's power opposed a popular election. This would include Country party delegates, who were suspicious of executive power, as well as states' rights delegates who saw a powerful president as a threat to state power.

I found that, as expected, delegates were more likely to support a popularly elected president if they were nationalists who wanted a strong central government. They were also more likely to do so if they were wealthy. On the other hand, they were less likely to do so if they wanted to weaken presidents by limiting them to a single term of office, as Country party members would seek to do.

The September 6 compromise led, in the fullness of time, to the modern system of American presidential politics, with a president elected by electors who do not exercise an independent judgment and simply vote the way the voters tell them. It would be a mistake, however, to assume that that is what the delegates intended. Many of them made it abundantly clear that they wanted anything but that, and the empirical analysis which I conducted helps to explain how the delegates understood the compromise.

VIII. WHAT THEY DECIDED

After roll call 355 on August 24, the delegates groped towards a grand compromise, with something for everyone, and the coalitions which had formed over the question of the appointment of the president began to blur. On August 31 the delegates referred the question of presidential elections to the Committee on Unfinished Parts, with one delegate for each state. Those who favored a democratically elected president were represented by Madison, Gouverneur Morris, Dickinson, Carroll, Rufus King of Massachusetts and possibly Hugh Williamson of North Carolina.¹³² They would be opposed by New Hampshire's Nicolas Gilman, South Carolina's Pierce Butler and Georgia's Abraham Baldwin. The two remaining members of the committee, Roger Sherman and New Jersey's David Brearly, had supported a Congressional appointment, but their states had voted a few days earlier on roll call 359 for a popular election.

The committee was well aware that whatever solution it might propose should commend itself to the delegates. The Convention was now three months into its deliberations. Everyone sensed that it must come to an end shortly. Years

¹³² *Records*, II.55-56 (King). Williamson was opposed to a president elected by the people on July 17 but also saw objections to a Congressional appointment on July 25. His state voted consistently for a Congressional appointment. He remained a strong state supporter on September 6, proposing an election by the House voting by state, if the electors failed to elect a president by majority vote *see Records*, II.527.

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later Madison recalled that the decision about how to choose a president, made so late in the day, “was not exempt from a degree of the hurrying influence produced by fatigue and impatience.”¹³³ The delegates were out of time and voted for the plan with a minimum of discussion. It was this or nothing.¹³⁴

On September 4 Gouverneur Morris spoke for the committee in explaining the changes. Many of its members, he said, had wanted a popular election of the president, but that was not what the committee had recommended. Instead, Morris said, the committee had proposed a change which would eliminate the prospect of intrigue and faction were Congress to appoint the president.¹³⁵ The committee’s plan also made it possible to re-elect the president to a second term and eliminate term limits which would deprive the country of an experienced president.

This was an argument for a form of separation of powers, and it seems to have won over Butler.¹³⁶ However, it would be a stretch to claim that the other members of the committee or the Convention subscribed to it or understood it to mean our current understanding of separationism. They didn’t anticipate a powerful executive branch and thought that the choice of president had been removed from the people in three ways.

First, the delegates who had been skeptical about democracy and who subscribed to Madison’s filtration theory would have noted that an electoral college was interposed between the voters and the president under Art. II § 1, cl. 2:

Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress...

This plausibly helped bring Madison on board, since he thought that the electors would exercise an independent judgment, arguing before the Virginia ratifying convention that a choice by electors would be “more judicious” than a vote by the people.¹³⁷ In *Federalist* 68, Hamilton agreed with him. Speaking of the electors, he said:

It was equally desirable, that the immediate election should be made by men most capable of analyzing the qualities adapted to the station, and acting under circumstances favorable to deliberation, and to a judicious combination of all the reasons and inducements which were proper to govern their choice. A small number of persons, selected by their fellow citizens from the general mass, will be most likely to possess the information and discernment requisite to so complicated an investigation.

¹³³ Letter from James Madison to George Hay, August 23, 1823 in Gaillard Hunt ed., *supra* note 113, at 147.

¹³⁴ That was not quite the end of the matter. On September 5 John Rutledge moved that the committee’s vote be postponed and that the delegates take up the original proposal for a president appointed by the legislature. This failed, 8 to 2 in roll call 445, and thereafter the Virginia Plan’s idea of a president appointed by Congress was never again raised.

¹³⁵ *Records*, II.500.

¹³⁶ *Records*, II.501.

¹³⁷ Record, X DHRC 1377; 11 PJM 154.

That wasn't the only reason for an electoral college. The three-fifths compromise had given slave states additional representation in the electoral college by counting slaves as three-fifths of a person. In addition, there was a concern that a state might inflate its votes by broadening its franchise.¹³⁸ However, these concerns might have been addressed without interposing a group of people between the voters and the president, nor was it necessary to defend their independent discretion, unless there was something suspect about choices made in popular elections. Similarly, the delegates would not have thought Art. II § 1, cl. 2's ban on Congressmen sitting as electors necessary unless they thought the electors would exercise an independent judgment.¹³⁹

Second, the delegates who had previously supported a Congressional appointment of the president might also have thought they had won the day. If clause 2 failed to give a candidate a majority of electoral votes, clause 3 threw the election to the House (originally the Senate, in the Committee's draft).

The Person having the greatest Number of Votes shall be the President, if such Number be a Majority of the whole Number of Electors appointed; and if there be more than one who have such Majority, and have an equal Number of Votes, then the House of Representatives shall immediately chuse by Ballot one of them for President; and if no Person have a Majority, then from the five highest on the List the said House shall in like Manner chuse the President....

This would have happened in 2000 had the Florida votes been disallowed, and did happen in the elections of 1800 and 1824. Many delegates at the Philadelphia Convention thought it would almost always happen this way, since they did not expect that, after George Washington, national candidates with country-wide support would emerge. George Mason thought the election would be thrown to the legislature 95 percent of the time,¹⁴⁰ and many of the most prominent members of the Convention, including Madison, Wilson, Hamilton, Dickinson, Randolph, Charles Pinckney, Rutledge and likely Sherman, agreed that this was likely.¹⁴¹ Almost the only delegate to disagree was Gouverneur Morris,¹⁴² who more than anyone had put the winning coalition together.

¹³⁸ *Records*, II.57 (Madison).

¹³⁹ As Hamilton emphasized in Federalist 68.

¹⁴⁰ *Records*, II.500. See also II.512. Mason raised the figure to 98 percent on June 18, 1788 in the Virginia ratifying convention.

¹⁴¹ *Records*, II.500; Record X DHRC 1377 (Madison); II.522 (Wilson); II.524-25, II.530 (Hamilton); II.513 (Dickinson); II.513 (Randolph); II.501 (Pinckney); II.511 (Rutledge); II.499 (Sherman). See also *Records*, II.524 (Clymer); II.501 (Williamson). This was not what Madison had wanted, see II.513, but his motion to let the electors choose the president if only a third of them settled on a candidate was defeated 9 to 2 in roll call 448 at II.508. The majority of delegates wanted Congress to play a role in presidential elections. By the end of the Convention, however, Madison described Article II as providing for a president "elected by the people." *Records*, II.587.

¹⁴² *Records*, at II.512. For an example of the floor manager at work, see Morris' anxious demand that Wilson get with the program, *Records*, at II.523. Baldwin was the only other delegate who expressed the view that a majority of electors would agree on a candidate. *Records*, II.501.

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This would have come down to Madison's Virginia Plan, and in case anyone missed the point he repeated it in *Federalist* 39, where he contrasted elections for members of the House with elections for senators and presidents. Members of the House would be elected "immediately" by the people, while senators and presidents would be chosen "indirectly from the choice of the people." That, he said, was the way in which governors were appointed in state governments, that is, by the legislature.

The delegates had voted for a form of separation of powers, but just what did this mean to them? Madison's encomium to separationism in *Federalist* 47 is often taken to refer to the modern American presidential system, but that is not what he had in mind. In the same paper, he held up the 1776 Virginia Constitution, which he had had a hand in drafting, as an example of separationism. We wouldn't think it so today. The 1776 Constitution declared that "the legislative, executive and judiciary departments, shall be separate and distinct," but then made the governor the creature of the legislature. He was not popularly elected but instead was appointed by the legislature. Just in case he forgot who appointed him, the legislature also appointed an executive council which could veto the governor's decisions. The Constitution went on to prohibit the governor from exercising "under any presence ... any power or prerogative, by virtue of any law, statute or custom of England." That might have been too great a concentration of power in the legislative branch, thought Madison, but this nevertheless was "the sense in which [the separation of powers] has hitherto been understood in America."

A third coalition, composed of delegates from smaller states, might also have thought they had won. They had just won the Connecticut Compromise, which gave them an equal number of seats in the Senate, and they were on a roll. Letting state legislatures choose the method of selecting presidential electors under Art. II § 1, cl. 2 might thus have seemed like one more notch on their belt. Six weeks before the delegates had voted 8 to 2 in roll call 183 for electors chosen by state legislatures, and some delegates would have expected that that is just what their states would do, given the choice. That indeed is how most states selected electors in the first presidential election of 1788-89, and in 1812 half the states still chose their electors in this manner. A quarter did so in 1824 and South Carolina continued to choose electors in this way in 1860.

Small state delegates would also have noticed that each state would have as many presidential electors as the number of its senators and representatives, giving smaller states a greater clout than they would have had if the number of electors had been based on state population. Moreover, when the electors failed to give a majority of their votes to a single candidate and the choice of president fell to the House, each state, large and small, would have one vote, a measure proposed by the astute Sherman.¹⁴³ But for this, recalled Rufus King (a nationalist member of the Committee on Unfinished Parts), small state delegates would not have agreed to the compromise.¹⁴⁴

¹⁴³ *Records*, II.527.

¹⁴⁴ *Records*, III.461.

The delegates who were fearful of democracy and the states' rights supporters thought that, in Article II, they had dodged a bullet. Moreover, the Constitution they devised featured a much weaker separation of powers than ours does. Their presidents would nearly always be chosen by Congress, making splits between the executive and legislative branches far less likely. The choice of who was to be president would be made by state delegations in the House of Representatives, and state legislatures would also choose both the presidential electors and the senators. Politics would be centered at the state level, and a party which won one branch of government would in most cases make a clean sweep of the presidency and both houses of Congress.

Few if any delegates thought that, by adopting Article II, they were voting for the popular election of the president. And yet, for the minority of democrats at the Convention, this was as close as they would come. That was how Dickinson remembered things in 1802, fifteen years later. He recalled that he came late to the Committee on Unfinished Parts one morning and found the other members on their feet, about to leave. As a courtesy, they read their draft plan to him, which again featured a president appointed by the legislature. Dickinson remonstrated with the other delegates. "The Powers which we had agreed to vest in the President, were so many and so great, that I did not think, the people would be willing to deposit them with him, unless they themselves would be more immediately concerned in his Election."¹⁴⁵ The work of the entire Convention would be lost, and the country would revert to the wholly unsuitable Articles of Confederation, with less chance of a successful revision. He then recalled what happened next:

Having thus expressed my sentiments, Gouverneur Morris immediately said—"Come, Gentlemen, let us sit down again, and converse further on this subject." We then all sat down, and after some conference, James Maddison took a Pen and Paper, and sketched a Mode for Electing the President agreeable to the present provision. To this we assented and reported accordingly.¹⁴⁶

Throughout their deliberations, the delegates were well aware that whatever they proposed would be for naught if it did not commend itself to the voters. George Mason observed that, "notwithstanding the oppressions & injustice experienced amongst us from democracy; the genius of the people is in favor of it, and the genius of the people must be consulted."¹⁴⁷ More than anyone, Dickinson was sensitive to the need for a constitution that the people would support. "When this plan goes forth," he told the delegates, "it will be attacked by the popular leaders. Aristocracy will be its watchword: the Shibboleth among its adversaries."¹⁴⁸ The only safe way of conferring such powers on a single individual would be if he were a man of the people.

During the Convention, Dickinson was the great compromiser. He was the first to propose that the Senate be elected by the state legislatures and more than anyone voiced the moderate Federalist position which carried the day. And it

¹⁴⁵ *Records*, IV.300.

¹⁴⁶ *Records*, IV.301.

¹⁴⁷ *Records*, I.101. See also *Records*, I.215 (Gerry); II.201 (Ellsworth).

¹⁴⁸ *Records*, II.278.

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was he, plausibly, who brokered the compromise which gave us Article II.¹⁴⁹ There is, of course, the possibility that his memory was faulty. Fifteen years after the fact, he recalled insisting that the president would entirely owe his election to the will of the people. There would be electors, but they would be mere ciphers. “There was no Cloud interposed between [the president] and the people.”¹⁵⁰ In 1788, however, just a year after the Convention had concluded, he had argued that the electors would exercise an independent discretion, and this in the *Letters of Fabius* written to persuade voters to support the Constitution. Here the Fabian conservative underlined that, while the power of the people pervades the Constitution, the people do not elect the president.

This president is to be chosen, not by the people at large, because it may not be possible, that all the freemen of the empire should always have the necessary information, for directing their choice of such an officer....¹⁵¹

The electors might throw away their votes on an unworthy candidate, but they might also, “justly revering the duties of their office, dedicate their votes to the best interests of their country.”¹⁵²

If there was a pure democrat at the Convention, that honor belongs rather to James Wilson. Wilson was the first to propose the popular election of the president, and his persistent appeals to democratic principles and political realities must have had an influence on other delegates. He believed that the legitimacy of government derived from the mutual consent of free men, and from the theory of a sovereign people he derived the right of popular sovereignty.¹⁵³ Defending the Constitution before the Pennsylvania ratifying Convention, he asserted that in principle the new government was entirely democratic,¹⁵⁴ and that the choice of

¹⁴⁹ While this is a nice story, it’s not the only one which can be told. Pierce Butler, another member of the Committee on Unfinished Parts, took credit for proposing the method of presidential elections in a May 1788 letter to an English kinsman. III.302. This seems an exaggeration, however. In the same letter Butler wrote that he thought the powers of the president excessive, and in an earlier letter to the same relative, written less than a month after the Convention ended, he wrote that “a Copy of our deliberations ... is not worth the expense of postage, or I wou’d now enclose it to You.” Quoted in S. Sidney Ulmer, *The Role of Pierce Butler in the Constitutional Convention*, 72 REV. OF POLITICS 361, 374 (1960). On the whole, Dickinson seems a considerably more reliable witness than the foppish Butler, who was given to boasting and whom the delegates took much less seriously than Dickinson.

¹⁵⁰ *Records*, IV.301.

¹⁵¹ John Dickinson, *The Letters of Fabius*, in 1788, on the Federal Constitution, Letter II, in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES, PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE, 1787-1788 (Paul Leicester Ford eds., Brooklyn, N.Y., 1888).

¹⁵² *Id.*

¹⁵³ *Records*, II DHRC 449, 497; JAMES WILSON THE WORKS OF JAMES WILSON 77 (Robert G. McCloskey, ed., 1967). See generally JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM Chapter 4 (1990).

¹⁵⁴ *Records*, II DHRC 349, 363. Bernard Bailyn notes that this speech attracted far more attention from contemporaries than did the Federalist Papers. BERNARD BAILYN, FACES OF REVOLUTION: PERSONALITIES AND THEMES IN THE STRUGGLE FOR AMERICAN INDEPENDENCE 230 (1990).

who the president would be “is brought as nearly home to the people as is practicable.”¹⁵⁵ If Wilson’s ideas did not succeed in 1787, they came in time to define the fundamental principles of American constitutionalism.

And then there was the wily Gouverneur Morris, who saw democracy as a threat to republican government, but who nevertheless supported a popularly elected president as a bulwark against populist and democratic state governments. Like Hamilton, he was above all concerned to promote American commerce, which he saw as a source of political stability as well as wealth. “Take away commerce, and the democracy will triumph.”¹⁵⁶ And what commerce needed was a strong national government, with an elected president at its head. He it was who cleverly turned that man of theory, James Madison, supplying him with a convenient new theory of separationism to permit him to abandon inconvenient old filtration theories, and who thus persuaded the nationalist Virginian delegates to abandon the idea of a Congressional appointment of the president. Without this, we today would have a form of parliamentary government in the United States.

That leaves Madison. Though he came to be called the “Father of the Constitution,” this was not a sobriquet earned at the Convention, where he often dug in his heels to defend losing propositions. Nor did the final document bear the imprint of his cherished ideas. He had wanted a president appointed by Congress, a Senate appointed by the House of Representatives, seats in the Senate allocated on the basis of population, a Congressional veto over all state laws and a Council of Revision composed of the executive and judicial branches to veto Congressional bills; and on every one of these was voted down. He was a member of the Committee on Unfinished Parts, but after Morris presented its plan for the election of the president Madison raised several objections which went nowhere. Madison was so frustrated at this point that he supported Mason’s call for an Executive Council, composed of members nominated by the states, to fetter the president’s authority.¹⁵⁷ At the very end of the Convention, Madison had reverted to his earlier opposition to a strong presidential system.

With Hamilton, Madison was the principal author of the *Federalist Papers*, which glossed over the battles in the Convention and passed silently over the objections which the two of them had to the new Constitution (and with each other). Hamilton confessed his disappointment with the Constitution at the Convention, telling the delegates he planned to support it only because it was “better than nothing.”¹⁵⁸ Madison too emerged from the Convention unhappy with the result. In a letter written on the same day that the delegates voted to adopt what has come down to us as Article II, Madison told Jefferson that “the plan ... will neither effectually *answer* its *national object*, nor prevent the local *mischiefs*

¹⁵⁵ *Records*, II DHRC 567.

¹⁵⁶ *Records*, I.512.

¹⁵⁷ *Records*, II.542. A year later Madison had swung back to supporting a strong form of independence for the executive against the legislature, in his comments on Jefferson’s draft for a new Virginia constitution. 11 PJM 289.

¹⁵⁸ *Records*, II.524.

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which everywhere *excite disgust* agst. the *State Governments*.”¹⁵⁹ He had lost, and he knew it.

The *Federalist Papers* themselves seem to have had little effect on the Ratification debate,¹⁶⁰ which was rather the work of the politicians in each state. Of these, Madison was a tireless worker. He had pushed for the Convention, secured Washington’s presence in Philadelphia and gave the impetus to replace the Articles of Confederation with an ambitious Virginia Plan. In the Continental Congress which followed the Convention, he successfully argued that the Constitution be sent to state Conventions for ratification; and in the Virginia ratifying convention, he stood up to antifederalists such as Mason and Patrick Henry. If he was the Father of the Constitution, however, this was one of those cases, not unknown in delivery rooms, where the child bore little resemblance to the father.

IX. CONCLUSION

In the end, the democrats won the day. The rickety machinery they devised for the election of presidents was a sealed car speeding through the first decades of the republic, darkened in obscurity on departure but emerging in sunlight on arrival to transform American politics. Presidential electors came to be chosen by popular vote, not by state legislatures, and the electors became the mere ciphers which Dickinson thought they were in 1802. Candidates with national appeal were elected by a majority of electors, so that elections were not kicked over to the House of Representatives.

The president became the principal symbol of American democracy and equality, and the most effective counterpoise to state governments. Not only was he democratically elected, but he was the only person so elected by the entire country. In times of crisis, a Lincoln or Franklin Roosevelt might thus emerge to defend and lead a unified county. With a legitimacy derived from both the Constitution and the democratic process, the president became the spokesman for the welfare of the nation as a whole. He might oppose the will of Congress, and in doing so strengthen the separation of powers.¹⁶¹

¹⁵⁹ *Records*, III.77 (italics in original).

¹⁶⁰ The essays were seldom published outside of New York. PAULINE MAIER, *RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-88* 84 (2010). Credit for the rediscovery of Madison’s Federalist 10 goes not to a conservative or public choice theorist, but to Charles Beard. CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (New York: Free Press, 1941). See also Larry D. Kramer, *Madison’s Audience*, 112 *HARV. L. REV.* 611 (1999).

¹⁶¹ It is tempting to assume that the admirable people who lived in the past must have held the same values we hold dear today, and that the Framers must have known all along where things were headed. So several writers assume. See Martin Diamond, *Democracy and The Federalist: A Reconsideration of the Framers’ Intent*, 53 *AM. POL. SC. REV.* 60, (1959); Rossiter *supra* note 21; RICHARD B. MORRIS, *THE AMERICAN REVOLUTION RECONSIDERED* 161 (1967). However, this asks us to forget the Framers’ fears of democracy, the strong support many gave to states’ rights and the clever manner in which they nudged the decision back to the House of Representatives.

Nevertheless, it is historically inaccurate to view the Constitution through a separationist prism. The delegates had sharply disagreed on the division of powers between the federal and state governments, and what they devised was a compromise with something for both nationalists and states' rights adherents. They arrived at their method of choosing senators not to promote an abstract principle of separation of powers within the central government, but to give the states a measure of control of the central government. As for the Executive, Article II was a compromise which gave something to both sides. Nationalists got a president who, in some states at least, would be popularly elected. States' rights supporters were given an executive selected by a method chosen by the states, in which, so they thought, the ultimate choice would be made by state delegations in the House of Representatives, with one vote per state. If one should adhere to the Framers' understanding of the Constitution, as Originalists claim, the doctrine of separation of powers should therefore be demoted from its position as a touchstone of constitutional interpretation.

Appendix A

ESTIMATED LOGISTIC COEFFICIENTS OF THE EXPLANATORY VARIABLES ON THE METHOD OF PRESIDENTIAL ELECTION AT THE PHILADELPHIA CONVENTION

To test a model of delegate preferences as to a presidential system of government at the Philadelphia Convention of 1787, I here report on a regression of delegate preferences on measures of their personal ideology and background and state characteristics. This procedure empirically determines the impact of a specific variable on the probability of a delegate voting yes or no on a roll call. The model takes the form:

$$P_{ij} = f(I_{ij}, B_{ij}, S_j),$$

where P_{ij} represents the preferences of delegate i from state j on the election or appointment of the president, based on his voting patterns and speeches at the Convention; I_{ij} is a set of variables representing the preferences of delegate i from state j on nationalism and presidential term limits, as seen in their votes at the Convention; B_{ij} is a set of variables representing the personal background of delegate i from state j ; and S_j is a variable for state factors in state j .

I employed two different kinds of estimation procedures. The first measured the intensity of delegate preferences by seeing how often they voted for a popularly elected president in roll calls 11 and 355. Here I employed an ordered logistic regression procedure,¹⁶² which permitted an overall look at delegate

¹⁶² The STATA command is `ologit y x1 x2 x3`.

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preferences, on the assumption that they were stable over the course of the entire Convention. Delegates most strongly in favor of a popularly elected president would have voted yes in both roll calls, while those least in favor of an elected president would have voted no both times.

In addition, I wanted to see how delegate preferences evolved over the course of the Convention, and therefore looked at how the delegates voted on the selection of the president on three significant roll calls, once in each month from June to August 1787. During these votes, different coalitions of delegates assembled and split apart.

For these three votes I employed an Ordinary Least Squares regression procedure, which permits one to dispense with a marginal effects table. Because the preferences P_{ij} are limited to 0 or 1, I also employed a binary logistic regression procedure (logit) and arrived at very similar results, which I do not report.

A disadvantage of OLS, when the dependent variable is dichotomous, is that the model necessarily suffers from heteroskedasticity, and I sought to correct for this by clustering the standard errors by state.¹⁶³ An OLS model makes the unrealistic assumption that the model is correctly specified and that the residual of each observation is independent of the others. By clustering one can identify and adjust for relationships amongst the standard errors, eliminating within-group dependence in a cluster. Even though delegates within a state often disagreed with each other, the state level is the most intuitively likely place for there to be such dependence, since the delegates were appointed and voted by state.

The Dependent Variables

The dependent variables measure the preferences and votes of the delegates on the choice of executive, and permit us to examine two different coalitions amongst the delegates: those who favored the election of the president by popular ballot and those who favored the appointment of the president by Congress. The former wanted a presidential regime, the latter a parliamentary one.

The President dependent variable, employed in the ordered logistic regression equation, measures the intensity of a delegate's preference for a popularly elected president. President takes the value 3 if the delegate voted yes on both James Wilson's June 2 motion that the president be elected by electors elected by popular ballot on roll call 11 and on Daniel Carroll's August 24 motion that the president be elected by the people in roll call 355. It takes the value 2 if the delegate voted yes only once on the two motions, and 1 if he voted no both times.

For the OLS estimations, I examine delegate preferences and votes for each of roll call 11 and 355, and also for roll call 215 on July 24 on William Houston's motion that the president be appointed by Congress. A delegate who wanted a popularly elected president would have voted yes on roll calls 11 and 355 and no on roll call 215. After roll call 355 the coalitions of delegates began to break down and 12 days later the delegates agreed to the compromise found in Art. II § 2, with a president chosen by electors selected by a method to be determined by state legislators.

¹⁶³ The STATA command is `regress y x1 x2 x3, cluster (state)`.

The Explanatory Variables

I hypothesized that nationalists at the Convention would want a popularly elected president, as this would increase his political authority in his dealings with states. As a proxy for nationalist sentiment, I looked at how delegates voted on a June 8 roll call 34 on a motion by Charles Pinckney and James Madison on whether Congress could veto any state legislation it thought improper (NatVeto34).¹⁶⁴ This was an acid test of nationalist sentiment, and indeed the proposal drove states' rights supporters up a wall.

I boiled down the delegates' economic interests to a simple dichotomous distinction between rich vs. not-rich delegates, since the records as to property ownership are sketchy. At the time the country was suffering from a credit crisis caused by pro-debtor policies which states had adopted, and one would expect that wealthier delegates would be most sensible of this and to support a powerful national presidency.¹⁶⁵

The suggestion that the delegates were motivated by economic considerations was first made by Charles A. Beard's pioneering work nearly a century ago, which Gordon Wood has called the most influential history book ever written in America.¹⁶⁶ Beard saw the Constitution as the product of a class struggle won by a rising capitalist class of bondholders who were displacing an agrarian class of indebted landowners.

Beard's marxisant view of the Framers, which reduced high theory and republican virtue to self-seeking economic motives, was popular with contemporary Progressives, who chafed at the barriers to social welfare legislation imposed by the separation of powers and sought to debunk the Framers. Since then, however, the Beard thesis has been taken to have been refuted by Robert Brown in 1956 and Forrest McDonald in 1958.¹⁶⁷ Beard had claimed that the Federalists who supported the Constitution were creditors who held public and private debt and who had a personal stake in the revival of credit,¹⁶⁸ but Brown and McDonald reported that Beard had misrepresented the property holdings and voting rec-

¹⁶⁴ I.163. Delegate preferences on NatVeto34 are taken from ROBERT A. MCGUIRE, *TO FORM A MORE PERFECT UNION: A NEW ECONOMIC INTERPRETATION OF THE UNITED STATES CONSTITUTION* 55-56, 88 (2003), which in turn are largely derived from FORREST MCDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* 98-99 (1958).

¹⁶⁵ I constructed for the Rich variable from the description of the economic interests of the delegates in McDonald, *supra* note 47.

¹⁶⁶ CHARLES A. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (1935). See GORDON S. WOOD, *REVOLUTIONARY CHARACTERS: WHAT MADE THE FOUNDERS DIFFERENT* 6 (2006).

¹⁶⁷ ROBERT E. BROWN, *CHARLES BEARD AND THE CONSTITUTION* (1956); FORREST MCDONALD, *WE THE PEOPLE: THE ECONOMIC ORIGINS OF THE CONSTITUTION* (1958). See also Jac C. Heckelman and Keith L. Dougherty, *Personalty Interests at the Constitutional Convention: New Tests of the Beard Thesis*, 4 *CLIOMETRICA* 207 (2010); ALAN GIBSON, *UNDERSTANDING THE FOUNDING: THE CRUCIAL QUESTIONS* ch. 1 (2010).

¹⁶⁸ Beard, *supra* note 166, at 324. Beard tried to have it both ways. While denying that he claimed that the members of the Convention were self-interested (Heaven forbid!), he went on to say that he did not want to ask "how many hundred thousand dollars accrued to them as a result of the foundation of the new government." *Id.* at 73.

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ords of the delegates. Together, the two authors lay waste to the Beard thesis, ploughed it underground and sowed salt in the earth.

That didn't amount to a refutation of the thesis that economic motives played a role, however. What Brown and McDonald concluded was not that the delegates were unmoved by economic interests, but only that Beard had failed to find evidence of this. The delegates did not appear to be influenced by their holdings of public debt, as Beard had claimed, but where he failed others might yet succeed in providing an economic interpretation of the Constitution. Moreover, as Beard had noted, the delegates to the Philadelphia Convention had expostulated frequently, passionately and at length on the sad decline of credit during the Articles period and the need to remedy this and protect creditor rights. Anyone reading the records of the deliberations would be surprised to be told that the delegates were unmoved by economic concerns, particularly when it came to slavery. When Robert McGuire brought more sophisticated empirical tools to the task, then, he was able to find that private economic interests (slaves, public and private debt, wealth in land) were correlated with votes on certain key roll calls.¹⁶⁹ McGuire did not, however, examine the roll calls on the method of selecting the president, as I do.

Any attempt to reduce the delegates' motives solely to economics is crude and mistaken. There was more going on, and most if not all delegates shared the disinterested concern for the country's welfare so transparently seen in a Washington or Mason. At the same time, a concern for America's welfare obviously included a concern for its economic well-being. Not merely could the two motives overlap but they might at times come down to the selfsame patriotic motive. Further, if wealthier delegates wanted a stronger presidency, this does not prove that they were motivated by the prospect of a personal payoff. Instead, and more plausibly, the wealthier delegates were simply those who had a better understanding of the financial crisis and a greater desire to fix it.

The delegates voted on several proposals which would have curbed the president's authority. Some delegates wanted a triumvirate instead of a single president; others wanted the president to share his veto power with judges; and still others wanted the president limited to a single term in office. I selected the last of these—a vote for term limits—as the proxy for the desire for a weak president, and rejected the first two. Several delegates who wanted a weak central government rejected a plural executive because a three-man presidency simply made little sense, and motions for a single executive passed unanimously on July 17 and August 24.¹⁷⁰ Similarly, some states' rights delegates did not think that judges were competent to share in the presidential veto power, while others did not want any kind of a presidential veto power.

That leaves term limits, as a proxy for the desire to limit presidential power. On June 2 the delegates voted 7 to 2 for term limits in roll call 15.¹⁷¹ This was the first of five roll calls on term limits. The delegates voted 6 to 4 against term

¹⁶⁹ MCGUIRE, *supra* note 164. See also Heckelman & Dougherty, *supra* note 167.

¹⁷⁰ *Records*, Roll call 164 at II.24 and II.401.

¹⁷¹ *Records*, I.79.

limits in roll call 168, 8 to 2 against term limits in roll call 184, 6 to 5 against term limits in roll call 220, and 7 to 3 for term limits in roll call 224.

I rely primarily on delegate preferences in roll call 15, when it was thought that the president would be appointed by Congress. Subsequently, the delegates considered the possibility of an appointment by state legislatures, and indeed voted for this in roll call 183. Several states' rights supporters, notably Elbridge Gerry and the New Jersey delegates, who had previously supported term limits voted against them in roll call 184 when they thought the states would do the appointing. Because of this, the continuing support for term limits by other delegates in roll call 184 stands out in sharper relief.

The Officer variable was included because the officer corps of the Revolutionary Army was thought to be aristocratic and anti-democratic.¹⁷² As such, its members might be expected to be opposed to the popular election of the president.

On several issues before the delegates there was a split between delegates from large and small states. Because of this I employ a variable measuring what the delegates saw as the population of each state in 1787, as estimated by Charles Pinckney.¹⁷³ This understates the actual figures, but what matters is what the delegates thought was the population of each state.

Six of the twelve states at the Convention were slave states. Of these, Delaware was seen to have relatively few slaves, but the remaining five states had a very large slave population, particularly Virginia.¹⁷⁴ One might expect delegates from slave states to want a weak national government, and a Congressionally-appointed president, lest it seek to limit or abolish slavery.

Delegate Preferences

A total of 55 delegates attended the Convention, but two dropped out after a week (Virginia's George Wythe and New Jersey's William Houston), leaving a sample of 53 delegates.

For the purpose of determining the delegates' preferences as to the method of choosing a president and term limits, I relied on the speeches of the delegates and state voting records as well as the analysis of factional allegiances and personal backgrounds by McDonald and Rossiter, as well as the close analysis of delegate voting patterns by Riker.¹⁷⁵ I took attendance records from Farrand and Hutson, and was assisted by Rossiter and the teachingamericanhistory.org website.

There are at least three obstacles to identifying the preferences of the delegates.

¹⁷² See *Records*, II.114.

¹⁷³ *Records*, III.253.

¹⁷⁴ The figures are taken from Pinckney at *Records*, III.253.

¹⁷⁵ McDONALD, *supra* note 164, Riker *supra* note 130; ROSSITER, *supra* note 161; FORREST MACDONALD, *E PLURIBUS UNUM: THE FORMATION OF THE AMERICAN REPUBLIC 1776-1790* (1979).

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1. The delegates might have hidden their true sentiment in their votes and even in their speeches. They might have engaged in log-rolling, trading off votes on one issue for votes in another. They might also have voiced their sentiments strategically, so as to frame the debate in a manner which ultimately favored them.

2. The delegates changed their minds on issues over the course of the Convention. In some cases they abandoned positions they initially favored but which they knew could never command the support of a majority of states. In other cases, they might have been persuaded by what they took to be the superior arguments of the other side.

3. Finally, attendance was not taken each day of the Convention, and we cannot always be certain who voted on a particular roll call.¹⁷⁶ If a delegate was absent for a vote, I nevertheless took him to have expressed his preference one way or the other, based on his speeches and political allegiances.

Identifying delegate preferences therefore requires a close reading of the delegate speeches and attendance data, an understanding of their background, and a careful analysis of state voting patterns.

New Hampshire. The state's two delegates, John Langdon and Nicolas Gilman, did not show up until July 23. Langdon spoke on occasion at the Convention, Gilman not once. On occasion they disagreed, as for example on September 12 on the override of the presidential veto. When one of them was absent the other did not vote. Langdon was a merchant who had had business dealings with Robert Morris.

On July 24 they voted in roll call 215 for a president appointed by the national legislature, and I infer that they would have opposed a president elected by the people on June 2 in roll call 11. They did, however, vote on July 25 in roll call 218 for a compromise suggested by Oliver Ellsworth, in which the national legislature would initially appoint the president but that the choice would devolve upon state legislatures if the president ran for a second term. On the following day they voted in roll call 225 for a president appointed by the national legislature. On August 24 in roll call 355 they voted against James Wilson's motion that the president be elected by the people and not by Congress and later that day in roll call 359 voted against a popularly elected president.

Massachusetts. Rufus King was present on May 25, the first day of the Convention, followed by Nathan Gorham and Caleb Strong on May 28 and Elbridge Gerry on May 29. From August 6-9 Gerry was in New York, and King was there from Aug. 13-16. Strong left Philadelphia on August 27.

¹⁷⁶ See generally McGuire *supra* note 164, at 49-64 on regression analyses of voting patterns at the Convention.

King was allied with a populist party led by John Hancock, who had just defeated the more conservative James Bowdoin as Governor in an election fought over Bowdoin's suppression of the Shays' Rebellion. Gerry and Strong were supporters of the more conservative Bowdoin. Gerry was a leading voice in the Convention, but Rossiter described him as unpredictable. McDonald saw Gorham as a Hancock supporter but Rossiter thought him as a follower of Bowdoin.

The state opposed a popularly elected president in roll calls 11, 355 and 359. On roll call 215 it favored a Congressional appointment. It also favored an appointment by state legislators on roll call 215.

Gerry was firmly opposed to both an appointment by the national legislature and an election by the people. He proposed an election by electors appointed by state governors on June 9, and subsequently would have had them appointed by state legislatures. On June 24 he spoke against a Congressional appointment, and proposed in its place an appointment by state legislatures. King spoke up for the separation of powers between the executive and legislative branches on July 17 and supported a popularly elected president on July 19. By July 24, however, he had swung over to Gerry's side and seconded his colleague's motion for an executive chosen by the legislature of the states. No other state supported this and a few moments later Massachusetts joined a majority of the other states in roll call 215 in voting for a president chosen by Congress. Gerry and King were both present that day. One of them must have switched sides, and I infer it was the erratic Gerry, and that King opposed roll call 215 but was outvoted by Strong and Gorham and Gerry. Strong on July 24 appeared to favor of an appointment by Congress, and on August 7 Gorham might also be thought to have favored a Congressional appointment. I believe these preferences carried over to roll call 355.

The state voted for term limits on roll call 15 (June 2), but against them on roll call 184 (July 17 and 19). Gerry would have term limited a president appointed by Congress (July 19 and 24), but changed his mind when it seemed (as Gerry wished) that the states would appoint the president. (I'll refer to this as the Gerry switch). King and Strong opposed term limits, and I infer that one of them was absent for roll call 15. I also infer that Gorham agreed with Gerry on the desirability of term limits on June 2 but subsequently changed his mind on roll call 184, as part of the Gerry switch.

Rhode Island. "Rogue Island," which had passed strongly pro-debtor legislation, did not send delegates to the Philadelphia Convention.

Connecticut. Oliver Ellsworth arrived on May 29 and Roger Sherman the next day. William Johnson arrived on June 2. Ellsworth was likely absent on August 24. Sherman and Johnson were likely absent from July 20 to August 7.

The state voted against a popularly elected president in roll calls 11 and 355, and also against a Congressionally-appointed president in roll call 215.

Roger Sherman was the strongest advocate for a Congressionally-appointed president. He would have made the president accountable to Congress, and even proposed on June 1 that it have the right to appoint co-presidents to keep him in check. Sherman had been Ellsworth's mentor and friend, but the younger man was an independent spirit and voted against the older man 20 percent of the time. Ellsworth opposed a Congressional-appointment of the president by Congress

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and proposed an election by electors appointed by state legislatures on July 19. On July 25 he proposed a compromise in which Congress would appoint a president for his first term with state legislatures doing so if he ran for a second term.

I conclude that all three delegates voted against the popular election of the president on roll call 11. On roll call 215 on July 24 Sherman and Johnson were likely absent and Ellsworth voted against a Congressionally-appointed president, preferring a state-appointed president.¹⁷⁷ I infer that Sherman and Johnson would have disagreed. Ellsworth was likely absent for roll call 355 on August 24, and Sherman and Johnson voted against a popularly elected president. I infer that Ellsworth would have agreed with them.

The state voted for term limits in roll call 15, but against them in roll call 184 (when Ellsworth was the only delegate present from the state). I infer that all three delegates supported term limits on roll call 15. They continued to do so on June 15, when they supported the New Jersey Plan, which featured a Congressionally-appointed president and term limits. Two days later Sherman seconded a motion for term limits. Connecticut favored states rights, and I infer that, as part of the Gerry switch, all three delegates opposed term limits on roll call 184 when it was thought that the states would appoint the president.

New York. Robert Yates and Alexander Hamilton arrived on May 25 and John Lansing on June 2. Lansing and Yates left the Convention on July 10, not to return, leaving the field to Hamilton, with his very different constitutional views. However, Hamilton was also absent for most of the Convention. He left on June 29, popped in on August 13, and returned again on September 6. Hamilton was a very strong nationalist, and Yates and Lansing became anti-federalists who opposed the new Constitution. Lansing expressed support for the New Jersey plan, which featured a Congressionally-appointed president and term limits.

On roll call 11 the state was divided. I infer that one of Yates or Lansing was absent and that Hamilton voted for a popularly elected president, as a means of strengthening the national government. No one was present for the state on roll calls 215 and 355, but I infer that their preferences had not changed.

New Jersey. David Brearly, William Churchill Houston and William Paterson arrived on May 25. Houston was absent from June 6 onward and is not included in my data set. William Livingston arrived on June 5 to take Houston's place. Jonathan Dayton arrived on June 21. Paterson was likely absent from July 27 until the last day of the Convention, September 17.

New Jersey voted against a popularly elected president in roll call 11, for a Congressionally-appointed president in roll call 215, and against a popularly elected president on roll call 355. There appeared to be close cooperation amongst delegates from the state.

The New Jersey Plan presented on June 15 featured a president appointed by Congress, but with a very weak central government. On July 19, Paterson expressed a desire for a president chosen by state-appointed electors. Dayton and

¹⁷⁷ The quorum requirement for Connecticut was satisfied with only one delegate.

Brearily expressed reservations about a Congressionally-appointed president on August 24 and preferred a state-appointed president.

As for term limits, the state was not represented for roll call 15 on June 2. However, I infer that all of the delegates supported the New Jersey Plan, which featured term limits. The state opposed term limits in roll calls 168 and 184, which is consistent with the Gerry switch.

Pennsylvania. Robert Morris, Gouverneur Morris, James Wilson and Thomas Fitzsimons attended on May 25, followed by Benjamin Franklin, George Clymer, Jared Ingersol and Thomas Mifflin on May 29. Robert Morris nominated his houseguest, George Washington, to serve as the Convention's president, but thereafter did not speak. Ingersoll was silent throughout the Convention. Mifflin, the picture of self-assurance in Copley's portrait in the Philadelphia Museum of Art, spoke once only, according to Madison's notes.

The state was divided into a populist Constitutionalist and a conservative and nationalist anti-Constitutionalist faction. The two Morris', Wilson and Clymer were members of the latter faction. Fitzsimons was an associate of Robert Morris and worked closely with the nationalist faction. Ingersoll was a member of the Constitutionalist faction, and Franklin and Mifflin also leaned towards it, though Mifflin occupied an equivocal position between both sides.¹⁷⁸ In his speeches, Franklin spoke on an avuncular manner and was principally concerned to ensure that the delegates would compromise their differences. If he was off-point at times, it was to deflect the delegates from sharp debates that threatened to torpedo the Convention. However, he rowed with muffled oars and often adopted an ironic tone which sailed over the heads of the delegates (and some subsequent historians).

Pennsylvania voted for a popularly elected president in roll calls 11 and 355, and against a Congressionally-appointed president in roll call 215. Wilson and Gouverneur Morris strongly supported a popularly elected president and opposed a Congressional appointment. I take Robert Morris, Clymer and Fitzsimons to have sided with them, as they were members of the same faction. Madison's notes indicate that Franklin supported a popularly elected president. The remaining two members, associated with the populist Constitutionalist faction, I take to be dissenters.

On term limits the state was divided on roll call 15 but voted against term limits on roll call 184. Wilson opposed term limits on June 1, as Gouverneur Morris did on July 19 and 25. I take Franklin to have expressed support for term limits on July 26, and infer that Ingersol and Mifflin agreed with him. To produce the split on roll call 15, I infer that Fitzsimons supported term limits, as Clymer was more closely a member of the Wilson and Gouverneur Morris faction. Wilson spoke against term limits on July 24, and I believe took his faction with him, as well as Fitzsimons in roll call 184.

¹⁷⁸ See Owen Ireland, *Partisanship and the Constitution: Pennsylvania 1787*, 45 PENN. HIST. 315 (1978).

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Delaware. George Read, Richard Bassett and Jacob Broom arrived on May 25, followed by Gunning Bedford on May 28 and John Dickinson on May 29. Dickinson was ill and unable to attend the Convention on a consistent basis. He billed his state for attending only 74 of the 116 days of the Convention.¹⁷⁹

Dickinson served as Governor of Pennsylvania as well as of Delaware and was a member of the conservative, anti-Constitutionalist faction in the former state. Read was his ally in Delaware and a strong nationalist (I.136-37), while Broom, Bassett and Bedford were independents. Broom was a moderately successful farmer. Bassett was a religious enthusiast and nationalist who had attended the Annapolis conference. Bedford was Delaware's Attorney-General. He had been Madison's classmate at Princeton, and as clever as Madison was it was Bedford who graduated at the head of the class.

Delaware opposed a popularly elected president in roll call 11 and supported a Congressionally-appointed president in roll call 215. However, in roll call 355 it supported a popularly elected president. On July 25 Dickinson stated that he had "long leaned towards" a popular election of the president. However, on June 15 he prepared a private plan of government, featuring a Congressionally-appointed president, which he did not share with the other delegates.¹⁸⁰ I take the views he expressed publicly, and not his private thoughts of June 15, to reflect his deepest preferences throughout the Convention. Even then, however, Dickinson sought to effect a compromise, and on July 25 proposed that the voters of each state nominate a citizen of their state, and that the final choice be made by Congress from these nominees. As noted, he later recalled that he had proposed a plan for the popular election of the president.

Delaware voted for term limits on roll call 15 but against them on roll call 184. Two days after roll call 15, the state voted against a single executive, suggesting a strong fear of executive misbehavior. Bedford supported term limits on June 1, but only after a third three-year term. Read and Broom were presumably in favor of term limits on roll call 15 but must have changed their minds, as they supported a lifetime appointment during good behavior on June 26.

Maryland. James McHenry arrived on May 28 but left on June 1 and only returned on August 5. Daniel Jenifer arrived on June 2 and stayed to the end. Luther Martin arrived on June 9 and attended most of the rest of the Convention until he left on September 4. Daniel Carroll arrived on July 9. John Mercer arrived on August 6.

Carroll was a nationalist and a democrat, and McHenry was allied with him. Jennifer also voted as a nationalist. Martin was a leader of an opposing states' rights faction, to which Mercer was allied. Carroll was allied with James Wilson and on August 24 proposed (seconded by Wilson) that the president be elected by the people. On July 17 Martin proposed a presidency chosen by electors appointed by state legislatures.

Jenifer cast Maryland's ballot for a popularly elected president on roll call 11. However, the state voted for a Congressionally-appointed president on roll

¹⁷⁹ MILTON E. FLOWER, JOHN DICKINSON: CONSERVATIVE REVOLUTIONARY 250 (1983).

¹⁸⁰ *Records*, IV.87, 90.

call 215 and against a popularly elected president in roll call 355. For those two roll calls, I infer that Carroll and McHenry wanted a popular election but were outvoted by Mercer, Martin and Jenifer (who must have switched sides).

Maryland voted for term limits on roll call 15 but against them on roll call 184. Martin proposed term limits on July 19, at a time when it was thought that Congress would appoint the president.

Virginia. George Washington, Edmund Randolph, James Madison, John Blair, George Mason, George Wythe and James McClurg were present on May 25. McClurg felt inadequate to the task and was absent after August 5. George Wythe left on June 4 and did not return.

Washington and McClurg were close to Madison, while Blair was closer to Randolph. Washington was a strong nationalist, who had often had cause to complain of the shortcomings of Congress during the Revolution. Madison was the apparent author of the Virginia Plan, with its president appointed by Congress. I believe that all of the Virginia delegates voted against a popularly elected president in roll call 11. At the prompting of Gouverneur Morris, however, Madison began to argue for a separation of powers between the legislative and executive branches on July 17. McClurg was absent on roll call 215 but likely would have opposed a Congressional appointment, as Madison and Washington did. Mason argued against a popular election of the president on July 17 and on July 26 argued for a president appointed by Congress. Mason and Blair supported a Congressional appointment on roll call 215 and Randolph would no doubt have agreed with them. Mason, Randolph and Blair likely opposed a popularly elected president in roll call 355.

On June 4 Randolph, Mason and Blair favored a three-person executive and I infer that they also supported term limits. Mason feared presidential misbehavior and favored a broad impeachment power. On July 25 he agreed with Charles Pinckney that the president should be term limited to six years in any 12 year period.

The Virginia Plan featured term limits and the state voted for this on roll call 15. The state voted against term limits on roll call 184. Randolph supported term limits on July 19 and Mason spoke in favor of a limited form of term limits on July 25. Blair was likely absent for roll call 184, but I believe would have voted with his allies, Randolph and Mason. Madison, Washington and McClurg must have opposed term limits on roll call 184.

North Carolina. Alexander Martin, William Richardson Davie, Richard Dobbs Spaight and Hugh Williamson arrived on May 25. William Blount arrived on June 20 and spent July in Congress in New York. Davie and Martin left in August. As a judge, Martin had been severely beaten by members of the back-country Regulator movement. When they served as state legislators, Blount and Davie had voted for laws to bar debt collections by British creditors. Williamson and Davie proposed a broad impeachment power on June 3, to which the states unanimously agreed.

North Carolina voted consistently for a Congressionally-appointed president and against a popularly elected one. On July 24 Spaight seconded Houstoun's motion for a president appointed by Congress. Williamson supported a president appointed by Congress on July 17 but saw objections to a Congressional ap-

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pointment on July 25. He was playing above his weight at the Convention, and I infer that he did not buck his North Carolina colleagues on roll call 355. He remained a small state supporter throughout, and as such likely opposed a simple popular election.

North Carolina voted for term limits in roll calls 15 and 184. Williamson seconded the motion in roll call 184 and Davie seconded the motion on roll call 224, in both cases showing their support for term limits. There was little sign of disagreements amongst the delegates from the state.

South Carolina. John Rutledge, Charles Cotesworth Pinckney, Charles Pinckney and Pierce Butler arrived on May 25 and stayed to the end. Rutledge and Butler were members of the low country planter aristocracy. So too was C.C. Pinckney, who also had ties to a rival merchants faction. Charles Pinckney was allied with a younger group of rising planters who would soon supplant the Rutledge faction.

South Carolina voted consistently for a Congressionally-appointed president and against a popularly elected one. Charles Pinckney argued for an appointment by Congress on July 17. Rutledge argued for a president appointed by the Senate on June 1 and argued again for an appointment by Congress on July 19, and repeated this on September 5. On July 25 Butler spoke in favor of an appointment by electors appointed by state legislators and spoke again on September 4 to oppose an appointment by Congress.

South Carolina voted for term limits in roll calls 15 and 184. Charles Pinckney proposed a limited form of term limits on July 25. Butler said he wanted term limits in all cases on July 25.

Georgia. William Few arrived on May 25, but left from July 4 till early August. William Pierce arrived on May 31 but left in June to attend Congress in New York. William Houstoun arrived on June 1 but left for New York in August and September. Abraham Baldwin arrived on June 11.

Few was a backwoods farmer and one of the poorest men at the Convention. He had been a member of the Regulators in North Carolina, and had moved to Georgia only after his brother had been hanged for his part in their protests. He and Baldwin had voted for a debtor relief law in the state legislature, and Pierce had voted for paper money. Pierce was a friend of Hamilton, who helped Pierce smooth over a duel with one of Hamilton's clients in July 1787. Baldwin, born in Connecticut, began to caucus with that state's delegates towards the end of the Convention.

Georgia voted consistently for a Congressionally-appointed president and against a popularly elected one. On July 23-24 Houstoun moved that Congress appoint the president.

Georgia voted against term limits on roll calls 15 and 184. Houstoun moved the motion in roll call 168 to strike out term limits.

Summary of the Findings

The voting patterns at the Philadelphia Convention of 1787 were significantly correlated with the personal ideologies and economic interests of the delegates. A coalition of nationalist delegates supported a popularly elected president, presumably because they believed this would strengthen the office and that

a powerful president would serve as a counter-weight to the states. Wealthier delegates also favored a popularly elected president, likely for the same reason, as they more than most delegates would have recognized the need to protect credit markets against pro-debtor state laws. Delegates who supported term limits, and worried about excessive presidential power, were more likely to vote against a popularly elected president in the three roll calls.

As expected, the NatVeto34 coefficient is significant in Table 1.3's ordered logistic regression. Overall, the nationalist delegates wanted a popularly elected president. This didn't happen at once. In Table 1.4, the NatVeto34 coefficient is not significant on June 2's roll call 11, as the nationalist Virginian delegates continued to back the Congressionally-appointed president of the Virginia Plan. By July 24, however, the nationalists had gotten their act together and united to oppose a Congressionally-appointed president in roll call 215, as seen in Table 1.5. This coalition weakened but remained in place on August 24 for roll call 355, as seen in Table 1.6. The magnitudes of the coefficient are large, and a nationalist was almost 50 percent more likely to oppose a Congressionally-appointed president in roll call 215.

Wealthier delegates were significantly more likely to support a popularly elected president in the ordered logistic regression and in roll call 11, and to oppose a Congressionally-appointed president in roll call 215. On roll call 11, wealthier delegates were about 40 percent more likely to prefer a popular election of the president.

Delegates who wanted to term limit the president were more likely to want a Congressionally-appointed president, as that method of appointment would also tend to fetter his discretion.

The Officer variable had no significant explanatory power. Delegates who served as officers during the American Revolution, and who were seen as an aristocratic element in American society, appeared to split their votes on the appointment of the president. As an aristocratic class, one might have expected them to oppose a popular election. However, some of them, such as Hamilton, were nationalists who were close to the likely first president, George Washington.

There was no evidence of a small state coalition when it came to the method of choosing a president. The coalition of small state delegates, who were so powerful on the questions of the state appointment of senators and Congressional veto powers over state laws and, broke apart on the question of the appointment of the president. The coefficients were not significant and the magnitudes of the marginal effects vanishingly small.

There was no evidence of a slave state effect when it came to the method of choosing a president. Slave state delegates opposed a popularly elected president in roll call 11, but this was because the nationalist Virginia delegates were still supporting the Virginia Plan. By roll calls 215 and 355, they had switched sides and the slave state effect had disappeared.

The findings support the view that, from the beginning of the Convention until roll call 355 on August 24, the delegates were divided into two different factions. One faction, composed of the more nationalistic and wealthier delegates, preferred a strong presidential system; while a second faction, composed of less wealthy delegates who favored states' rights, preferred a parliamentary (Congress appoints the president) regime.

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After roll call 355, the delegates compromised their differences to arrive at the language of Art. II § 2 of the Constitution, and in doing so the factions I have identified dissolved.

Table 1.1 **Variables**

Dependent Variables

President	Equals 1 if the delegate did not vote for a popularly elected president in either roll call 11 or 355, 2 if the delegate voted yes once only in roll calls 11 and 355, and 3 if the delegate voted yes in both roll calls
Pop11	Equals 1 if the delegate favored the election of the president by popular suffrage, as expressed in their speeches prior to July 19 or in roll call 11, 0 otherwise
Leg215	Equals 1 if the delegate favored the appointment of the president by the national legislature, as expressed in their speeches on or prior to July 24 or in roll call 215, 0 otherwise
Pop355	Equals 1 if the delegate favored the election of the president by popular suffrage, as expressed in their speeches on or prior to August 24 or in roll call 355, 0 otherwise

Explanatory Variables

Personal Ideology

NatVeto34	Equals 1 if the delegate voted to give the national legislature an absolute veto power over state legislation in roll call 163 on July 17, 0 otherwise
Term15	Equals 1 if the delegate expressed a preference or voted to restrict the president to a single term of office on roll call 15 on June 2 at I.79, 0 otherwise
Term184	Equals 1 if the delegate expressed a preference or voted to restrict the president to a single term of office on roll call 184, 0 otherwise

Personal Background

Officer	Equals 1 if the delegate served as an officer during the American Revolution, 0 otherwise
Rich	Equals 1 if the delegate was rich, 0 otherwise

State Effects

Pop1787	Estimated population in 1787
%Slave	Estimated percent Slave population
Fixed State	Taking a separate number for each state

Table 1.2 Data - overleaf

1 Br. J. Am. Leg. Studies (2012)

NAME	ST	Pop11	Leg213	Pop355	NatVeto34	Term15	Term184	Officer	Rich	Pop1787	SLAVE
Gilman	NH	0	1	0	0	1	1	1	0	102	0
Langdon	NH	0	1	0	0	1	1	1	1	102	0
Gerry	MA	0	1	0	0	1	0	0	1	360	0
Gorham	MA	0	1	0	1	1	0	0	0	360	0
King	MA	1	0	1	1	0	0	1	1	360	0
Strong	MA	0	1	0	1	0	0	0	0	360	0
Ellsworth	CT	0	0	0	1	1	0	0	0	202	0
Johnson	CT	0	1	0	0	1	0	0	0	202	0
Sherman	CT	0	1	0	0	1	0	0	0	202	0
Hamilton	NY	1	0	1	1	0	0	1	1	233	0
Lansing	NY	0	1	0	0	1	1	0	1	233	0
Yates	NY	0	1	0	0	1	1	0	0	233	0
Brearley	NJ	0	1	0	0	1	0	1	0	138	0
Dayton	NJ	0	1	0	0	1	0	1	1	138	0
Livingston	NJ	0	1	0	0	1	0	0	0	138	0
Paterson	NJ	0	1	0	0	1	0	0	0	138	0
Clymer	PA	1	0	1	1	0	0	0	1	360	0
Fitzsimmons	PA	1	0	1	1	1	0	1	1	360	0
Franklin	PA	1	0	1	1	1	1	0	0	360	0
Ingersol	PA	0	1	0	1	1	1	0	0	360	0
Mifflin	PA	0	1	0	1	1	1	1	0	360	0
G. Morris	PA	1	0	1	1	0	0	0	1	360	0
R. Morris	PA	1	0	1	1	0	0	0	1	360	0
Wilson	PA	1	0	1	1	0	0	0	1	360	0
Bassett	DE	0	1	1	0	1	0	1	0	37	0
Bedford	DE	0	1	1	0	0	0	1	0	37	0
Broom	DE	0	1	1	0	1	0	0	0	37	0
Dickinson	DE	1	0	1	1	1	0	1	1	37	0
Read	DE	0	0	1	1	1	0	0	0	37	0
Carroll	MD	1	0	1	0	1	0	0	1	218	0.47
Jenifer	MD	1	1	0	0	1	0	0	1	218	0.47
Martin	MD	0	1	0	1	1	1	1	0	218	0.47
McHenry	MD	1	0	1	0	1	0	0	1	218	0.47
Mercer	MD	0	1	0	1	1	0	1	1	218	0.47
Blair	VA	0	1	0	1	1	1	0	1	420	1.11
Madison	VA	0	0	1	1	1	0	0	0	420	1.11
Mason	VA	0	1	0	0	1	1	0	1	420	1.11
McClurg	VA	0	0	1	1	1	0	0	1	420	1.11
Randolph	VA	0	1	0	0	1	1	1	1	420	1.11
Washington	VA	0	0	1	0	1	0	1	1	420	1.11
Blount	NC	0	0	0	1	1	1	0	1	200	0.37
Davie	NC	0	1	0	0	1	1	1	0	200	0.37
Martin	NC	0	1	0	0	1	1	1	0	200	0.37
Spaight	NC	0	1	0	0	1	1	1	1	200	0.37
Williamson	NC	0	1	0	0	1	1	0	0	200	0.37
Butler	SC	0	0	0	0	1	1	1	0	150	0.78
C Pinckney	SC	0	1	0	1	1	1	1	1	150	0.78
CC Pinckney	SC	0	1	0	0	1	1	1	1	150	0.78
Rutledge	SC	0	1	0	0	1	1	0	0	150	0.78
Baldwin	GA	0	1	0	0	0	0	0	0	90	0.26
Few	GA	0	1	0	0	0	0	1	0	90	0.26
Houstoun	GA	0	1	0	0	0	0	0	0	90	0.26
Pierce	GA	0	1	0	0	0	0	1	0	90	0.26

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Table 1.3 Estimated Coefficients for President in an Ordered Logistic Regression

NatVeto34	1.52a (.62)	1.24b (.66)		1.34b (.73)
Rich		1.70a (.67)		2.07a (.76)
Term15	-1.46a (.69)	-1.64a (.77)		-1.24c (.86)
Officer		-.42 (.66)		-.56 (.71)
Pop1787			.007a (.003)	-.0002 (.004)
%Slave			-2.26b (1.20)	-1.46 (1.59)
Fixed State	-.05 (.10)	-.05 (.11)	.15 (.15)	.07 (.18)
No. Observ.	53	53	53	53
Pseudo R ²	0.13	0.20	0.06	0.22

- a. Statistically significant at the .05 level
- b. Statistically significant at the .10 level
- c. P-value is .20 or less. While not considered significant at conventional levels, the coefficient may be precise enough to be treated as significant given the small sample size. See Leamer (1978, ch. 4).

Note. Standard errors in parenthesis.

Table 1.4 OLS Estimated Coefficients for Pop11

NatVeto34	.27c (.19)	.18 (.17)		.13 (.14)
Rich		.37a (.15)		.43a (.16)
Term15	-.30c (.19)	-.30a (.12)		-.22a (.09)
Officer		-.10 (.14)		-.08 (.14)
Pop1787			.001c (.0006)	.0002 (.0005)
%Slave			-.40b (.19)	-.35a (.15)
Constant	34c (.21)	.25c (.16)	.042 (.11)	.22c (.13)
No. Observ.	53	53	53	53
F	2.27	13.01	0.10	13.64
R ²	0.22	0.41	0.18	0.48

- a. Statistically significant at the .05 level
- b. Statistically significant at the .10 level
- c. P-value is .20 or less. While not considered significant at conventional levels, the coefficient may be precise enough to be treated as significant given the small sample size. See Leamer (1978, ch. 4).

Notes. Standard errors in parenthesis. Clustered for state effects. To assess the extent to which multicollinearity is a problem for each independent variable, I tested for the variance inflation factor, using STATA's estat vif command, with the following results: NatVeto (1.42), Term15 (1.12), Officer (1.15), Rich (1.25), Pop1787 (1.83), %Slave (1.38), Mean VIF (1.36), which is not suggestive of a problem.

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Table 1.5 OLS Estimated Coefficients for Leg215

NatVeto34	-.49a (.17)	-.42a (.15)	-.42a (.14)		-.46a (.19)	-.45a (.17)
Rich		-.26b (.12)	-.26a (.10)		-.27c (.16)	-.23c (.14)
Term15	.10 (.15)	.10 (.09)			.12 (.10)	
Term 184			.24b (.12)			.27b (.14)
Officer		.11 (.13)	.07 (.13)		.13 (.14)	.07 (.13)
Pop1787				-.001b (.0006)	.0003 (.0007)	.0001 (.0006)
%Slave				.10 (.14)	-.07 (.09)	-.14 (.11)
Constant	.79a (.17)	.83a (.14)	.84a (.12)	.93a (.14)	.79a (.14)	.83a (.09)
No.Observ.	53	53	53	53	53	53
F	5.36	6.58	6.11	2.53	12.63	23.60
R ²	0.29	0.40	0.42	0.10	0.37	0.42

- a. Statistically significant at the .05 level
- b. Statistically significant at the .10 level
- c. P-value is .20 or less. While not considered significant at conventional levels, the coefficient may be precise enough to be treated as significant given the small sample size. See Leamer (1978, ch. 4).

Notes. Standard errors in parenthesis. Clustered for state effects.

Table 1.6 OLS Estimated Coefficients for Pop355

NatVeto34	.31b (.15)	.26b (.14)	.27b (.14)		.29c (.17)	.28b (.14)
Rich		.21 (.15)	.19c (.12)		.25c (.14)	.19c (.12)
Term15	-.25 (.19)	-.25c (.15)			-.23c (.16)	
Term184			-.44a (.15)			.44a (.16)
Officer		-.05 (.14)	.030 (.13)		-.06 (.12)	.030 (.11)
Pop1787				.0009 (.001)	-.0003 (.001)	-.00002 (.001)
%Slave				-.20 (.20)	-.06 (.21)	.04 (.19)
Constant	.40c (.22)	.34c (.22)	.29c (.20)	.20 (.33)	.39 (.36)	.29 (.29)
No.Observ.	53	53	53	53	53	53
F	4.26	3.86	17.58	0.52	3.98	13.43
R ²	0.18	0.23	0.37	0.05	0.23	0.37

- a. Statistically significant at the .05 level
- b. Statistically significant at the .10 level
- c. P-value is .20 or less. While not considered significant at conventional levels, the coefficient may be precise enough to be treated as significant given the small sample size. See Leamer (1978, ch. 4).

Notes. Standard errors in parenthesis. Clustered for state effects.

WHY LIBERAL NEUTRALITY PROHIBITS SAME-SEX MARRIAGE: RAWLS, POLITICAL LIBERALISM, AND THE FAMILY

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ABSTRACT

John Rawls's political liberalism and its ideal of public reason are tremendously influential in contemporary political philosophy and in constitutional law as well. Many liberals are Rawlsians of one stripe or another. This is problematic, because most liberals also support the redefinition of civil marriage to include same-sex unions, and as I show, Rawls's political liberalism actually prohibits same-sex marriage. Recently in Perry v. Schwarzenegger, however, California's northern federal district court reinterpreted the traditional rational basis review in terms of liberal neutrality akin to Rawls's ideal of "public reason," and overturned Proposition 8 and established same-sex marriage. (This reinterpretation was amplified in the 9th Circuit Court's decision upholding the district court on appeal in Perry v. Brown). But on its own grounds Perry should have drawn the opposite conclusion. This is because all the available arguments for recognizing same-sex unions as civil marriages stem from controversial comprehensive doctrines about the good, and this violates the ideal of public reason; yet there remains a publicly reasonable argument for traditional marriage, which I sketch here. In the course of my argument I develop Rawls's politically liberal account of the family and defend it against objections, discussing its implications for political theory and constitutional law.

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I. INTRODUCTION

In *Perry v. Schwarzenegger* federal district judge Vaughn Walker overturned California’s Proposition 8 that defined marriage as between a man and a woman.¹ Among the findings of fact in the case, Walker includes the following assertion about the illegitimacy of moral judgment as a justifiable ground for state action:

In the absence of a rational basis, what remains of the proponents’ case is an inference, amply supported by evidence in the record, that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples. FF 78-80. *Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate.* See *Romer*, 517 U.S. at 633; *Moreno*, 413 U.S. at 534; *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (“[T]he Constitution cannot control [private biases] but neither can it tolerate them.”)²

None of Walker’s citations in *Romer*, *Moreno*, or *Palmore* actually support the assertion that moral judgment, as such, is an unreasonable basis for legislation. Indeed, how could they? State governments have always exercised the traditional “police powers” over public health, safety, and morals, however broadly or narrowly the courts have construed them. *Romer*, *Moreno*, and *Palmore* each disqualifies animus as a rational basis, but none of them makes the claim, as Walker does, that “moral disapproval” or judgments of ethical superiority are themselves equivalent to irrational animus.

¹ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

² *Id.* at 1002 (emphasis added).

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In the 9th Circuit Court's decision upholding Walker's ruling on appeal (now as *Perry v. Brown*³), Judge Stephen Reinhardt, writing for the 2-1 judgment of the panel, amplifies Walker's assertion. Reinhardt notes that California's Proposition 8 is not subject to any heightened scrutiny, because the U.S. Supreme Court has never held that sexual orientation is a suspect classification. Rather, he argues that Proposition 8 is subject to the lower hurdle of rational basis review, which it nevertheless fails to clear. Although Reinhardt admits that "[a]s a general rule, states may use their police powers to regulate the 'morals' of their population," straightaway he withdraws this concession and echoes Walker by asserting that moral judgment as such does not constitute a legitimate state interest, and that "animus, negative attitudes, fear, a bare desire to harm, and moral disapproval" are equivalently unconstitutional grounds for legislation.⁴ Reinhardt's evidence for his assertion is a remark by Justice O'Connor in a concurrent opinion in *Lawrence v. Texas*: "Indeed, we have never held that moral disapproval, without any other asserted state interest, is a sufficient rationale under the Equal Protection Clause to justify a law that discriminates among groups of persons."⁵ Reinhardt speculates that "[t]he *Lawrence* majority opinion seems to have implicitly agreed" with O'Connor's remark, which thus entails that moral judgment as such is an illegitimate state interest according to Supreme Court precedent.⁶

Walker and Reinhardt's arguments against moral judgment as a legitimate state interest are novel developments in constitutional law. Nevertheless, the thought that moral approval and disapproval as such are somehow an illegitimate basis for state action is a very familiar one. The thought arises not from federal case law, but liberal political theory, where the thought is expressed in more sophisticated fashion as the political principle of liberal neutrality.⁷ However immediate or derivative the influence of liberal political theory upon Walker and Reinhardt's thinking, their decisions in *Perry* effectively reinterpret the traditional judicial standard of rational basis review in terms of a liberal neutrality principle. I point this out not in order to raise a question about the legitimacy of informing constitutional interpretation with philosophical considerations about justice—this may be inevitable anyway—but in order to show the real impact of academic theorizing about law and justice upon judicial practice, especially in the contentious public debate about same-sex marriage. What I do wish to question is whether liberal neutrality as a constitutional principle, which seems so attractive to many people, has the implications for the marriage debate that philosophers, constitutional theorists, and the 9th Circuit judges think that it does.

What is the same-sex marriage debate really about? The legal institution of marriage has the expressive effect of socially recognizing, promoting and dignifying the nature of the relationships that the law deems eligible for marriage. The expressive effect of legal marriage is what the debate over same-sex unions is

³ *Perry v. Brown*, 671 F. 3d 1052 (9th Cir. 2012).

⁴ *Id.* at 1102 (citing *Romer v. Evans*, 517 U.S. at 635).

⁵ *Lawrence v. Texas*, 539 U.S. 558 at 582.

⁶ *Perry*, 671 F. 3d at 1102.

⁷ For an overview of liberal neutrality, see e.g. the classic essays collected in, *PERFECTIONISM AND NEUTRALITY: ESSAYS IN LIBERAL THEORY* (George Klosko & Steven Wall eds., 2003).

really about.⁸ As it is playing out in the United States and elsewhere, the debate is about which rival conception of sexual value and identity should harness law's expressive effect and be reinforced by the law's coercive and pedagogical powers. Traditionalists, on the one hand, want the law to preserve its historic definition of marriage as a sexually complementary and conjugal union between a man and a woman. Where the law does this it has had the effect of reinforcing heterosexuality as socially normative and bolstering traditional gender roles. The revisionists, on the other hand, fall into one of three camps. The first camp wants the law to redefine "marriage" as any adult affective sexual relationship in which two parties of whichever sex wish to be recognized by the state.⁹ The second camp wants to redefine marriage by introducing "plural" or polygamous marriage in addition to two-person same-sex unions.¹⁰ The third camp wants to disestablish civil marriage altogether or remove intimate associations from state concern.¹¹ Where the law follows any of the revisionist camps, it has the effect of inducing social acceptance of homosexuality as normal, undermining traditional gender roles, and legally establishing a liberal conception of moral equality.¹²

⁸ See Martha Nussbaum, *A Right to Marry? Same-Sex Marriage and Constitutional Law*, DISSENT, (Summer 2009), available at <http://www.dissentmagazine.org/article/?article=1935>. C.f. Adam Haslett, *Love Supreme*, THE NEW YORKER, May 31, 2004, at 19 ("As a political and cultural matter, [same-sex marriage cases] are contests over something less easy to codify: the official recognition of love.... The state is being asked not only to distribute benefits equally but to legitimate gay people's love and affection for their partners. The gay couples now marrying in Massachusetts want not only the same protections that straight people enjoy but the social status that goes along with the state's recognition of a romantic relationship") quoted in William C. Duncan, *Marriage and the Utopian Temptation*, 59 RUTGERS L. REV. 265, 272 (2007)).

⁹ See, e.g., ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY (1996) (explaining how such redefinition just catches up with contemporary social practice and has fundamentally conservative implications); Jonathan Rauch, *For Better or Worse? The Case for Gay (and Straight) Marriage*, THE NEW REPUBLIC (May 6, 1996) at 18 (arguing that defenders of traditional marriage are actually better served, by their own lights, in endorsing gay marriage).

¹⁰ See *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships*, BEYONDMARRIAGE.ORG (July 26, 2006) available at http://beyonddmarriage.org/full_statement.html. Signatories include influential figures such as Cornel West, Gloria Steinem, and Barbara Ehrenreich.

¹¹ See, e.g., David Boaz, *Privatize Marriage: A Simple Solution to the Gay-Marriage Debate*, SLATE (April 25, 1997) available at http://www.slate.com/articles/briefing/articles/1997/04/privatize_marriage.html (arguing for a libertarian "privatization" of marriage); TAMARA METZ, UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE (2010) (explaining that liberals and gay rights activists should abolish legal marriage); MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES, (1995) (explaining that the very institution of legal marriage harms women).

¹² As gay marriage advocate Victoria A. Brownworth says, "[President George W.] Bush is correct ... when he states that allowing same-sex couples to marry will weaken the institution of marriage.... It most certainly will do so, and that will make marriage a far better concept than it previously has been." Victoria A. Brownworth, *Something*

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Participants in the marriage debate sometimes say that traditionalists and revisionists agree upon the importance of marriage, but differ over who should have access to it. Such “agreement” is specious and merely verbal, however. It conceals the depth of the conflict and the significance of what is at stake as the debate is engaged at present: if one side wins, then the other side necessarily loses. The winner-take-all terms in which this debate is posed are why it is so acrimonious. As Ellen Willis, a same-sex marriage advocate, puts it, “conferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart.”¹³ The traditionalists and the revisionists alike propose to enshrine in the law a deeply controversial facet of their incompatible “comprehensive doctrines,” to use John Rawls’s term, about the valuable forms of sexuality, their place in human flourishing, and the nature of moral equality.¹⁴

The Rawlsian theory of political liberalism provides a principled way to prescind from the socially divisive, zero-sum terms in which the marriage debate is now engaged. Rawls’s political liberalism and its ideal of “public reason” are tremendously influential in contemporary political philosophy and in constitutional law as well. Many, perhaps even most, liberals are Rawlsians of one stripe or another. Political liberalism has the resources to propose an alternative deliberative framework for resolving the debate that treats the opposing parties equally, because the framework’s justification is neutral relative to divergent comprehensive doctrines. At the center of this framework is the ideal of public reason, which requires that arguments over the legal definition of marriage, like other arguments over matters of basic justice, be “publicly reasonable.”¹⁵ That is, marriage arguments must be acceptable from citizen’s different viewpoints within the

Borrowed, Something Blue: Is Marriage Right for Queers? in *I DO/I DON’T: QUEERS ON MARRIAGE* 53, 58-59 (Greg Wharton & Ian Philips eds., 2004).

¹³ Ellen Willis, *Can Marriage Be Saved? A Forum*, *THE NATION* (July 5, 2004) at 16. Gay activist Michelangelo Signorile is even more explicit: he argues that gay couples “demand the right to marry not as a way of adhering to society’s moral codes but rather to debunk a myth and radically alter an archaic institution.” The strategy is for gay couples “to fight for same-sex marriage and its benefits and then, once granted, redefine the institution of marriage completely [, because the] ... most subversive action lesbians and gay men can undertake ... is to transform the notion of ‘family’ entirely.” Michelangelo Signorile, *Bridal Wave*, *OUT* (Dec.-Jan. 1994) at 68, 161.

¹⁴ A “comprehensive doctrine” in this technical sense includes “conceptions of what is of value in human life, and ideals of personal character, as well as ideals of friendship and of familial and associational relationships, and much else that is to inform our conduct, and in the limit to our life as a whole. A conception [of the good] is fully comprehensive if it covers all recognized values and virtues within one rather precisely articulated system; whereas a conception is only partially comprehensive when it comprises a number of, but by no means all, nonpolitical values and virtues and is rather loosely articulated,” JOHN RAWLS, *POLITICAL LIBERALISM* 13 (1995).

¹⁵ Public reason “is a view about the kind of reasons on which citizens are to rest their political cases in making their political justifications to one another when they support laws and policies that invoke the coercive powers of government concerning fundamental political questions.” John Rawls, *The Idea of Public Reason Revisited*, 64 *CHICAGO L. REV.* 765, 795 (1997).

various comprehensive doctrines that overlap to form the public political culture of liberal democracies. The arguments must not depend essentially upon controversial facets of any comprehensive doctrine as such.

Granted that the actual terms of the marriage debate today are publicly *unreasonable*, because all sides appeal to their incompatible comprehensive doctrines, what would happen if the debate were reconceived along the lines of political liberalism? When this question has been asked, Rawlsians and their fellow travelers such as Walker and Reinhardt have concluded that fairness requires the politically liberal state to revise the legal definition of marriage to include (at least) homosexual unions.¹⁶ The burden of this essay is to show the contrary. In fact, political liberalism and its ideal of public reason, rightly understood, prohibit the legal recognition of homosexual unions as civil marriages. The upshot is that even if the decisions in *Perry* are justified in construing the rational basis review in terms of liberal neutrality, this construal provides no grounds for endorsing same-sex marriage. In fact, to the extent that the rational basis standard in U.S. constitutional jurisprudence includes neutrality, the courts have a positive legal duty to strike down federal and state statutes enacting same-sex marriage as unconstitutional.

I will argue that there are two reasons why liberal neutrality is incompatible with same-sex marriage: the first reason is that all available arguments in favor of same-sex marriage depend essentially upon controversial moral values and principles drawn from comprehensive doctrines about the good life. These arguments are therefore illegitimate grounds for state action in a liberal democracy marked by reasonable pluralism. Traditional marriage, however, can be defended in terms of public reasons. The most familiar defenses that traditionalists give are not publicly reasonable, as I will show in a moment, but the defense I propose here is publicly reasonable. There is a legitimate, politically liberal state interest in ensuring the orderly reproduction of society over time. This interest entails two public responsibilities: first, ensuring a sufficient and sustainable birth rate, and second, ensuring the just and effective rearing of children into capable citizens. The second responsibility, understood in politically liberal terms, requires that citizens develop what Rawls calls “the two moral powers.” These are the power to exercise a sense of justice as fairness and the power to form one’s own reasonable comprehensive conception of the good. Although there are alternatives to Rawls’ account of public reason, such as the work of Gerald F. Gaus, for example, it is worth focusing upon Rawls’ account because it is the most influen-

¹⁶ Elizabeth Brake, *Minimal Marriage*, 120 ETHICS 302, 312 (2010) (“The ban on arguments which depend on comprehensive conceptions of the good precludes appeal to the special value of long-term dyadic sexual relationships, and without such appeal, ... restriction of marriage to such relationships cannot be justified.”). See also, Linda C. McClain, *Deliberative Democracy, Overlapping Consensus, and Same-Sex Marriage*, 66 FORDHAM L. REV. 1241, 1244-52 (1998) (arguing that Rawlsian liberalism requires gay marriage); Kory Schaff, *Equal Protection and Same-Sex Marriage*, 35 JOURNAL OF SOCIAL PHILOSOPHY 133, (2004) (explaining how Fourteenth Amendment claims for equal protection support gay marriage). Later on I will discuss the purportedly Rawlsian arguments of Samuel Freeman, Frank Michelman, Stephen Macedo, Véronique Munoz-Dardé, and Elizabeth Brake.

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tial.¹⁷ Furthermore, many of the main features of Rawls' theory that I will appeal to are independently plausible, as I hope to show.

My specific claim is that the two aforementioned responsibilities provide sound public reasons for reaffirming the conception of civil marriage that happens to be the traditional one, by legally recognizing and promoting families headed by two married parents who are the biological mother and father of their children. Rawls himself is very clear that any candidate conception of legal marriage must be specified in terms of the publicly reasonable, limited state interest in marriage and the family as the organ of orderly social reproduction. By contrast, the politically liberal state has no legitimate interest in promoting the personal intimate relationships of adults *as such*, but arguments in favor of same-sex marriage wrongly assume that it does. In a pluralistic democracy regulated by the ideal of public reason, there is no legitimate state interest in singling out, recognizing and promoting as civil marriages *specifically* homosexual relationships, because doing so privileges them uniquely among intimate relationships generally.

My argument will proceed by taking for granted the core of political liberalism: viz., that there is a purely "political" conception of justice, in Rawls's special sense of that term, and public reason is the regulatory ideal for legitimate state action on matters of basic justice and constitutional essentials. Public reason is central to political liberalism because, as Rawls says, it is a pluralistic democracy's form of civic friendship that constitutes the political community, binding citizens together with mutual respect and equal concern, in spite of their differing religious and philosophical worldviews.¹⁸ I will sketch a case against same-sex marriage developed from Rawls's discussion of the family that, unlike the most familiar arguments for traditional heterosexual marriage, satisfies the strictures of public reason.

I will summarize Rawls's account of the family in Section I, tracing its maturation from his early to later work, and outline his response to feminist critics of his account. In Section II I will show how within political liberalism the legitimate state interest in the family is functional, as the organ of orderly social reproduction. In Section III I will defend my claim that defining civil marriage as the conjugal union between a man and a woman is necessary in order for the state to ensure sustainable procreation and education of children in terms of the two moral powers. In support of my argument, I will appeal to and develop a number of insightful reflections about kinship and the family that J. David Velleman has sketched in a recent series of articles.¹⁹ Finally, in Section IV I will survey the best available arguments for same-sex marriage and show how they, unlike my argument in Section III, invariably make illicit appeals to comprehensive doc-

¹⁷ Cf. GERALD F. GAUS, *THE ORDER OF PUBLIC REASON: A THEORY OF FREEDOM AND MORALITY IN A DIVERSE AND BOUNDED WORLD* (2010); *PUBLIC REASON* (1998, Fred D'Agostino & Gerald F. Gaus, eds.).

¹⁸ RAWLS, *supra* note 14, at 470.

¹⁹ J. David Velleman, *Narrative Explanation*, 112 (1) *THE PHILOSOPHICAL REVIEW* (2003); J. David Velleman, *Family History*, 34 *PHILOSOPHICAL PAPERS* 357 (2005); J. David Velleman, *Persons in Prospect II: The Gift of Life*, 36 *PHILOSOPHY & PUBLIC AFFAIRS* 245 (2008).

trines and are thereby incompatible with the moral demands of pluralistic democracy.

Before addressing Rawls' account of the family, it will be helpful to contrast the form and content of a politically liberal argument with the more familiar arguments against legally recognizing same-sex unions as marriages. The most prominent philosophical arguments against same-sex marriage (and against the morality of same-sex acts generally) are those arguments advanced by John Finnis, Robert P. George and other moral and legal theorists in the natural law tradition.²⁰ Mary Geach, in a more Aristotelian vein, has offered similar arguments.²¹ One of the chief complaints about natural law arguments is that they rely upon contestable metaphysical premises about human nature, because they require endorsing a version of Aristotelian-Thomistic naturalism and a moralized conception of practical rationality.²² From the perspective of political liberalism, arguments from such premises face a dilemma: first, they are straightforwardly implausible, critics say, yet even if they are true, the appeal to such controversial metaphysical premises as a basis for legal action is unjust in a contemporary democratic society marked by moral and religious pluralism.²³ Legislating by appeal to some controversial philosophical or religious vision of the good life fails to treat as equals those citizens who do not subscribe to that vision.²⁴ Therefore, in order to treat citizens fairly legislation should appeal only to those more limited grounds that reasonable citizens could accept by their own lights.

If Rawls's political liberalism or something like it is correct, then even if the natural law arguments about sexual morality are sound, they still fail in the political realm to justify restricting civil marriage to heterosexual couples because such arguments appeal to a controversial comprehensive doctrine about human flourishing, since it is only from appeals to the natural sexual complemen-

²⁰ Perhaps the clearest statement of the natural law argument for traditional marriage is by Sherif Girgis, Robert P. George, and Ryan T. Anderson. See Sherif Girgis et al., *What is Marriage?* 34 HARV. J. L. & PUB. POL'Y 245 (2010).

²¹ See Mary Geach, *Marriage: Arguing to a First Principle in Sexual Ethics*, in MORAL TRUTH AND MORAL TRADITION 178 (L. Gormally ed., 1994); Mary Geach, *Lying with the Body*, 91 THE MONIST 523 (2008); see also Francis Beckwith, *Legal Neutrality and Same-Sex Marriage*, 7 PHILOSOPHIA CHRISTI 19 (2005) (explaining a traditional Christian natural law conception of marriage); Roger Scruton, *Sacrament and Sacrilege* in THE MEANING OF MARRIAGE (Robert P. George & Jean Bethke Elshtain eds., 2005) (arguing for a traditional conception of marriage by appealing to anthropology and phenomenology); ROGER SCRUTON, *SEXUAL DESIRE: A PHILOSOPHICAL INVESTIGATION* (2006) (arguing that homosexual desire is ethically suspect because its object is not essentially "other").

²² See Girgis et al., *supra* note 20 at 248-260; see also ROBERT P. GEORGE & PATRICK LEE, *BODY-SELF DUALISM IN CONTEMPORARY ETHICS AND POLITICS* (2008) (presenting a more extended treatments of Aristotelian-Thomistic philosophical anthropology); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* at 100-133 (1980) (offering an account of "practical rationality").

²³ See Steven Macedo, *Homosexuality and the Conservative Mind*, 84 GEORGETOWN L.J. 261 (1995) Paul Weithman, *Natural Law, Ethics and Sexual Complementarity in SEX, PREFERENCE AND FAMILY* 227 (Martha Nussbaum & David Estlund eds., 1997).

²⁴ See, e.g., Ronald Dworkin, *Liberalism in PUBLIC AND PRIVATE MORALITY* 60 (Stuart Hampshire ed., 1978).

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tarity that natural law theorists are able to conclude that civil marriage should be defined as between one man and one woman.²⁵ There are other philosophical theories of sexual morality in addition to the natural law tradition—notably the phenomenological theories of Roger Scruton and Aurel Kolnai, for example—which are also critical of homosexual acts and same-sex marriage.²⁶ These theories are no less “comprehensive” in their philosophical presuppositions than natural law, however, so they are equally impugned by political liberalism as grounds for legislation in a pluralistic democracy. There are of course religious conceptions of marriage that define marriage as an exclusively male-female union, but these conceptions are manifestly nonpublic from the perspective of political liberalism and ineligible as grounds for legislation.²⁷

For these reasons philosophers, political theorists, and constitutional lawyers alike have concluded that Rawlsian political liberalism mandates same-sex marriage as a requirement of basic justice. The significance of this conclusion goes beyond mere academic issues debated among idle theoreticians. For as Stephen Macedo has observed, “The insistence on public reasonableness is at the core of liberal constitutionalism and helps explain the importance of the political power of the courts and of judicial review.”²⁸ In the United States the legal recognition of same-sex unions as marriages has proceeded almost entirely through the action of state and federal courts or executive officials, without and often against considerable democratic majorities.²⁹ These courts and officials have justified the introduction of same-sex marriage by appealing to moral ideals of fairness and equality, which they purport to have found implicit in state and federal constitutional provisions regarding equal protection and due process of law. These interpretations of such constitutional provisions have often been justified along Rawlsian lines, as Rawls himself urges: “in a constitutional regime with judicial review, public reason is the reason of its supreme court,” and “the supreme court is the branch of government that serves as the exemplar of public reason.”³⁰ In this way and in others Rawlsian political liberalism, which dominates contemporary Anglophone political thought, has extended its influence to the actual practice of constitutional law by justifying an expansive moral reading of constitutional provisions. Legal practitioners have shown an increasing willingness to make the ideal of public reason judiciable, and the issue of same-sex marriage is a prime example of this tendency. Rawls himself remarked that the

²⁵ See Robert P. George & Christopher Wolfe, *Natural Law and Public Reason in NATURAL LAW AND PUBLIC REASON* (Robert P. George & Christopher Wolfe eds., 2005)

²⁶ See Scruton, *supra* note 21 and SCRUTON, *supra* note 21; AUREL KOLNAI, *SEXUAL ETHICS* (Francis Dunlop ed., 2005).

²⁷ For a concise account and defense of the traditional Christian understanding of marriage, see J. Budziszewski, *The Illusion of Gay Marriage*, 7 *PHILOSOPHIA CHRISTI* 46 (2005).

²⁸ Stephen Macedo, *Homosexuality and the Conservative Mind*, 84 *GEO. L.J.* 261, 299 (1995-1996).

²⁹ The one exception is the recent example of the State of New York, which established same-sex marriage legislatively on July 24, 2011, Marriage Equality Act (AB A08354).

³⁰ Rawls, *supra* note 14, at 231.

judiciary should be the exemplar of public reason; many American judges like Walker and Reinhardt seem primed to take his advice.

Rawls's followers, however, have failed to appreciate that although the standard natural law case against same-sex marriage violates public reason by appealing to comprehensive philosophical doctrines, so too do all the available arguments *for* same-sex marriage.³¹ All available justifications for same-sex marriage appeal to different varieties of comprehensive doctrines about, e.g., sexual liberation or personal autonomy. Nonetheless there remains a persuasive and publicly reasonable case for preserving marriage as a legal union between a man and a woman, which is what I propose to demonstrate here.

If the foregoing contention is correct, why have Rawls's followers not recognized that political liberalism prohibits same-sex marriage? I suspect that the reason is threefold: firstly, Rawls's followers have almost universally failed to ask *why* the state has a legitimate interest in marriage at all, but without first answering this question the issue of same-sex marriage cannot be resolved; secondly, they have failed to attend closely to the implications of Rawls's own functional definition of the legitimate state interest in the family; thirdly, most Rawlsian political liberals are also comprehensive liberals, and so they are prone to read their own private liberal convictions into the "purely political" conception of justice, which is supposed to be free from such private convictions.

II. RAWLS'S ACCOUNT OF THE FAMILY

In order to understand Rawls's account of the family, it is important to grasp how political liberalism is supposed to adjudicate policy disagreements like the debate over same-sex marriage. Political liberalism *as such* does not demand or prohibit any specific marriage policy. This is because public reason applies to and imposes strictures upon what sorts of grounds may be invoked to justify policies, but it does not actually speak to specific policy programs themselves. Unlike liberalism as a comprehensive doctrine, liberalism as a "purely political conception of justice," as Rawls puts it, does not provide a substantive policy platform, but rather it regulates *how* contemporary pluralistic democracies should make substantive policy by providing a deliberative framework that ensures reasonable citizens participate politically on fair and equal terms. Political liberalism is thus a form of deliberative democracy.³² As Rawls emphasizes:

Public reason may also seem too restrictive because it might seem to settle questions in advance. However, it does not, as such, determine or settle par-

³¹ Of course natural law theorists have argued against public reason, or argued that it should be reformulated to allow for natural law arguments. See, e.g., John Haldane, *The Individual, the State and the Common Good*, 13 SOCIAL PHILOSOPHY & POLICY, 59 (1996) (making the case against public reason); George & Wolfe, *supra* note 25, at 51-74 (arguing that public reason should be expanded in order to include natural law arguments).

³² See AMY GUTMANN & DENIS THOMPSON, *WHY DELIBERATIVE DEMOCRACY?* (2004).

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ticular questions of law or policy. Rather, it specifies the public reasons in terms of which such questions are to be decided.³³

No available arguments for legal recognition of same-sex unions can be specified in terms of public reasons because all essentially appeal to controversial comprehensive doctrines about sexual value. At first blush this claim is no doubt surprising. Rawls himself was a liberal and his passing remarks about same-sex unions suggest that he found them unproblematic. Furthermore, the few discussions of same-sex marriage in the voluminous secondary literature on Rawls of which I am aware extrapolate Rawls's casual remarks and conclude that political liberalism allows legal recognition of same-sex marriage, and some go further and argue that political liberalism demands it.³⁴ It is important to recall, however, that even by his own lights Rawls's profession of liberalism as a comprehensive doctrine includes commitments to moral positions which a "purely politically liberal" conception of justice would circumscribe from the public sphere, and the recommendation of same-sex marriage may be just one of those moral positions.

If both the comprehensive liberal arguments for same-sex marriage and the natural law arguments against it violate the strictures of public reason, it is natural to conclude that marriage, as a legal institution, should be disestablished entirely.³⁵ Perhaps there is no publicly reasonable justification for the state to be in the marriage business to begin with. If this is so, then marriage should be reconceived as a private form of voluntary association available to those who seek it on whatever terms they decide, but it should be detached from the public concerns of the state. Rawls, however, is quite explicit that the politically liberal state *must* be in the marriage and family business, and his reasons for affirming the state's interest are sound. His treatment of the family and the state's interest in it changed over the course of his career, however, and it is worth tracing his development.

Rawls wrote two big books defending different versions of his theory of "justice as fairness," *A Theory of Justice* (1971) and *Political Liberalism* (1994).³⁶ By his own admission the former book fails by the standard of the latter, since *A Theory of Justice* depends upon a comprehensive liberal doctrine about human good. By the time Rawls published *Political Liberalism* in 1994, the

³³ RAWLS, *supra* note 14, at Iiii. See also Frank Michelman, *Rawls on Constitutionalism and Constitutional Law* in THE CAMBRIDGE COMPANION TO RAWLS 413-414 (Samuel Freeman ed., 2003) ("[I]n a company of free and equal persons divided by a plurality of comprehensive ethical views, it cannot be reasonable to allow any subgroup a privilege of using political authority to shape the basic structure [of political society] in accordance with that group's special ethical convictions at the cost of equal citizenship for all; that 'neutrality of aim' is the only reasonable approach to adjusting the claims to liberty of equally respected citizens whose ethical convictions differ and sometimes collide; that, in sum, a morally defensible answer to the problem of political legitimacy in modern free societies does not come without its price, and the price is the constraint of public reason....").

³⁴ *Id.*

³⁵ See TAMARA METZ, *supra* note 11; Véronique Munoz-Dardé, *Is the Family to be Abolished Then?*, PROCEEDINGS OF THE ARISTOTELIAN SOCIETY (1998).

³⁶ The latter was further developed in JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* (Erin Kelly ed., 2001).

American “culture wars” were in full swing and an account of justice like the one in *Theory*, which relied upon prior acceptance of controversial liberal moral ideals such as individual autonomy and economic egalitarianism, failed to address what Rawls now took to be the central problem of political philosophy for modern western democracies, viz., securing agreement among reasonable people about principles of fair political cooperation in order to ensure a stable and just democratic society.³⁷ The historical context of Rawls’s work is suggestive: *A Theory of Justice* was published two years before the U.S. Supreme Court handed down *Roe v. Wade*,³⁸ which stoked the culture wars, and *Political Liberalism* was published two years after *Planned Parenthood v. Casey*,³⁹ which aggravated them further.

Although *A Theory of Justice* relied too heavily upon comprehensive liberal moral doctrines, there is a different sense in which it was not comprehensive enough in its treatment of the basic structure of social life. As critics pointed out, Rawls neglected both the role of the family in sustaining a just society over generations and the possible application of principles of justice *within* the family itself. With respect to the first issue, Annette Baier points out that

Rawls’s sensitive account of the conditions for the development of that sense of justice needed for the maintenance of his version of a just society takes it for granted that there will be loving parents rearing the children in whom the sense of justice is to develop. “The parents, we may suppose, love the child, and in time the child comes to love and trust the parents.” Why may we suppose this? Not because compliance with Rawls’s version of our obligations and duties will ensure it. Rawls’s theory, like so many other theories of obligation, in the end must take out a loan not only on the natural duty of parents to care for children (which he will have no trouble including) but on the natural *virtue* of parental love (or even a loan on the maternal instinct?). The virtue of being a *loving* parent must supplement the natural duties and the obligations of justice, if the just society is to last beyond the first generation.⁴⁰

In *Political Liberalism* Rawls acknowledges this problem and attempts to correct it by incorporating the family into his account of the basic structure of

³⁷ The question which POLITICAL LIBERALISM attempts to answer is, ‘How is it possible for there to exist over time a just and stable society of free and equal citizens who remain profoundly divided by reasonable religious, philosophical, and moral doctrines?’ (4). By contrast, A THEORY OF JUSTICE “explicitly attempts to develop from the idea of the social contract, represented by Locke, Rousseau, and Kant, a theory of justice.... *A Theory of Justice* hopes to present the structural features of such a theory so as to make it the best approximation to our considered judgments of justice and hence to give the most appropriate moral basis for a democratic society. Furthermore, justice as fairness is presented there as a ‘comprehensive doctrine’ (although the term ‘comprehensive doctrine’ is not used in the book) in which all the members of its well-ordered society affirm that same doctrine. *This kind of well-ordered society contradicts the fact of reasonable pluralism and hence Political Liberalism regards that society as impossible.*” JOHN RAWLS, LAW OF PEOPLES 179 (2001) (emphasis added).

³⁸ 410 U.S. 113 (1973).

³⁹ 505 U.S. 833 (1992).

⁴⁰ Annette Baier, *What do Women Want in a Moral Theory?*, in VIRTUE ETHICS 267-68 (Roger Crisp & Michael Slote eds., 1997).

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society and emphasizing the family's functional role in reproducing society over time.⁴¹ Rawls also attempts to respond to the second allegation of neglect, often leveled by feminist theorists, that he gives an insufficiently radical scope to the principles of justice and so prevents reforming gender relations within the family. On this point Rawls more or less holds the ground he staked out in *Theory*.⁴² Most discussion of Rawls's treatment of the family has centered on this second issue, viz., of justice applied *within* the family. In this essay I focus on the first.

III. THE POLITICAL FUNCTION OF THE FAMILY

In *A Theory of Justice* Rawls states, “[h]owever attractive a conception of justice might be on other grounds, it is seriously defective if the principles of moral psychology are such that it fails to engender in human beings the requisite desire to act upon it.”⁴³ A candidate conception of justice must be a conception of justice adequate to real human beings, and not to some merely imaginable rational creature. Although Rawls makes this point in terms of moral psychology, the point needs to be generalized, in light of Baier's criticism quoted above, in terms of sociology: that is, however attractive a conception of justice might be on other grounds, it is seriously defective if the principles of sociology are such that a “just” society fails to reproduce itself in an orderly way over time. This implication is precisely what Rawls comes to recognize in his later work. As he notes in *Justice as Fairness*, “the family is part of the basic structure [of society], the reason being that one of its essential roles is to establish the orderly production and reproduction of society and of its culture from one generation to the next.”⁴⁴ Political responsibility for ensuring the orderly reproduction of society is not optional within Rawls's political liberalism. Unlike so many liberal theorists, Rawls in his later work attends to the social imperative of providing for society's future generations:

a political society is always regarded as a scheme of cooperation over time indefinitely; the idea of a future time when its affairs are to be wound up and society disbanded is foreign to our conception of society. Reproductive labor is socially necessary labor. Accepting this, essential to the role of the family is the arrangement in a reasonable and effective way of the raising and caring for children, ensuring their moral development and education into the wider culture.⁴⁵

The purely political liberal conception of justice bears an important, if limited, resemblance to Aristotelian justice, and it is worth fleshing out this comparison. Unlike Aristotelian justice, the purely political conception eschews grandi-

⁴¹ RAWLS, *supra* note 14 at 258. This latter discussion comes chiefly in the later essay, Rawls, *supra* note 15.

⁴² See SAMUEL FREEMAN, RAWLS (2007) (describing how Rawls defended certain aspects of his early claims from later feminist criticisms).

⁴³ JOHN RAWLS, A THEORY OF JUSTICE 398 (2d ed., 1997).

⁴⁴ *Id.* at 162.

⁴⁵ *Id.* at 162-63.

ose metaphysical commitments about human nature and presupposes a basic separation between political and comprehensive values that is a given historical feature of modern pluralistic democracies. Like Aristotelian justice and unlike some perfectionist forms of liberal individualism, however, the purely political conception acknowledges the sociality of human nature by making orderly social reproduction by means of the family a desideratum for any candidate theory of justice.⁴⁶ Thus political liberalism presupposes a non-trivial but “thin” moral psychology and sociology of human nature.⁴⁷

Political liberalism’s presupposition of a certain moral psychology and sociology does not compromise its commitment to neutrality as an ideal. It is a common misunderstanding to think that because political liberalism is anti-perfectionist, then its “neutrality” purports to go all the way down, as it were, and implies being neutral about neutrality itself. On the contrary, political liberalism can take its own side in an argument (*pace* Robert Frost) because political liberalism entails a *moral* commitment to neutrality—or better, a moral commitment to impartial regard for citizens and their reasonable comprehensive doctrines. This is why Stephen Macedo, for example, prefers to contrast neutrality with public reason:

Neutrality builds on principles that are central to liberalism, but for them it erects an excessively strong ban on judgments about human ideals. Liberals properly deploy reasons that can widely be seen to be reasonable, and liberals believe in respect for all those who pass the threshold requirements of reasonableness. Liberals resist paternalism, and minimize interference with people’s choice. These do not, however, add up to neutrality. Liberal restrictions on the reason that can be offered to support government actions are not strict enough to constitute a commitment to neutrality.⁴⁸

Rawls himself tended to avoid the idiom of neutrality precisely to discourage the misunderstanding that political liberalism purported to be free from moral commitments; it doesn’t. Given political liberalism’s manifest commitment to the moral ideal of equal citizenship, therefore, the moral commitments implicit in

⁴⁶ Just as certain forms of perfectionist liberalism echo Plato’s radical proposals in the *REPUBLIC* to abolish the family, so Rawls’s neutralist liberalism seems to echo Aristotle’s criticism of Plato’s proposal. In the *POLITICS* Aristotle argues, “...everybody is more inclined to neglect something which he expects another to fulfill; as in families many attendants are often less useful than a few. Each citizen will have a thousand sons who will not be his sons individually, but anybody will equally be the son of anybody, and will therefore be neglected by all alike.... Nor is there any way of preventing brothers and children and fathers and mothers from sometimes recognizing one another; for children are born like their parents and they will necessarily be finding indications of their relationship to one another”. *THE COMPLETE WORKS OF ARISTOTLE* 1262a 1-20 (Jonathan Barnes, ed. 1984).

⁴⁷ See RAWLS, *supra* note 14, at 86-88. For a further treatment of the need to press Rawls’s political conception of the person in an Aristotelian direction, see Martha C. Nussbaum *The Future of Feminist Liberalism* in 74 *PROCEEDINGS AND ADDRESSES OF THE AMERICAN PHILOSOPHICAL ASSOCIATION* at 47 (Nov., 2000).

⁴⁸ STEPHEN MACEDO, *LIBERAL VIRTUES*, 262-3.

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political liberalism's prerequisite moral psychology and sociology are unproblematic.

Political liberalism's thin moral psychology and sociology bears similarities to the notion of natural necessity that H. L. A. Hart deploys in *The Concept of Law*.⁴⁹ Considering Hart's discussion is instructive for clarifying the circumscribed but essential role of human nature as a foundation of political liberalism.⁵⁰ Hart isolates and contrasts two concepts of law: a wide concept, which includes any valid norm of a legal system, and a narrow concept, which includes only those legal norms that are just and morally admirable. Hart is a legal positivist whose task is to develop a jurisprudence *qua* descriptive sociology of the wide concept of law. Even so, the wide concept of law inevitably includes a "minimal moral content," given certain natural necessities of social life for human beings associated together. Hart identifies six truisms about human life and community: human vulnerability, approximate equality, limited altruism, limited resources, limited understanding and strength of will. These natural facts "afford a *reason* why, given survival as an aim, law and morals should include a specific content," because "without such a content laws and morals could not forward the minimum purpose of survival which men have in associating with each other."⁵¹ These truisms about human life correspond roughly to the basic human needs that Rawls addresses under the rubric of primary goods.

Political liberalism provides a specifically "political understanding of what is to be publicly recognized as citizens' needs."⁵² Accommodation of these needs, and thus access to primary goods, is necessary from infancy to adult citizenship, whatever one's ultimate conception of the good life. Thus Rawls argues:

[t]o identify the primary goods we look to social background conditions and general all-purpose means normally needed for developing and exercising the two moral powers and for effectively pursuing conceptions of the good with widely different contents.⁵³

Although neither Hart nor Rawls appeals to human nature in a morally thick sense, the fact that they do appeal to human nature is undeniable and necessary. Hart recognizes that any theory of law must conceive of human beings as natural-

⁴⁹ H. L. A. HART, *THE CONCEPT OF LAW* 199-200 (2d ed., 1994) ("For it is a truth of some importance that for the adequate description not only of law but of many other social institutions, a place must be reserved, besides definitions and ordinary statements of fact, for a third category of statements: those [*natural necessities*] the truth of which is contingent on human beings and the world they live in retaining the salient characteristics which they have").

⁵⁰ It is true that Rawls himself says that in political liberalism "[a]ccounts of human nature we put aside and rely on a political conception of persons as citizens instead." RAWLS, *supra* note 14, at 800. In the context of this remark, however, Rawls uses "human nature" to refer to all-things-considered comprehensive accounts of human nature, such as those accounts that figure in Thomism, Platonism, or Marxism. *See id.* at 800 n. 86. What I am calling a "thin moral psychology and sociology" is compatible with what Rawls means by "a political conception of persons as citizens."

⁵¹ HART, *supra* note 49, at 199.

⁵² RAWLS, *supra* note 14, at 179.

⁵³ RAWLS, *supra* note 14, at 75-76.

ly inclined towards survival, self-maintenance, and improvement in association with one another, because without these inclinations there would be no law to begin with. Nevertheless, as Hart insists—in a very Rawlsian tone—such an appeal to human nature “can be disentangled from more disputable parts of the general teleological outlook in which the end or good for man appears as a specific way of life about which, in fact, men may profoundly disagree.”⁵⁴ Likewise Rawls claims that there is a specifically political understanding of primary human goods that provides the impetus for a political conception of justice, and without such primary goods there would be no content for a theory of justice. Marriage and the family are not themselves primary goods, because there are of course reasonable life plans that do not include getting married or having children, but marriage and the family are nevertheless part of society’s basic structure.

Many Rawlsians, even if they were willing to concede that this is a plausible elaboration of Rawls’s own views, might argue that the family should not be as central to political liberalism as Rawls himself makes it out to be; or they would argue that the state’s interest in the family should be more than purely functional and the state should set out to transform the family in light of a substantive moral vision of equality.⁵⁵ Véronique Munoz-Dardé, for example, accepts political liberalism and the ideal of public reason, but argues, against Rawls, that:

we should displace most of the *expectations* for securing material impartial care for the needs of individuals to the state. The aim is for affection not to be enforced (which is futile), nor assumed (for it fails). If political institutions fulfill their impartial role, the family can then be the realm of the genuinely affectional, not a fallible refuge which increases the vulnerability of the worst off.⁵⁶

Munoz-Dardé proposes that “families” should be redefined as “any social unity in which a group of elders are primarily responsible and have primary authority over a *particular* group of children,” and argues that marriage should be abolished as a legal category.⁵⁷ Her article is entitled “Is the Family to be Abolished Then?” which is a quotation from *A Theory of Justice*, where Rawls himself answers the question negatively. Although Munoz-Dardé’s nominal answer to this question is also negative, she rejects the fanciful alternative of mandatory state-administered orphanages so tepidly and redefines “family” so thoroughly that her conclusion is tantamount to abolishing the family in all but name. Her argument here and in a similar article is worth evaluating, firstly, because it addresses our primary concern, which is the justice *of* the family and not merely justice *within* the family, and secondly, because Munoz-Dardé’s argument betrays a number of substantive and methodological flaws that vitiate attempts to

⁵⁴ HART, *supra* note 49, at 193.

⁵⁵ There is admittedly some ambiguity in Rawls’s treatment of the family as it develops from A THEORY OF JUSTICE to POLITICAL LIBERALISM. In the former the parties to the original position are ‘heads of households’.

⁵⁶ Munoz-Dardé, *supra* note 35 at 55.

⁵⁷ Munoz-Dardé, *supra* note 35 at 44.

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deploy a Rawlsian framework to justify radical transformations of marriage and the family.⁵⁸

Munoz-Dardé purports to show how a “form of contractualism more individualistic than Rawls’s would do better at addressing the concerns about justice and the family raised by feminist theorists, and would also compel us to be more egalitarian.”⁵⁹ This can be achieved, she argues, by retooling the original position within which parties to the social contract deliberate over principles of justice. If parties within the original position are defined merely as individuals, and never as representatives of households as Rawls himself defines them in *A Theory of Justice*,⁶⁰ and furthermore if those individuals are shorn of any knowledge about or sentimental ties to family members, then the principles of justice produced by this decision procedure would be more radically egalitarian.

There are liberal theories, feminist or otherwise, that are of course more individualistic and more egalitarian than Rawls’s political liberalism, and no doubt Munoz-Dardé is correct on the narrow point that by alterations to the original position, Rawls’s political liberalism could be modified in this direction. This point hardly amounts to an objection against Rawls’s project as it stands, however, because the suggested modification fails even to engage with the distinctive aim of properly *political* liberalism. That aim is to provide a *noncomprehensive* and purely political conception of justice that can be agreed to in a principled fashion by people who disagree about the ultimate aims of life, but who live together in a democratic society. By arguing that the original position should be packed with more controversial assumptions based on individualistic and egalitarian moral ideals, Munoz-Dardé undermines the consensus-building purpose of the social contract methodology and plays into the hands of Rawls’s antiliberal critics.

Conservative and Marxist critics alike have long maintained that the original position is an elaborate sham whose real function is to disguise the bourgeois liberal assumptions of justice as fairness, which would never gain assent if Rawls argued for them openly.⁶¹ Munoz-Dardé’s modifications of the original position, however attractive they might be to holders of liberal comprehensive doctrines, would simply validate the conservative and Marxist suspicions. As I mentioned above, Rawls came to realize that even the version of justice as fairness that he proposed in *A Theory of Justice* was too sectarian for a pluralistic democracy, and so he tried to restate justice as fairness in terms accessible to all reasonable citizens without appealing to a comprehensive liberalism. This greater epistemic humility, which contrasts with the ambitious comprehensive philosophies of earlier liberals like Mill and Kant, is not a form of moral skepticism on Rawls’s part,

⁵⁸ The very similar paper is Véronique Munoz-Dardé, *Rawls, Justice in the Family, and Justice of the Family*, 48 *PHILOSOPHICAL QUARTERLY* 335 (July 1998).

⁵⁹ *Id.* at 335.

⁶⁰ RAWLS, *supra* note 37, at 128-29.

⁶¹ Cf. ROBERT P. GEORGE, *MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY* (1995); Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 *YALE LAW JOURNAL* 2475 (1996-7); ROBERT PAUL WOLFF, *UNDERSTANDING RAWLS: A CRITIQUE AND RECONSTRUCTION OF A THEORY OF JUSTICE*, (1977).

but a response to the historically demonstrable “burdens of judgment” in moral and political matters, which is a fact of the Western democratic inheritance.⁶² Thus Rawls says:

A Theory of Justice hopes to present the structural features of such a theory so as to make it the best approximation to our considered judgments of justice and hence to give the most appropriate moral basis for a democratic society. Furthermore, justice as fairness is presented there as a “comprehensive doctrine” (although the term “comprehensive doctrine” is not used in the book) in which all the members of its well-ordered society affirm that same doctrine. This kind of well-ordered society contradicts the fact of reasonable pluralism and hence *Political Liberalism* regards that society as impossible.⁶³

Munoz-Dardé’s proposed modifications to the original position with respect to the family would contradict the fact of reasonable pluralism even more egregiously than the first version of justice as fairness from *A Theory of Justice*, which Rawls himself came to reject. Munoz-Dardé’s argument is less a sympathetic critique of Rawlsian political liberalism than simply an alternative, perfectionist form of liberalism grounded in a particular comprehensive doctrine.

Stephen Macedo, unlike Munoz-Dardé, has offered an argument that emends Rawls’ account while agreeing that the family should play a central role in political liberalism. The state should promote marriage and the family, he says, with the conviction “that encouraging people to make deeper and more stable commitments than they might otherwise do will be good for them and for society, and that seems [publicly] reasonable.”⁶⁴ At this level of generality, he acknowledges common ground with conservative natural law theorists about the legitimate state interest in the family. But Macedo goes on to argue that natural law theory’s narrower conception of marriage and the family violates public reason by relying upon further philosophically controversial assumptions. He reasons that if “incentives to form relatively stable commitments are good for straight people, then they may be good for gays and lesbians as well.”⁶⁵ Therefore, Macedo claims that promotion of same-sex marriage should be part of the general state interest in ensuring marital and familial stability.

Macedo’s argument fails because it relies upon the assumption that homosexual sexual relationships are intrinsically valuable. Even if this is true, to premise state action upon its truth violates public reason, and it is the mirror image of the natural law argument against same-sex marriage, which is premised upon the truth of *its* claims that heterosexual marriage is the intrinsically valuable expression of sexuality. As David Estlund puts it, “... Macedo’s reasons for state action [to promote homosexual unions] are simply the value of the form of life the ac-

⁶² There are of course doubts that may be raised about Rawls’s conception of political history, but I’m bracketing these concerns.

⁶³ RAWLS, *supra* note 37 at 179 (emphasis added).

⁶⁴ Stephen Macedo, *Sexuality and Liberty: Making Room for Nature and Tradition? in SEX, PREFERENCE AND FAMILY* 94 (David M. Estlund & Martha C. Nussbaum eds., 1998). It is worth noting that Macedo’s claim is so broad that, barring further qualifications that he does not make, it clearly justifies the state promotion of polygamy in addition to same-sex marriage.

⁶⁵ *Id.* at 93.

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tion would encourage, just the sort of reasoning political liberalism seems to repudiate.”⁶⁶ In spite of his professed sympathy with Rawls, therefore, Macedo ends up advocating a form of perfectionist liberalism at odds with the purely political conception of justice, and so like Munoz-Dardé, he fails to specify an argument for redefining marriage and the family in terms of public reasons. Elsewhere Macedo urges that the evaluation of arguments about legislation on matters of basic justice should restrict itself to “...the reasonableness of these arguments as contributions to our *public* deliberations about important and basic matters of political morality.”⁶⁷ But Macedo violates his own recommendation.

Elizabeth Brake argues that Rawlsian political liberalism requires only “minimal marriage.”⁶⁸ According to Brake, minimal marriage “institutes the most extensive set of restrictions on marriage compatible with political liberalism [and it implies] no principled restrictions on the sex or number of spouses and the nature and purpose of their relationships, except that they be caring relationships.”⁶⁹ Thus Brake thinks that any “network” of individuals should qualify as a civil marriage so long as they care for each other. Brake’s argument is perhaps the closest to the one I am proposing here, because she tries to avoid relying upon controversial liberal ideals about sexual morality: “...it is unjust to define marriage legally on the basis of contested moral views regarding same-sex activity.”⁷⁰ Brake also recognizes at some level that the state interests in orderly reproduction (i.e., marriage) and in the “caring networks” of adults are distinct.⁷¹ But her argument nevertheless fails because she neglects to attend to the full implications of the family’s role in political liberalism as the unit of orderly social reproduction over time, which is the role that distinguishes marriage and the family specifically from networks of caring generally. Brake also mistakenly inverts the burden of proof for justifying legislative policy. Because there is (allegedly) no “compelling reason” from social science data to think that her conception of “minimal marriage” would harm children, she thinks that minimal marriage is justified as a viable policy. Even if social science suggested that traditional marriage provided the *optimal* context for childrearing, Brake claims, “[s]ociety does not and cannot require that parents be ideally suited to maximize children’s well-being (there would not be enough parents).”⁷² This is a straw man. A politically liberal argument for traditional marriage need not assert that the state *require* parents to be ideally suited to maximize children’s well-being. It only needs to promote and encourage people to choose for themselves to become parents within the context of traditional conjugal marriage, because this is the context that is optimal for children. (I will discuss this momentarily.) For her argument to be successful, Brake would have to show that “minimal marriage,” as she conceives

⁶⁶ Estlund & Nussbaum, *supra* note 64, at 164.

⁶⁷ Stephen Macedo, *Homosexuality and the Conservative Mind* at 264.

⁶⁸ Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 ETHICS 302 (2010).

⁶⁹ *Id.* at 305.

⁷⁰ ELIZABETH BRAKE, MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW (2012) at 133.

⁷¹ See BRAKE, *supra* note 70, ch. 6.

⁷² *Id.* at 318.

it, is the form of relationship that specifically benefits children and therefore promotes orderly reproduction.⁷³ It isn't sufficient just to argue from ignorance by pointing to the absence of evidence that "minimal marriage" specifically harms children. The *absence* of evidence that a policy harms does not amount to the *presence* of evidence that a policy benefits.

Before addressing what for Rawls constitutes the moral development and education of children, it bears reminding ourselves of the obvious fact that children cannot be raised and cared for if they do not come to be in the first place. It is no more legitimate for political liberalism to take out a loan on a supposedly incorrigible "natural instinct" of people to conceive and bear children than it was for *A Theory of Justice* to take out a loan on the "maternal instinct" of women to nurture their children.⁷⁴ A necessary prerequisite, therefore, to families fulfilling their essential role of raising and caring for children in a reasonable and effective way is that families have sufficient numbers of children in the first place. There is a politically liberal state interest in ensuring that this happens. An insufficient average birthrate below population replacement levels for a long enough period would have a number of destabilizing effects on society, some of them grave, and it is worth mentioning some of these explicitly.⁷⁵

⁷³ In fact, the optimal status of family headed by a married mother and father, in comparison to merely cohabiting and unmarried parents, has again been reaffirmed in a recent federal study report to the US Congress on child abuse and neglect. See A.J. SEDLAK ET AL., U.S. DEP'T OF HEALTH & HUMAN SERV., ADMIN. FOR CHILDREN & FAMILIES, FOURTH NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT (NIS-4): REPORT TO CONGRESS, EXECUTIVE SUMMARY 12 (2010) *available at* http://www.acf.hhs.gov/programs/opre/abuse_neglect/natl_incid/index.html (noting that after having "classified children into six categories: living with two married biological parents, living with other married parents [e.g., step-parent, adoptive parent], living with two unmarried parents, living with one parent who had an unmarried partner in the household, living with one parent who had no partner in the household, and living with no parent... [t]he groups differed in rates of every maltreatment category and across both definitional standards. *Children living with their married biological parents universally had the lowest rate, whereas those living with a single parent who had a cohabiting partner in the household had the highest rate in all maltreatment categories. Compared to children living with married biological parents, those whose single parent had a live-in partner had more than 8 times the rate of maltreatment overall, over 10 times the rate of abuse, and nearly 8 times the rate of neglect*") (emphasis added).

⁷⁴ See William A. Galston, *Individualism, Liberalism and Democratic Civil Society* in THE ESSENTIAL CIVIL SOCIETY READER: CLASSIC ESSAYS IN THE AMERICAN CIVIL SOCIETY DEBATE 370 (Don Eberly ed., 2000) ("We cannot simply chant the mantra of diversity and hope that fate will smile upon us. We must try as best we can to repair our tattered social fabric by attending more carefully to the moral requirements of liberal public life and by doing what is possible and proper to reinforce them.").

⁷⁵ Such destabilization has occurred before in Western European social history; famously, during the late Roman period when imperial officials constantly tried unsuccessfully to encourage the Roman governing classes to have enough children to sustain their population levels. Harvard sociologist Carle C. Zimmerman chronicled how three basic family structures have appeared in different periods in Western history: the quasi-tribal "trustee family" of ancient Greece which re-emerged during the political and social instability of the early medieval period after the Roman collapse, the "domestic family"

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Since the early twentieth century there has been a revolution in the economics of childbearing.⁷⁶ From a social perspective, children are a capital asset. Without sufficient children, society comes to an end. For most of history children were also material assets for the parents who had and reared them, so that the huge opportunity cost of parenting was more than offset by the investment in the children themselves. Before the early twentieth century it was easy for adults to see the clear economic benefits in having children. In 1776 Adam Smith estimated that in colonial America, “the labour of each child before it can leave [its parents’ house] is computed to be a hundred pounds clear gain to them.” Even as late as 1899, a child’s economic contribution to his parents, if he stayed at home until age 18, was estimated at \$599.95.⁷⁷ Parents also saw their opportunity costs in having large families as investments in their security in old age, since by having many children parents could ensure that they would be cared for when they themselves eventually became weak or ill.

Although today children remain necessary assets to society, they no longer yield material returns, either in monetary or security value, to their parents. As early as 1938 the economist Henry C. Simmons could argue, “it would be hard to maintain that the raising of children is not a form of consumption on the part of the parents.” Indeed, by 1982 the economist Laurence Olson pointed out, “in purely monetary terms, couples would be better off putting their money in a bank as a way of saving for their old age,” rather than incurring the costs of childrearing. If most people took Olson’s advice, the consequence would of course be disaster. Not only would society’s future disappear, but the viability of the present generations would also be destroyed, because present economic viability assumes future generation-linked cycles of production and investment. Moreover, the availability of socialized pension systems creates a further free rider problem. Socialized pension systems tend to require growing numbers of workers and/or continual increases in productivity because politicians tend to favor increasing present payouts at the cost of future debt. So although socialized pension systems need large young generations, adult individuals are “better off” materially if they opt not to have children, since they can still draw their benefits regardless of whether they support the broader system by having children themselves. Thus they can externalize the costs of their growing old onto other people whose having children sustains the system.⁷⁸

which arose in the early modern period as a result of the social stability and control introduced by strong ecclesiastical and civil institutions, and finally the “atomistic family” which emerged in force during the nineteenth century as a result of urbanization and liberalized social and religious *mores*. See CARLE C. ZIMMERMAN, *FAMILY AND CIVILIZATION* (1947).

⁷⁶ The following draws upon Rolf George, *On the External Benefits of Children in KINDRED MATTERS: RETHINKING THE PHILOSOPHY OF THE FAMILY* (D. T. Meyers et al. eds., 1993).

⁷⁷ *Id.* at 209. (The 1899 estimate is from an Indiana jury in a wrongful death case).

⁷⁸ Someone might raise the problem of overpopulation. First, it is not clear that this really is a problem, given present estimates of global population and productivity, as against the alarmist and false predictions in the 1970s and 80s. In any case, Rolf George has made a

Recent estimates about the financial costs of childrearing are bracing. In 2007 the estimated cost of raising a child from birth through age 17 in the United States, *excluding* the price of a college education, was \$204,060.⁷⁹ In constant 2007 U.S. dollars that cost was a three percent increase from 1995 (at \$197,709), whereas during that same period the average income for husband-wife families remained static. Furthermore, during that same time period the additional average cost of an in-state, public college increased by forty percent, to \$11,963 from \$8,562 in constant 2007 dollars. Philip Longman argues, “[w]ithout the multimillion-dollar liability of children, even young couples of comparatively modest means can often afford big-ticket luxury items. These might include a fair-sized McMansion, two BMWs, and regular vacations to the Caribbean, all of which could easily cost less than raising 2.1 children.”⁸⁰ The Department of Labor estimates that adults who are not raising children have on average 500 additional hours of leisure time each year compared with adults who are raising children.⁸¹

From an economic perspective, therefore, parents incur tremendous, uncompensated expenses and opportunity costs, yet having and rearing children remains a socially necessary task. Liberal western *mores*, a market economy, and the social welfare state create a massive economic externality in which childbearing families confer an uncompensated and unintended benefit on the childless.⁸²

Socialized pension systems have become integral to all advanced democratic nations and their maintenance presupposes sufficiently large young generations. A persistently low birthrate would endanger socialized pension systems, and any consequent benefits reduction or (more drastically) system collapse would have a disparate impact upon the retired, disabled, and poor who depend principally upon the support of such systems. Western Europe appears to face just this threat since its average birth rate has dropped well below replacement levels and at present there is no indication of a significant reversal. Asia is threatened by the same prospect.⁸³ The population situation in the United States appears to be less threatening because the birthrate remains at replacement level.

persuasive argument against the relevance of overpopulation to any given nation’s orderly (self) reproduction over time. See George, *supra* note 76, at 215.

⁷⁹ 2007 dollars calculated using the Bureau of Labor Statistics CPI Inflation Calculator available at www.bls.gov/data/inflation_calculator.htm; Mark Lino, U.S. DEP’T OF AGRIC., CTR. FOR NUTRITIONAL POL’Y & PROMOTION, *Expenditures on Children by Families* (2007) available at <http://www.cnpp.usda.gov/Publications/CRC/crc2006.pdf>.

⁸⁰ PHILIP LONGMAN, *THE EMPTY CRADLE: HOW FALLING BIRTHRATES THREATEN WORLD PROSPERITY AND WHAT TO DO ABOUT IT* 82 (2004).

⁸¹ U.S. DEP’T OF LABOR, BUREAU OF LABOR STATISTICS, *American Time-Use Surveys* (June 2008) available at http://www.bls.gov/news.release/archives/atus_06242009.pdf.

⁸² These facts undermine an argument for same-sex marriage made by Laurence Drew Borton. See Laurence Drew Borton, *Sex, Procreation, and the State Interest in Marriage*, 102 COLUMBIA L. REV. 1089 (2002) (arguing that United States case law shows that the historic state interest in marriage was not procreation, but simply preventing sexual activity outside of marriage). Even if Borton is correct, which is not evident, there may be a new state interest in marriage that arises from present conditions.

⁸³ See Nicholas Eberstadt, *Demographic Trends in Northeast Asia: Changing the Realm of the Possible*, FAR E. ECON. REV. (May 2007).

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Low birthrates lead to a dearth of productive workers and governments often try to compensate for this by encouraging large-scale immigration (or “guest worker” programs that have amounted to de facto immigration), which leads to another potentially socially destabilizing effect. Immigration is not a principled solution to society’s orderly reproduction over time. From the perspective of political liberalism, there is certainly nothing suspect about immigration as such. However, immigration cannot reliably fill the population gap when the family fails to provide the socially necessary labor of reproduction. Immigration is first of all not a sustainable means of social reproduction since the number of possible immigrants is finite and subject to extrinsic contingencies, since any given country has very little control over whether, when or how many aliens will in fact immigrate. Furthermore, large-scale immigration from nonliberal societies could threaten to undermine the public political culture, which embodies the requisite principles of reciprocity and mutual respect. Not every conceivable or actual comprehensive doctrine can participate in the reasonable overlapping consensus. It is crucial to note that for Rawls:

[t]he dualism in political liberalism between the point of view of the political conception and the many points of view of comprehensive doctrines is not a dualism originating in philosophy. Rather, it originates in the special nature of democratic culture as marked by reasonable pluralism.⁸⁴

It is certainly possible that through significant unacculturated immigration a democratic culture once hospitable to the ideals of political liberalism could become marked by an *unreasonable* pluralism.⁸⁵ Rawls requires that “members of the community have a common sense of justice and they are bound by ties of civic friendship,” but substantial illiberal minorities could break such ties.⁸⁶ The point here is not to argue about the empirical question of whether or not such destabilizing immigration actually obtains anywhere today.⁸⁷ Rather, it is simply to flesh out the implications of Rawls’s recognition that a politically liberal pluralistic democracy must ensure a *sustainable* arrangement of social reproduction *by means of the family*, and not rely parasitically on fickle immigration trends for support. Political liberalism requires that “[c]itizens must have a sense of justice and the political virtues that support political and social institutions.” Therefore, “[t]he family must ensure the nurturing and development of such citizens in appropriate numbers to maintain an enduring society.”⁸⁸ The concept of sustainability receives much attention today in environmental ethics and public policy. Rawls recognized that sustainability should apply to our treatment of *human* political ecology just as much as to natural ecology. Indeed, Rawls emphasizes that in principle, “[n]o particular form of the family (monogamous, heterosexual, or otherwise) is so far required by a political conception of justice so long as it is

⁸⁴ RAWLS, *supra* note 14, at 23.

⁸⁵ Cf. Philip Longman, *The Return of Patriarchy*, FOREIGN POL’Y (Feb. 17, 2006).

⁸⁶ RAWLS, *supra* note 43, at 470.

⁸⁷ Some social commentators from the left and the right have argued that this is in fact the case with Western Europe today. See, e.g., BRUCE BAWER, *WHILE EUROPE SLEPT* (2007); Stanley Kurtz, *Demographics and the Culture War*, 129 POL’Y REV (Feb. 2005).

⁸⁸ JOHN RAWLS, *COLLECTED PAPERS* 596 (Samuel Freeman ed., 2001).

arranged to fulfill these tasks [of social reproduction] effectively and does not run afoul of other political values⁸⁹ That is, for political liberalism the state interest in the family is purely functional, even if families in their own self-image are not, and so there is no antecedent political preference for either “traditional” or “liberated” family forms as such.⁹⁰

Appeals to monogamy as such, or against same-sex marriages, as within the government’s legitimate interest in the family, would reflect religious or comprehensive moral doctrines. Accordingly, that interest would be improperly specified.⁹¹

But as I will show in the next section, that interest can be *properly* specified. The state has a state interest in monogamy and against same-sex marriage, not because it need claim that one is intrinsically valuable and the other is not, but for the sake of the orderly reproduction of society. The appeals to the *moral value* of monogamy as such and the *moral value* of same-sex unions as such both equally reflect comprehensive doctrines and are therefore illegitimate within political liberalism.

At any rate, there are further reasons why it is insufficient that there simply *be* enough young workers to support the old; it is socially ? important for many people, if not all, to have children of *their own*.⁹² When people have children of their own, they forge intergenerational ties of reciprocal concern. Adult generations become better able to absorb the disruptive effects of technological development and consequent increases in economic productivity that are persistent features of modern life. Technological change that renders one’s own lifelong craft or profession obsolete can be borne more easily when that obsolescence is seen to benefit one’s *own* children in the long run. Without the personal affective ties to future generations that having children establishes, an adult is less likely to see his own interest as tied up in the long-term wellbeing of society. When this propensity is writ large across a society, then the relations between its generations are prone to become antagonistic, rather than cooperative, with the interests of the young pitted against the interests of the old.⁹³ It is well-known that family busi-

⁸⁹ *Id.*, at 163

⁹⁰ Samuel Freeman says, “The *primary function of the family* for Rawls—what makes it a basic social institution—has nothing to do with romantic love or even marriage between the natural or adoptive parents or caretakers of children. The family is rather regarded as a basic social institution since any society has to have some social structure for nurturing and raising its children. Without some kind of family formation, a society cannot *reproduce itself over time*.” SAMUEL FREEMAN, RAWLS 237 (2007).

⁹¹ Rawls, *supra* note 15, at 779.

⁹² Cf. the study published by the National Marriage Project, a nonpartisan research partnership at Rutgers University (and now at the University of Virginia), BARBARA DAFOE WHITEHEAD AND DAVID POPENO, LIFE WITHOUT CHILDREN: THE SOCIAL RETREAT FROM CHILDREN AND HOW IT IS CHANGING AMERICA (2008) *available at* <http://www.virginia.edu/marriageproject/specialreports.html>.

⁹³ Cf. Rachel Donadio, *Europe’s Young Grow Agitated over Future Prospects*, N.Y. TIMES, Jan. 2, 2011 at A6, *available at* <http://www.nytimes.com/2011/01/02/world/europe/02youth.html?pagewanted=all>

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nesses provide invaluable social stability in times of economic and political turmoil.⁹⁴

More generally, however, even during peaceful periods, individuals' membership in intergenerational families serves to lengthen their range of self-interest into the future and to moderate the narrowly consumptive mentality that market economies encourage. As Alexis de Tocqueville recognized, when "family spirit" is a strong force in one's life, then:

[o]ne seeks to perpetuate and in a way to immortalize oneself in one's remote posterity. Whenever the spirit of family ends, individual selfishness reenters into the reality of its penchants. As the family no longer presents itself to the mind as anything but vague, indeterminate, and uncertain, each concentrates on the comfort of the present; he dreams of the establishment of each generation that is going to follow, and nothing more.⁹⁵

Without children of one's own, then one loses a powerfully tangible reason to dream even about the next immediate generation, let alone more remote generations into the future. But the political community needs people to forgo present satisfactions for the sake of the well-being of remote future generations.

Children are needy and dependent beings; when they are raised outside of a stable family they put a tremendous material burden on the state, which must step in to care for them. Therefore, well-ordered families not only build up the social capital that liberal democracies rely upon to sustain social welfare programs such as socialized pensions, but they prevent the erosion of that capital by avoiding social dysfunction.

What, then, is the content of the moral development and education that families must provide to children once they are born? The principal responsibility of families within political liberalism is to educate children into mature citizens who can capably exercise the two basic moral powers, which are a shared sense of justice and a rational conception of the good (whatever particular eligible comprehensive doctrine that conception may embody). This responsibility of course includes providing basic care for physical health, nutrition, safety and intellectual development. As Samuel Freeman emphasizes, Rawls nonetheless

sees this as consistent with parents raising their children within their own religion, and even with teaching them anti-liberal moral and religious views.... The reasons for this seem to be that Rawls, for reasons of religious freedom, association, and other basic liberties, did not want to give governments the power to intervene in within family life and impose a positive duty upon parents to bring up their children as morally autonomous beings.⁹⁶

Requiring the government to impose this sort of positive duty would not be publicly reasonable, since "moral autonomy" as an ideal is part of controversial comprehensive doctrines of the good. *Whose* conception of moral autonomy? Saint Paul and John Stuart Mill, for example, would both nominally agree on

⁹⁴ HAROLD JAMES, *FAMILY CAPITALISM: WENDELS, HANIELS, FALCKS AND THE CONTINENTAL EUROPEAN MODEL* (2006).

⁹⁵ ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA*, Vol. I, Pt. 1, Ch. 3 (2000). 49.

⁹⁶ FREEMAN, *supra* note 90, at 238.

“moral autonomy” as a goal, but they would of course fill out the ideal in very different ways: freedom in the truth of Christ versus freedom for experiments in living.⁹⁷ Both ideals, religious and secular, are illegitimate grounds for political action.

Rawls’s functional role for the family within political liberalism might seem to some critics as perversely instrumentalizing. Is not the family, in whatever form it should take, an intrinsically valuable form of association whose significance is much more profound than any mere instrument for fabricating future citizens? In a word, the answer is *yes*—but this conviction is not in fact at odds with the Rawlsian position. No one can deny that the bonds of kinship are among the most intimate and meaningful relations in a human life, and it is within families that most people seek their happiness. Far from these truths being an objection to Rawls’s functional treatment of the family, however, they in fact support it. It is precisely because the family is the locus of such profoundly intimate affective relationships that from the perspective of political liberalism the state should have a strictly limited interest in it.

First of all, the massive apparatus of the modern nation-state is too blunt and bureaucratic an instrument to entrust with regulating the complicated and emotionally fraught terrain of personal friendships, filial ties and domestic relations embodied in the family. To task the nation-state with brokering intimate personal associations is to give it a therapeutic mandate that it is incapable of managing. Secondly, friendship, kinship, and personal and affective relationships are not basic matters of political justice or constitutional essentials of a liberal regime. Rawls contrasts the state’s publicly reasonable interest in the family’s social reproductive function with the distinctive and non-public perspective of people *within* families.

The public vs. non-public distinction is not the distinction between public and private. This latter I ignore: there is no such thing as private reason. There is social reason—the many reasons of associations in society which make up the background culture; there is also, let us say, domestic reason—the reason of families as small groups in society—and this contrasts both with public and social reason. As citizens, we participate in all these kinds of reason and have the rights of equal citizens when we do so.⁹⁸

Followers of Rawls who ignore or downplay the centrality he gives to the family have difficulty making sense of this passage.⁹⁹ What Rawls seems to be saying is that the family has a dual rationale, which is explained from both internal and external perspectives. The external perspective captures the family’s public and functional role of ensuring orderly reproduction. The internal perspective, which is the perspective of “domestic reason,” captures the family’s intrinsic significance to its members, considered from their vantage point as spouses, chil-

⁹⁷ Cf. *Romans 7*; J.S. MILL, ON LIBERTY.

⁹⁸ RAWLS, *supra* note 14, at 220.

⁹⁹ See, e.g., Munoz-Dardé, *supra* note 35, at 336-37 (dealing with the passage by imputing ambiguity and confusion to Rawls). She addresses this passage and related ones under the heading “Perplexing statements.”

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dren, and siblings, and not as citizens alone.¹⁰⁰ The family, along with other forms of social organization like churches, synagogues, mosques, clubs, and businesses, forms part of the “background culture” of a politically liberal society, as Rawls puts it. But in virtue of its additional public role, the family is unique among the social institutions of the background culture. Rawls marks this distinction by singling out and contrasting the “domestic reason” proper to the family with both the generic “social reason” of other institutions in the background culture and public reason of political life.

The centrality of the family does not mean that the autonomy of its inner life is absolute. In participating in the overlapping spheres of domestic, social, and public reason we “have the rights of equal citizens when we do so,” Rawls reiterates.¹⁰¹ J. S. Mill claimed that the Victorian-era family was a “school for despotism,” which habituated people’s characters in ways that undermined democracy; if sociological data could show the same to be true of present-day family, then, as Rawls asserts, “the principles of justice enjoining a reasonable constitutional democratic society can plainly be invoked to reform the family.”¹⁰²

In short, for Rawlsian political liberalism the family is semi-autonomous. It is accountable to the claims of political justice but at the same time it is not a creature of the state and has a defeasible sovereignty over a certain sphere of personal life. Indeed, analogous to the way in which political justice constrains possible family forms, so too “[t]he family,” Rawls says, “imposes constraints on ways in which [equality of opportunity] can be achieved.”¹⁰³ It has considerable range of discretion to raise and care for children as the parents see fit, provided it performs its functional role of inculcating in the children the two moral powers prerequisite to publicly reasonable citizenship. In *A Theory of Justice* Rawls asks, “[e]ven when fair opportunity (as it has been defined) is satisfied, the family will lead to unequal basic chances between individuals. Is the family to be abolished then?”¹⁰⁴ Rawls’s answer is *no*. The family, as the institution defined by the task of society’s reproduction, is a permanent feature of the basic structure of a well-ordered liberal democratic polity. The achievement of absolute equality, or any other political aspiration, which came at the cost of undermining the family would be a self-destructive and fleeting victory, since such a momentary gain could not be preserved or transmitted to future generations. To sacrifice the well-being of future generations in order to provide unsustainable benefits to the present strikes at society’s integrity and is a failure of political rationality—a conception of justice as social suicide pact—because it is part of society’s nature to be temporally extended across generations. Although radical restructurings of the

¹⁰⁰ Cf. SCRUTON, *supra* note 21.

¹⁰¹ RAWLS, *supra* note 88, at 598 (quoted in Freeman, *supra* note 90, at 240).

¹⁰² *Id.*

¹⁰³ RAWLS, *supra* note 88, at 596. Thus some important recent judicial decisions are incompatible with the Rawlsian conception of the state interest in the family, because they conceive of marriage and the family as mere creatures of state discretion. For example, the Supreme Judicial Court of Massachusetts asserts: “Simply put, the government creates civil marriage.” *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 945 (Mass. 2003).

¹⁰⁴ RAWLS, *supra* note 43, at 448 (quoted in Freeman, *supra* note 90, at 242).

family may have a part in the politics of utopian perfectionism, liberal or otherwise, political liberalism prudently forgoes such ambitions.

IV. A PUBLICLY REASONABLE ARGUMENT FOR TRADITIONAL MARRIAGE

Given the Rawlsian account of the family's functional role sketched above, it is not difficult to frame an argument for traditional marriage in Rawlsian terms. A publicly reasonable argument for traditional marriage specifies the state interest in terms of sustainable procreation and cultivating in citizens the two moral powers, which are "a capacity for a sense of justice and for a conception of the good."¹⁰⁵ According to Rawls, a conception of the good is "a conception of what is valuable in human life," which is comprised "of a more or less determinate scheme of final ends, that is, ends that we want to realize for their own sake, as well as attachments to other persons and loyalties to various groups and associations."¹⁰⁶ A conception of the good is "fully comprehensive if it covers all recognized values and virtues within one rather precisely articulated system; whereas a conception is only partially comprehensive when it comprises a number of, but by no means all, nonpolitical values and virtues and is rather loosely articulated."¹⁰⁷ In short, a conception of the good is the coherent narrative of a person's identity that he develops for himself.

A liberal democratic society needs sufficient children and it needs them to be educated. Therefore, a liberal democratic society needs families headed by two married parents who are the biological mother and father of the children, because such families are (a) intrinsically generative and (b) optimal for childrearing. In other words, sex between men and women makes babies; society needs sufficient babies; babies need moms and dads.¹⁰⁸ Every family arrangement in which children are raised need not and cannot conform to this pattern, but the state has a legitimate interest in encouraging people to form families that do so, which the state can accomplish by enshrining this conception of marriage in the law, as conferring unique social status, and promoting it with material benefits.

Why are traditional families intrinsically generative and what does this entail? Many viable forms of parenting partnerships are not generative. Consider, for example, an order of nuns who partner together to run an orphanage, or a

¹⁰⁵ RAWLS, *supra* note 14, at 19.

¹⁰⁶ *See id.*

¹⁰⁷ *See id.* at 19-20.

¹⁰⁸ I paraphrase Maggie Gallagher. She argues that traditional heterosexual marriage "is about uniting these three dimensions of human social life: creating the conditions under which sex between men and women can make babies safely, in which the fundamental interests of children in the care and protection of their own mother and father will be protected, and so that women receive the protections they need to compensate for the high and gendered (*i.e.*, nonreciprocal) costs of childbearing." Maggie Gallagher, *Does Sex Make Babies? Marriage, Same-Sex Marriage and Legal Justifications for the Regulation of Intimacy in a Post-Lawrence World*, 23 QUINNIAC L. REV. 447, 451 (2004).

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widower and his brother who are raising the children from the widower's marriage. These arrangements may be viable parenting partnerships, but they are not intrinsically generative, so they could not answer society's need for orderly reproduction over time. Traditional heterosexual marriage is intrinsically generative, because children characteristically result from sexual intercourse between a man and a woman in a statistically significant sense, and sexual intercourse is of course partly constitutive of marriage as a relation. In making this functional claim about heterosexual sex's generative character, I am not appealing to any controversial metaphysical biology about natural normativity in the way that natural law theorists or neo-Aristotelian virtue ethicists might.¹⁰⁹ Neither am I saying that every marriage does or should beget children. Rather, I am making an incontrovertible observation about a social fact, which has implications for the orderly reproduction of a liberal society.

Hart's work is again helpful here for making sense of this notion of social fact. In his analysis of law Hart notices that there are certain inescapable social facts about human nature, such as the persistent human desire for survival, which any social theory must acknowledge.¹¹⁰ A theory need not affirm a metaphysical thesis that survival "is something antecedently fixed which men necessarily desire because it is their proper goal or end."¹¹¹ It may simply prescind from such ambitious assertions or denials altogether. Nevertheless, a fact such as the desire for survival "still has a special status in relation to human conduct and in our thought about it, which parallels the prominence and the necessity ascribed to it in the orthodox formulations of Natural Law." The necessity with which human beings desire survival is, as it were, political and not metaphysical necessity, to use the Rawlsian language.¹¹² What I am suggesting is that the procreativity of heterosexual couples is analogous to the human desire for survival; for the purposes of social theory, both facts are necessary features of a political conception of human nature. Just as Hart's analysis of law asserts that human beings *naturally* desire survival, and yet avoids contentious metaphysical claims, so too a Rawlsian analysis of marriage and the family will recognize that heterosexual

¹⁰⁹ Although what I am claiming is not incompatible with Aristotelian ethical naturalism.

¹¹⁰ HART, *supra* note 49, at 191, quotes Hume, who writes, "Human nature cannot by any means subsist without the association of individuals: and that association never could have place were no regard paid to the laws of equity and justice." David Hume, *Of Justice and Injustice*, in TREATISE OF HUMAN NATURE, III, ii.

¹¹¹ HART, *supra* note 49, at 192.

¹¹² Thus Hart writes, "For it is not merely that an overwhelming majority of men do wish to live, even at the cost of hideous misery, but that this is reflected in the whole structures of our thought and language, in terms of which we describe the world and each other. We could not subtract the general wish to live and leave intact concepts like danger and safety, harm and benefit, need and function, disease and cure; for these are ways of simultaneously describing and appraising things by reference to the contribution they make to survival which is accepted as an aim." *Id.* at 192. Likewise, with the procreativity of heterosexual intercourse.

unions are *naturally* procreative. In both these cases, the “nature” appealed to is political, not metaphysical.¹¹³

What about the implications of biotechnology? Some might object that the availability of effective contraception for heterosexuals and artificial gamete donation for homosexuals makes procreation a matter of voluntary choice, not a given feature of relationships that happen to have the biological complementarity that makes them naturally reproductive. It is true that contraception and artificial reproduction make it more rhetorically difficult for natural law theorists to make persuasive arguments that procreation is the unique proper function of sexual intercourse. But such arguments are anyway irrelevant to political liberalism. It remains a social fact that sex—even contraceptive sex—makes babies. Irrespective of access to contraceptives, it is a social fact that heterosexual relationships result in children. Consider some data.¹¹⁴ The National Survey of Family Growth conducted a nationally representative survey of 10,847 women aged between 15-44 years. It concluded that about one-third of births between 1990 and 1995 were not planned; 56 percent of births to unmarried women were unintended, as were 39 percent of births to divorced women and 19 percent of births to married women.¹¹⁵ At least one parent did not initially plan to have a child in nearly one-third of births to married parents and three-fourths of the births to unmarried parents.¹¹⁶ A study published by the Alan Guttmacher Institute, which is associated with the abortion and contraceptive provider Planned Parenthood, showed that 60 percent of women in the United States have had at least one unplanned pregnancy by the time they reach their late 30s, and nearly four out of ten women aged 40-44 have at least one unplanned birth.¹¹⁷

The normal woman who uses contraceptives continuously will have on average nearly two unplanned pregnancies over the course of her life.¹¹⁸ The preg-

¹¹³ “In political philosophy one role of the ideas about our nature has been to think of people in a standard, or canonical, fashion so that they might accept the same kind of reasons. In political liberalism, however, we try to avoid natural or psychological views of this kind, as well as theological or secular doctrines. Accounts of human nature we put aside and rely on a political conception of persons as citizens instead,” RAWLS, *supra* note 14, at 800.

¹¹⁴ See Gallagher, *supra* note 108, at 454-56.

¹¹⁵ J. Abma, et al., *Fertility, Family Planning, and Women’s Health: New Data from the 1995 National Survey of Family Growth*, NAT’L CTR. FOR HEALTH STATS. 19 (1997), *quoted in* Gallagher, *supra* note 108, at 454.

¹¹⁶ *Id.* at 28 (Table 17). Only 28 percent of the births to unmarried mothers were intended by both parents, while 70.4 percent of the births to married mothers were intended by both parents.

¹¹⁷ Stanley K. Henshaw, *Unintended Pregnancies in the United States*, 30 FAMILY PLANNING PERSPECTIVES 28 (1998) (noting that 38.1% of women 40-44 years old have had at least one unplanned birth) (*quoted in* Gallagher, *supra* note 108, at 455).

¹¹⁸ James Trussell & Barbara Vaughan, *Contraceptive Failure, Method-Related Discontinuation and Resumption of Use: Results from the 1995 National Survey of Family Growth*, 31 FAMILY PLANNING PERSPECTIVES 71 (1999) (*quoted in* Gallagher, *supra* note 108, at 455). This high pregnancy rate is a function of *actual* use of contraceptive methods, which is significantly less effective than *perfect* use. “The typical woman who

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nancy rate for contracepting women varies dramatically among specific demographic groups. A cohabiting adolescent woman, for example, has a contraceptive failure rate of roughly 47 percent during her first year of contraceptive use; among married women who are aged 30 and older, the failure rate is 8 percent for 12-month use.¹¹⁹ In sum, “[a]bout three million pregnancies in the United States (48%) were unintended in 1994. Some 53 percent of these occurred among women who were using contraceptives.”¹²⁰ Although contraception lowers the odds that sex results in pregnancy, it does not alter the social fact that heterosexual relationships are generative, and this fact is just as important for political theory as the fact that human beings desire survival, and no more dubious.

The possibility of artificial gamete donation does not make homosexual relationships become generative. Rather, the possibility allows individuals of whatever sexual inclination to produce children without having sexual intercourse: a woman may have her egg fertilized from donor sperm, or a man can have a donor egg fertilized with his sperm and then gestated. Such a man or woman may or may not be involved in a homosexual relationship. In fact, the vast majority of people who produce a child through gamete donation are not gay or lesbian. It is typically single, married, or cohabiting heterosexuals who use gamete donation.

Therefore, the advent of gamete donation does not change the fact that relationships other than traditional heterosexual ones are non-generative, which means that neither does gamete donation provide a public reason for singling out some of the people who could use the procedure and empowering them to enter into civil marriage just because they happen to be involved in a homosexual relationship. For to do so would be to assume that homosexual relationships especially are intrinsically valuable (as the order of nuns or a widower and his brother, for example, are not), and this assumption is an illegitimate grounds for state action, because it violates public reason. There is an analogy between gamete donation and ordinary adoption. Both of these practices are available to anybody, whether or not he or she is a partner in a traditional heterosexual relationship or a non-traditional relationship. Neither practice, therefore, gives any reason for uniquely picking out homosexual relationships as a class from among non-traditional relationships generally, and privileging just those with eligibility for civil marriage.

There is a further problem with the practice of gamete donation from the perspective of political liberalism, which is a problem that arises independently from the same-sex marriage debate, and implies that the political imperative for orderly social reproduction over time could not be met by using the practice. As David Velleman has argued persuasively, gamete donation violates the rights of the children produced by it. I will re-state a publicly reasonable version of Velleman’s argument momentarily.

uses reversible methods of contraception continuously from her 15th to her 45th birthday will experience 1.8 contraceptive failures.” *Id.*

¹¹⁹ Haishan Fu, et al. *Contraceptive Failure Rates: New Estimates from the 1995 National Survey of Family Growth*, 31 FAMILY PLANNING PERSPECTIVES, 56 (1999) (quoted in Gallagher, *supra* note 108, at 455).

¹²⁰ Fu, *supra* note 119, at 56.

First, however, consider the second claim I made at the outset of Section III: families headed by two married parents who are the biological mother and father of their children are (b) the optimal structure for childrearing. This claim can be demonstrated in two ways: first, by making an empirical argument that children do best when raised by the mother and father who bore them; second, by making a philosophical argument that developing a conception of the good requires knowing your mother and father and the family history into which you are born. These two arguments are complementary, but largely independent.

The empirical argument is available elsewhere, and I can only summarize it here, and show how it can be framed in terms of public reason. According to Child Trends, a liberal think tank:

[R]esearch clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage. Children in single-parent families, children born to unmarried mothers, and children in step-families or cohabitating relationships face higher risks of poor outcomes.... There is thus value for children in promoting strong, stable marriages between biological parents.... [I]t is not simply the presence of two parents, ... but the presence of two biological parents that seems to support children's development.¹²¹

Sara McLanahan and Gary Sandefur, sociologists from Princeton University and the University of Wisconsin, respectively, argue:

If we were asked to design a system for making sure that children's basic needs were met, we would probably come up with something quite similar to the two-parent ideal. Such a design, in theory, would not only ensure that children had access to the time and money of two adults, it would also provide a system of checks and balances that promoted equality parenting. The fact that both parents have a *biological* connection to the child would increase the likelihood that parents would identify with the child and be willing to sacrifice for that child, and it would reduce the likelihood that either parent would abuse the child.¹²²

Within political liberalism, childrearing should be deemed successful just to the extent it cultivates in children the two moral powers. A family headed by a married mother and father tends to provide better and more consistent access to primary goods. Recall that primary goods are comprised of a "political understanding of what is to be publicly recognized as citizens' needs...."¹²³ The content of these goods is morally thin (see Section II above) and may be derived

¹²¹ See Kristin Andersen Moore et al., *Marriage from a Child's Perspective: How Does Family Structure Affect Children, and What Can We Do About It?*, CHILD TRENDS RES. BRIEF 1-2, 6 (June 2002) available at <http://www.childtrends.org/files/MarriageRB602.pdf>; see also WITHERSPOON INST., MARRIAGE AND THE PUBLIC GOOD: TEN PRINCIPLES (2008) available at <http://www.princetonprinciples.org> (summarizing research in a statement on marriage signed by various social scholars across multiple disciplines).

¹²² SARAH MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT 38 (1994).

¹²³ RAWLS, *supra* note 14, at 179.

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from the “social background conditions and general all-purpose means normally needed for developing and exercising the two moral powers and for effectively pursuing conceptions of the good with widely different contents.”¹²⁴

The claim that children do best when reared by the married mother and father who bore them, like any empirical claim whatsoever, is of course contestable. When social scientists do contest it, however, they often mischaracterize what alternative sociological data would have to show in order to support specifically homosexual parenting, or polyamorous parenting for that matter. Only if conclusive social scientific evidence were to show that children do as well or better with two homosexual parents in comparison to two heterosexual parents, *and in comparison to two parents of the same sex who were not homosexual*, could the data be taken as evidence that grounded a publicly reasonable argument on behalf of homosexual marriage as such. Otherwise, studies that purported to show the benefits of homosexual parenting would really just show at best the benefits of having two parents of whatever sexual relation, because they would not control for parenting couples such as a widower and his brother, for example, who are neither homosexual nor husband and wife.

This mistake along with many others vitiates the force of the American Psychological Association’s influential 2005 brief on lesbian and gay parenting. The brief asserts, “Not a single study has found children of lesbian or gay parents to be disadvantaged in any significant respect relative to children of heterosexual parents.”¹²⁵ But this assertion is extremely misleading, because the 59 studies cited in the brief do not really examine the “children of lesbian or gay parents” and furthermore they fail to use a stable and well-defined conception of “heterosexual parents” as a comparison class.¹²⁶ The studies overwhelmingly examine small, non-representative convenience samples of well-educated, wealthy, white lesbian mothers who live in cities on the East or West coast. The studies fail to investigate how children fare beyond adolescence, which precludes the studies from registering dysfunctions that typically arise in adulthood, and they evaluate children by documenting their *parents’* perceptions about the children’s wellbeing, rather than evaluating the children themselves.

The studies also focus upon an extremely narrow range of outcomes for children. Thus they examine outcomes such as “sexual orientation,” “behavioral adjustment,” “self-concepts,” and “sex-role identity,” “sexual identity,” “sex-role behavior,” self-esteem, “psychosexual and psychiatric appraisal,” and “socioemotional development,” and “maternal mental health and child adjustment”;¹²⁷ but they generally neglect to study the effects of lesbian or gay parenting on “inter-generational poverty, collegiate education and/or labor force contribution, serious

¹²⁴ RAWLS, *supra* note 14, at 75-76.

¹²⁵ C. J. Patterson, *Lesbian and Gay Parents and their Children: Summary of Research Findings*, LESBIAN AND GAY PARENTING: AMERICAN PSYCHOLOGICAL ASSOCIATION (2005) 5-22, available at <http://www.apa.org/pi/lgbt/resources/parenting-full.pdf>.

¹²⁶ See Loren Marks, *Same-Sex Parenting and Children’s Outcomes: A Closer Examination of the American Psychological Association’s Brief on Lesbian and Gay Parenting*, SOCIAL SCIENCE RESEARCH, VOLUME 41, ISSUE 4, JULY 2012, Pages 735–751, available at <http://dx.doi.org/10.1016/j.ssresearch.2012.03.006>.

¹²⁷ *Id.* at 743.

criminality, incarceration, early childbearing, drug/alcohol abuse, or suicide that are frequently the foci of national studies on children, adolescents, and young adults....¹²⁸

Twenty-two of the 59 studies cited in the brief (44.1%) have no heterosexual parenting comparison group whatsoever, and of the remaining 33 studies that do have a comparison group, many do not use intact families headed by a married mother and father. At least 13 of the 33 studies used various *single-parent* families as the heterosexual comparison groups, usually single mothers who were divorced or never married. The remaining 20 studies ambiguously refer to their heterosexual comparison group as “mothers” or “couples” without identifying whether they are single, married, divorced, cohabiting, or a mixture of these.¹²⁹

In summary, the Association’s brief is a methodological mess, and whatever the implications of the studies it cites, they do not establish that children of homosexual parents “are not disadvantaged in any significant respect relative to children of heterosexual parents.” Indeed, there is now evidence to the contrary, for the New Family Structures Study (NFSS) recently conducted by the University of Texas at Austin provides the first nationally-representative sample of adult children of homosexual parents, evaluated across a range of 40 important outcome measures.¹³⁰ The NFSS shows statistically significant differences between the adult children of intact biological families and of lesbian mothers on 25 of the 40 outcomes, with the adult children of lesbian mothers faring worse on factors such as need for psychiatric therapy, sexually transmitted infections, educational attainment, state welfare support, depression, drug use, criminality, infidelity, sexual victimization, and smoking.¹³¹ The NFSS shows statistically significant differences between the adult children of intact biological families and of gay fathers on 11 of 40 outcomes, with the latter group worse off on 10 out of 11.¹³² The adult children of gay fathers were better off in one respect: they reported a higher rate of voting in presidential elections than the adult children of intact biological families.¹³³

The NFSS is not a longitudinal study and on its own does not establish a causal link between homosexual parenting and poor outcomes for children.¹³⁴ But

¹²⁸ *Id.*

¹²⁹ *Id.* at 740-741.

¹³⁰ Available at <http://www.prc.utexas.edu/nfss/>.

¹³¹ See Mark Regnerus, *How Different are the Adult Children of Parents who have Same-Sex Relationships? Findings from the New Family Structures Study*, SOCIAL SCIENCE RESEARCH 41 (2012) 752-770.

¹³² *Id.*

¹³³ See <http://www.familystructurestudies.com> (for illuminating graphic comparisons on outcomes between various family structures).

¹³⁴ Mark Regnerus, the principal investigator of the NFSS is quite explicit about its limits. See REGNERUS, *supra* note 131, at 755 (“It is a cross-sectional study, and collected data from respondents at only one point in time, when they were between the ages of 18 and 39. It does not evaluate the offspring of gay marriages, since the vast majority of its respondents came of age prior to the legalization of gay marriage in several states. This study cannot answer political questions about same-sex relationships and their legal legitimacy.”).

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it does conclusively refute the claim that there are “no differences” between the childrearing of intact families headed by a mother and father and of homosexual couples. In any case, for the purposes of my argument here, I need to go beyond the narrowly social scientific, and to consider the second argument for the claim that children do best when reared by the married mother and father who bore them. This argument is philosophical and it is specific to political liberalism.¹³⁵ It is here that I will develop the work of David Velleman on family history and narrative identity. What I wish to contend is that biological kinship is among the conditions that are ordinarily necessary for someone to develop his narrative identity—that is, his conception of the good—and a just liberal regime will try to ensure that these conditions are obtained by enshrining heterosexual marriage in the law.

Velleman makes a powerful argument that biological kinship and family history are objectively valuable, so “other things being equal, children should be raised by their biological parents.”¹³⁶ For human animals, forming a conception of the good involves engaging with a narrative that is already partly written by one’s family history and biological kin. One’s personal knowledge of one’s origins:

is especially important to identify formation because it is important to the telling of one’s life-story, which necessarily encodes one’s appreciation of meaning in the events of one’s life. I [Velleman writes] began with the story of my Russian ancestors, whose search for something better I imagined to have culminated in my writing this essay. My family background includes many such stories, whose denouement I can see myself undergoing or enacting. ... Of course, my own life provides narrative context for many of the events within it; but my family history provides an even broader context, in which large stretches of my life can take on meaning, as the trajectory of my entire education and career takes on meaning in relation to the story of my ancestors.¹³⁷

Therefore, to have a child by a means that knowingly deprives him or her from having biological kin and a family history, e.g. through gamete donation, is to wrong the child gravely. Thus Velleman argues,

our society has embarked on a vast social experiment in producing children designed to have no human relations with some of their biological relatives.... The experiment of creating these children is supported by a new ideology of the family, developed for people who want to have children but lack the biological means to ‘have’ them in the usual sense.¹³⁸

A person’s desire to procreate

has been thought to ground a moral right to procreate only for those who are in a position to provide the resulting child with a family. According to the new ideology of the family, of course, virtually any adult is in a position to satisfy

¹³⁵ *Nota bene* that by calling this argument “philosophical” I don’t mean that it is entirely non-empirical.

¹³⁶ J. David Velleman, *Family History*, 34 PHILOSOPHICAL PAPERS 357 (2005).

¹³⁷ *Id.* at 375-76. For a lengthier account of narratives and narrative identity, see J. David Velleman, *Narrative Explanation*, 112 THE PHILOSOPHICAL REVIEW 1 (2003).

¹³⁸ Velleman, *Family History*, *supra* note 136, at 360.

this requirement, since a family is whatever we choose to call by that name. ... [But] what counts as providing the child with a family in the relevant sense is a question that must be settled prior to any claim of procreative rights.¹³⁹

[Nevertheless] people who create children by donor conception already know—or already should know—that their children will be disadvantaged by the lack of a basic good on which most people rely in their pursuit of self-knowledge and identity formation. In coming to know and define themselves, most people rely on their acquaintance with people who are like them by virtue of being their biological relatives.¹⁴⁰

[G]amete donation ... purposely severs a connection of the sort that normally informs a person's sense of identity, which is composed of elements that must bear emotional meaning, as only symbols and stories can.¹⁴¹

Velleman focuses his argument against the practice of anonymous gamete donation, but he recognizes that it also tells against deliberate single parenting and homosexual parenting as well, because such arrangements can “have” children only with artificially assisted reproduction through gamete donation.¹⁴²

Empirical evidence supports Velleman's argument that forming one's own narrative identity, or one's conception of the good, requires engaging with one's inherited family history through one's parents and siblings.¹⁴³ Forty-five percent of gamete donor offspring agree with the statement, “The circumstances of my conception bother me.” Forty-eight percent of donor offspring, as opposed to only 19% of adopted adults, agree, “When I see friends with their biological fathers and mothers, it makes me feel sad,” and 53% of donor offspring agree, “It hurts when I hear other people talk about their genealogical background,” whereas only 29% of adopted adults agree with this. After donor offspring reach adulthood, a full 57% agree, “I feel that I can depend on my friends more than my family,” which is about twice as many as adults who were raised by their biological parents. When controlling for socio-economic factors, gamete donor offspring are significantly more likely than their peers raised by their biological parents to manifest delinquency, substance abuse, and depression. Gamete donor offspring are 1.5 times more likely to suffer from mental health

¹³⁹ *Id.* at 374.

¹⁴⁰ *Id.* at 364-65.

¹⁴¹ *Id.* at 363.

¹⁴² *Id.* at 360 (“Creating children with the intention that they not have a custodial father, or alternatively a custodial mother, is potentially just as problematic as creating children divorced from their biological origins.”).

¹⁴³ This is drawn from ELIZABETH MARQUARDT ET AL., INST. FOR AM. VALUES, MY DADDY'S NAME IS DONOR: A NEW STUDY OF YOUNG ADULTS CONCEIVED THROUGH SPERM DONATION, available at <http://familyscholars.org/my-daddys-name-is-donor-2/>. This study, which is the first of its kind, attempts “to learn about the identity, kinship, well-being, and social justice experiences of young adults who were conceived through sperm donation.” The study collects a representative sample of 485 adults (18-45 years old) who said their mother used a sperm donor to conceive them and compares groups of 562 young adults who were adopted as infants and 563 who were raised by their biological parents.

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problems. Yale psychiatrist Kyle Pruett argues that his research on artificial reproductive technologies shows that children conceived through gamete donation and raised without fathers “hunger for an abiding paternal presence,” and this felt need that such children express mirrors the findings of work on divorce and single-parenthood.¹⁴⁴ These data of course do not show that it is impossible to flourish as the offspring of gamete donation, but they show that it is significantly more difficult.¹⁴⁵ There is quite generally considerable evidence for the importance to children of having biological ties with their parents *as* mother and father.¹⁴⁶

Although this empirical evidence should be fairly uncontroversial, Velleman’s argument, by contrast, is more controversial because it makes moral claims that implicate comprehensive doctrines about sorts of relationships that are intrinsically valuable in human life. If you fail to value your family history, and fail to take seriously the significance of your biological ties of kinship, then on Velleman’s account you make a moral error in not attending to something worthy of respect.¹⁴⁷ Velleman’s argument can be moderated, however, by weakening the conclusion. Weakening the conclusion has the effect of strengthening the force of the argument overall and making it defensible in terms of public reasons. Whereas Velleman wants to conclude that you ought to value biological ties, all I need to claim is that you ought to let other people decide for themselves whether to value their biological ties. In other words, for human beings this is an important and often life-defining decision to make, and no one should have the right to make this decision taken away from him. Therefore, one shouldn’t preempt people’s choice and foreclose access to an intimate sphere of human life for them by rendering them biological orphans through the

¹⁴⁴ KYLE PRUETT, *FATHERNEED* 207 (2000); *see also* DAVID POPENOE, *LIFE WITHOUT FATHER* (1996).

¹⁴⁵ *Cf.* Velleman, *Family History*, *supra* note 136, at 374 n.10 (“Children can of course be successfully reared by single mothers, if necessary. But children can be successfully reared, if necessary, in orphanages as well—a fact that cannot justify deliberately creating children with the intention of abandoning them to an orphanage. (Imagine a woman who would like to have the experience of conception and childbirth without incurring the responsibility for raising a child.) Just as the serviceability of orphanages cannot justify procreation in reliance on their services, so the serviceability of single parenting cannot justify the creation of children with the intention they grow up without a father of any kind.”).

¹⁴⁶ *See, e.g.*, Kristin Anderson Moore, et al., *Marriage From a Child’s Perspective*, CHILD TRENDS RESEARCH BRIEF at 6 (June 2002) (“Research clearly demonstrates that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict marriage.”); *id.* at 1-2 (“[I]t is not simply the presence of two parents, ... but the presence of *two biological parents* that seems to support children’s development.”); Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well Being in Cohabiting, Married, & Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 890 (2003) (“The advantage of marriage appears to exist primarily when the child is the biological offspring of both parents.”) (*Quoted in* Gallagher, *supra* note 107).

¹⁴⁷ Velleman’s argument rightly does not criticize ordinary adoption. Cases of adoption are those in which, “The child needs to be parented by someone, and it cannot or should not be parented by its biological parents, for reasons that outweigh any value inhering in biological ties.” *See* Velleman, *supra* note 135, at 363.

manner of their conception.¹⁴⁸ The desires of adults should not trump the just claims of children, and yet this is just what gamete donation does.

Without the possibility of gamete donation, children cannot be produced within the context of homosexual unions or other non-traditional relationships. Even with gamete donation, children conceived from the procedure are thereby deprived of the conditions ordinarily necessary for them to develop conceptions of the good, regardless of the family structure present, because developing one's own conception of the good includes forming one's narrative identity in terms of inherited family history. Therefore, homosexual unions or other non-standard relationships cannot satisfy the procreative functional criteria of civil marriage in a politically liberal regime. Only traditional heterosexual marriages are intrinsically generative and optimal for childrearing. It's worth emphasizing that this argument could not spring from any special disregard for an intimate union *as homosexual*, because the problem lies with the kin-alienation caused by gamete donation, which is a procedure used much more frequently by heterosexuals and single people than by homosexual couples. Political liberalism has no problem with conceptions of the good that reject traditional sexual morality. Yet traditional marriage is the publicly reasonable marital form because it happens to be the arrangement that serves the social need for orderly reproduction over time.

Sally Haslanger has objected to Velleman's argument for the importance of biological kinship in forming one's own sense of identity.¹⁴⁹ She argues that children are not wronged by being intentionally conceived as biological orphans via gamete donation or by conventional "closed" adoptions. Haslanger agrees with Velleman that parents and society have an obligation "to provide the social bases for healthy identity formation" in children, but she claims there are "multiple routes to this result," so "the obligation is only to provide for one or another of these routes." Indeed, the optimal alternative may be to promote anonymous gamete donation, among other things, because the practice undermines the cultural importance granted to biological ties and "it may even be a moral duty to combat bionormativity."¹⁵⁰ I mention Haslanger's objection only to set it aside, however, because her counterargument is premised upon her own controversial comprehensive doctrines, so it is irrelevant to the modified, publicly reasonable version of Velleman's argument that I have proposed here. As Haslanger says, "I enthusiastically endorse the disruption of old ideologies of the family, and resist new ideologies that entrench and naturalize the value of biological ties."¹⁵¹ In any case, throughout her analysis Haslanger carelessly runs together conventional adoption of children who have already been born and the "adoption" of donated gametes, which undermines the force of her objection against Velleman's original argument as well.

Even someone resolutely opposed to "old ideologies of the family" should concede that a publicly reasonable argument for the traditional conception of

¹⁴⁸ See *id.* (explaining why nonexistence isn't relevant here).

¹⁴⁹ Sally Haslanger, *Family, Ancestry, and Self: What's the Relevance of Biological Ties?* 2 ADOPTION & CULTURE (2009).

¹⁵⁰ *Id.* at 114.

¹⁵¹ *Id.* at 92.

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marriage does not defend that conception *qua* traditional. It is irrelevant that the conception of marriage as an exclusive union of a man and woman, ordered toward the bearing and rearing of children, happens to be one that is traditional in many societies (but not all, of course). Neither does a publicly reasonable argument defend traditional marriage because it is the sort of relationship in which a constituent of some comprehensive doctrine is realizable, as natural law theorists have argued. There is an apt comparison with between a publicly reasonable defense of traditional marriage and of racial equality. The mid-twentieth century civil rights movement for racial equality in the United States was deeply Christian. Many participants in the movement were not Christians of course, and there were specifically Christian arguments that some segregationists made *against* racial equality. Nevertheless, Rev. Martin Luther King and other key leaders in the movement made Christian arguments in the public square for racial equality in a biblical idiom that echoed the arguments of the anti-slavery movement in the 19th century, which were even more confessionally Christian.¹⁵² The reliance of Rev. King and others upon the controversial comprehensive doctrines of the Christian moral tradition did not violate the canons of public reason, however, because the case for racial equality could be re-stated in nonsectarian terms that expressed a purely political conception of justice.¹⁵³ The same is true for the traditional marriage movement. Much of this movement deploys specifically religious arguments in its defense, but this fact is irrelevant so long as some of these arguments can be re-stated in terms of public reasons, as I have done here.¹⁵⁴

This point merits emphasis because liberal proponents of same-sex marriage habitually refer to the religious motivations of advocacy for traditional marriage in the United States as if this fact implies a *reductio ad absurdum* of any political argument in favor of traditional marriage. But if the Christian inspiration of the anti-slavery and civil rights movements did not render them incompatible with political liberalism, then neither should the Christian inspiration of the traditional marriage movement. Furthermore, the translation of the Christian defense of traditional marriage into public reasons is not a mere hypothetical possibility, because this is already what Christian politicians and activists have been doing in practice.¹⁵⁵ In 2004 Republicans in the US Senate proposed a Federal Marriage Amendment (FMA) to the Constitution, which would

¹⁵² On the Christian character of abolitionism *see* JAMES M. MCPHERSON, *BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA* 8 (1988); ERIC FONER, *POLITICS AND IDEOLOGY IN THE AGE OF THE CIVIL WAR* 72 (1980); AILEEN S. KRADITOR, *MEANS AND ENDS IN AMERICAN ABOLITIONISM* (1967). *See also* MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 213 n.74 (2d ed. 1998).

¹⁵³ *See* Rawls, *supra* note 15. *But see* JEFFREY STOUT, *DEMOCRACY AND TRADITION* (2004) (arguing that Rawlsian public reason cannot successfully re-state the US civil rights movement independently of its Christian inspiration).

¹⁵⁴ It is worth noting that many of the arguments made in favor of same-sex marriage have been specifically religious.

¹⁵⁵ Of course they have done this without the sophistication or precision of an academic theorist, and they have been responding to political realities rather than being self-consciously motivated by Rawls' work.

have defined marriage as between one man and one woman. At the time, Frederick Liu and Stephen Macedo criticized the Republicans' "inarticulate gestures" in support of the FMA that failed to "amount to an adequate public justification for legislation." The senators' alleged inarticulacy about their deeper motivations, which stemmed more or less from traditional Christian natural law theory, "risk[ed] enshrining popular prejudices in the law," Liu and Macedo claimed.

It may be true that Republican senators lack the philosophical training to defend the natural law teaching on marriage. But we believe that most politicians would have no interest in articulating it if they could. . . . On Capitol Hill, however, there is a conscious effort, including among Republicans, to avoid adopting the sort of "intolerant" and "moralistic" tone often associated with the "Religious Right." One Republican legislative assistant admitted that his senator eliminated references to Judeo-Christian values that appeared in the original draft of his floor statement on the FMA. Another Republican aid spoke of her senator as "a religious man" who took a position against gay marriage first and "put words to it" later—words that never mentioned the influence of his faith. And yet another staffer conceded that, while her Republican senator's religious views were important in determining his stance on same-sex marriage, the senator could not reveal them and risk appearing "homophobic" before his constituents.¹⁵⁶

Liu and Macedo mention these facts as supposed evidence for the conclusion that Republicans in the US Senate employed a legislative strategy that was "cynical, opportunistic, and inconsistent with the equal respect and fairness that majorities owe to minorities if they are to govern legitimately."¹⁵⁷

Of course the irony is that Liu and Macedo accuse the Republican senators of bad faith for doing precisely what Rawls prescribes citizens in a pluralistic democracy should do: filter their comprehensive doctrines through the deliberative screen of public reason before proposing grounds for legislation. The only inconsistency here is on Macedo's part, since he professes to be an advocate of public reason.¹⁵⁸ In fact, Liu and Macedo's description of the Republican legislative process gives a rather exemplary case study of public reason at work, which is all the more impressive because it involves a conservative political party, which is officially hostile to liberalism as a comprehensive doctrine, nevertheless adopting something like public reason as its *de facto* regulative ideal.¹⁵⁹ If Liu and Macedo's description of the process is accurate, the senators and their aides seemed to have examined their comprehensive doctrines about marriage and sexuality and sifted out the aspects of those doctrines that they thought were too controversial and sectarian, in order to make a publicly reasonable case for traditional marriage in terms that all their fellow citizens could accept. They

¹⁵⁶ Frederick Liu & Stephen Macedo, *The Federal Marriage Amendment and the Strange Evolution of the Conservative Case against Gay Marriage*, 38 POL. SCI. & POLITICS 213-14 (2005).

¹⁵⁷ *Id.* at 214.

¹⁵⁸ See my discussion *supra* at 20.

¹⁵⁹ Of course the senators must have also been concerned about their own electoral popularity.

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knew that many of their fellow citizens could have reasonably rejected specifically Christian arguments for traditional marriage, so they circumscribed those arguments and put forward accessible ones instead. Why impute this process with bad faith? The Republican senators were doing just what Rawls argues that the Rev. Martin Luther King and his fellow civil rights activists could have done if their Christian case for racial equality were translated into public reasons. Indeed, Liu and Macedo go on to give even more conclusive evidence of the publicly reasonable character of the Republicans' legislative strategy in 2004:

When asked whether their senator believe homosexual conduct to be immoral, no legislative aides could respond for none had ever discussed the matter. One legislative assistant even questioned whether the morality of homosexual conduct was in any way relevant to the same-sex marriage debate. Legislators and their staffs on Capitol Hill seem to lack both the capacity and the motivation to advance a morally perfectionist case against same-sex partnerships.¹⁶⁰

Liu and Macedo assume that the Republicans were being incompetent natural lawyers who failed to grasp the dependence of natural law theory's criticism of gay marriage upon its criticism of homosexual conduct. But why not see the Republicans as well-intentioned, if unwitting, Rawlsians, whose lack of animus towards homosexuality is happily confirmed by Liu and Macedo's account? This interpretation fits plainly with the facts. Liu and Macedo's description of the legislative process in the Senate bolsters the publicly reasonable credentials of my argument for heterosexual marriage, because it shows that the actual partisan debate over marriage is already primed to be recast in politically liberal terms; the movement for the FMA in 2004 had already begun to do so.

Now I want to proceed by answering a more general objection to the argument thus far. Someone might respond to my conclusion: Isn't marriage about more than having kids? Marriage is about love too. Marital love can have real social and political implications beyond mere "affective feelings," since such love characteristically translates into real practices of caring—caring for the sick, infirm, and elderly in a way that impersonal institutions cannot. "Parenting partnerships" defined as exclusively procreative and childrearing would short-sell this caring love because it doesn't just arise within the context of having and raising children. Doesn't political liberalism have an interest in supporting it, not as merely "affective," but as the source of tangible practices of caring that benefit society?

This response is fundamentally correct. There are good public reasons within political liberalism for the state to promote and support relationships of tangible care between citizens, so long as some relationships aren't specially privileged by appeal to sectarian comprehensive doctrines. This issue connects with a central theme in Rawls' work, which is the social basis of self-respect. In *Theory* Rawls identifies self-respect as "perhaps the most important primary good."¹⁶¹ He sees self-respect in two aspects: "First...it includes a person's sense of his own value, his secure conviction that his conception of his good, his plan of life is

¹⁶⁰ *Id.*

¹⁶¹ RAWLS, *supra* note 14, at 386.

worth carrying out. And second, self-respect implies confidence in one's ability, so far as it is within one's power, to fulfill one's intentions."¹⁶² Although a parenting partnership should no doubt include the relationship of caring that would foster the primary good of self-respect, it wouldn't suffice. Therefore, there seem to be good public reasons to include another legal category, which might be called a "domestic dependency relationship," which supported relationships of caring that were not also parental. It might include legal benefits like hospital visitation rights, certain tax credits, power of attorney, and so on. The eligibility criteria for this status could not be based on values stemming from sectarian comprehensive doctrines: two elderly sisters, a pastor and his associate, or a widower and his brother would be eligible. A homosexual couple too would be eligible for entry, not because they happened to be homosexual, but because they were friends who committed to care for and support one another.¹⁶³

Proponents of same-sex marriage sometimes concede, for the sake of argument, that traditional heterosexual marriage may be the ideal context for raising children, but they point out that there is no reason why the law must always and only promote the ideal.¹⁶⁴ They infer, therefore, that even the optimality of a married mother and father's parenting wouldn't preclude redefining civil marriage to include couples who are homosexual.

It is true that the law needn't always and only promote the ideal, but same-sex marriage proponents are mistaken to think that this fact provides a toehold for their argument. Within political liberalism, the burden of proof for legislative justification lies with the proponent of any policy that would affect matters of basic justice and constitutional essentials. Heterosexual marriage meets this burden because the state's limited interest in ensuring orderly social reproduction is served by the optimality of a married mother and father's parenting. The contribution of specifically homosexual unions to orderly social reproduction is no different from the contribution of other, non-sexual affective unions, such as the ones mentioned in the previous paragraph. This is why a legal category for domestic dependency partnerships that is sex-neutral and orientation-neutral would meet all the publicly reasonable needs of non-standard families and real caring relationships. For example, there is at present no reason to think that a gay couple raising adopted children meets the need for orderly social reproduction any better or worse than, say, a widower and his bachelor brother who partner to raise the widower's children. The law would unreasonably privilege the gay couple and implicitly denigrate the widower and his brother if, on account of the former cou-

¹⁶² *Id.*

¹⁶³ Someone might argue that access to the primary good of self-respect itself directly justifies same-sex marriage, because the members of a homosexual couple might lack self-respect without the social affirmation that the status of civil marriage confers. This argument fails, however, because in general form it would lead to the absurd conclusion that anyone could petition for any kind of legal recognition that would promote his self-respect; thus a Catholic priest might petition to have his ordination recognized by the state as sacramentally valid, since without recognition he would be expressively harmed. Therefore, direct claims to promotion of self-respect, apart from the other criteria of public reason, cannot justify specific policy prescriptions.

¹⁶⁴ *Cf.* Liu & Macedo, *supra* note 156.

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ple's sexual orientation alone, its relationship was distinguished by making it eligible for civil marriage. This is why public reason still excludes homosexual unions from civil marriage, even granting that there is no general imperative for the law to promote the ideal.

Even with a further legal category of domestic dependency relationships whose entry criteria are blind to controversial ideals about the worth of kinds of sexual intimacy, enshrining traditional marriage in the law may still have the consequence of reinforcing traditional sexual *mores* and perhaps even of discouraging the social acceptance of homosexuality and other nontraditional forms of sexual expression as normal. It would be foolish to deny this real possibility. These possible consequences do not undermine the publicly reasonable case for traditional marriage, however, because political liberalism only involves a neutrality of *justification* and *aim* for political conceptions of justice and not a neutrality of *effect*.

It is surely impossible for the basic structure of a just constitutional regime not to have important effects and influences as to which comprehensive doctrines endure and gain adherents over time; and it is futile to try to counteract these effects and influences, or even to ascertain for political purposes how deep or pervasive they are.¹⁶⁵

It is impossible for every theory or application of justice to be neutral in its effects on the holders of different reasonable comprehensive doctrines. Even if this means that a politically liberal society will effectively suppress radical programs "to make every effort to disrupt the hegemony of the [nuclear family] schema"¹⁶⁶ and this schema's "heteronormative models of the family,"¹⁶⁷ this suppression is so much the worse for such programs, which anyway sit uneasily in a pluralistic democracy.

Although the argument I make here is novel because it is presented systematically in Rawlsian terms, its substance is not entirely unfamiliar. I have already shown how, according to Liu and Macedo's unintentionally revealing account, the 2004 Republican effort to pass the FMA in the US Senate was roughly in accord with public reason. Now I wish to highlight how the state's legitimate interest in ensuring orderly social reproduction appears to be an emerging theme of American jurisprudence, as reflected in the decisions of U.S. state and federal courts from 2000 to 2012 that deal with same-sex unions. During this period, eight decisions upheld the traditional definition of civil marriage.¹⁶⁸ One state court decision mandated "civil unions" that are equivalent in all but name to tra-

¹⁶⁵ RAWLS, *supra* note 14, at 193.

¹⁶⁶ Haslanger, *supra* note 149, at 115.

¹⁶⁷ *Id.* at 114.

¹⁶⁸ See *Conaway v. Deane*, 932 A.2d 571 (Md. 2007); *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (en banc); *Citizens for Equal Protection v. Bruning*, 455 F.3d 859 (8th Cir. 2006); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004); *Standhardt v. Superior Court ex rel. Cnty. of Maricopa*, 77 P.3d 451 (Ariz. Ct. 2003), *reh'g denied*, 2004 Ariz. LEXIS 62, May 25, 2004.

ditional civil marriage.¹⁶⁹ Four decisions overturned traditional civil marriage and mandated same-sex marriage.¹⁷⁰ All eight decisions upholding traditional marriage accepted the defendants' appeal to the legitimate state interest in procreation and childrearing. Indeed, even in the New Jersey Supreme Court case that ordered civil unions, the majority notes:

The State does not argue that limiting marriage to the union of a man and a woman is needed to encourage procreation or to create the optimal living environment for children. Other than sustaining the traditional definition of marriage, which is not implicated in this discussion, the State has not articulated any legitimate public need [for attaching specific benefits and burdens to married heterosexual couples].

Thus, the Court implies that the State *could* have justifiably argued against homosexual civil unions if it had appealed to encouraging procreation or childrearing. The Connecticut Supreme Court mandated same-sex marriages in *Kerrigan v. Dept. of Public Health* (2008), but here too, the majority decision emphasizes:

we note that the defendants expressly have disavowed any ... belief that the preservation of marriage as a heterosexual institution is in the best interest of children, or that prohibiting same-sex couples from marrying promotes responsible heterosexual procreation....

Therefore, only three decisions out of thirteen rejected the state defense of traditional marriage when that defense was expressed in terms of promoting procreation and childrearing. Furthermore, the three anomalous cases—*Goodridge v. Dept. of Public Health* (Mass. 2003), *In re Marriage Cases* (Cal. 2008), and *Varnum v. Brien* (Iowa 2009)—were decided explicitly on the basis of moral comprehensive doctrines and violated the ideal of public reason.

V. ARGUMENTS FOR SAME-SEX MARRIAGE ARE PUBLICLY UNREASONABLE

The 2003 *Goodridge* decision of the Supreme Judicial Court of Massachusetts ignited the present same-sex marriage debate in the United States. “Simply put, the government creates civil marriage,” the Court declared, and then inferred that the state—via the mandates of the Court—was free to refashion the terms of civil marriage according to values stemming from what its judges decided were its comprehensive doctrines.¹⁷¹ Thus, the Court contradicted Rawls’s

¹⁶⁹ *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006).

¹⁷⁰ *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Kerrigan v. Dep’t of Pub. Health*, 957 A.2d 407 (Conn. 2008); *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Goodrich v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). A fifth case was the 9th Circuit’s February 2012 decision in *Perry v. Brown* reaffirming the district court’s overturning of California’s Proposition 8, which I discussed at the outset of this article. (*Perry v. Brown*, 671 F. 3d 1052, (9th Cir. 2012)).

¹⁷¹ *Goodridge, v. Dep’t of Pub. Health*, 798 N.E.2d 941, 945.

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account of the state's limited and functional state interest in marriage and the family, and usurped for the state a power that is incompatible with a pluralistic democracy guided by public reason. Impetus for *Goodridge* presumably came from the U.S. Supreme Court's decision *Lawrence v. Texas*, which was handed down several months before *Goodridge*. In *Lawrence*, the Court violated public reason even more egregiously than *Goodridge* by finding in the U.S. Constitution a highly sectarian conception of liberal autonomy. Justice Anthony Kennedy, writing for the majority in *Lawrence*, announces:

Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.¹⁷²

Kennedy proceeds to quote *Planned Parenthood v. Casey*: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."¹⁷³ The remarkable fact about this decision is not the holding in *Lawrence*, which struck down irregularly enforced and unpopular anti-sodomy laws, but the sectarian principle the Court announced in support of it and injected into Federal case law.¹⁷⁴ One needn't have any sympathy for anti-sodomy laws to see that the purported right to define one's own concept of the universe, or of the autonomy of the self generally, are illegitimate grounds for judicial and legislative actions, because they are manifestly sectarian pieces of comprehensive liberal doctrines.¹⁷⁵

¹⁷² *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

¹⁷³ *Lawrence*, 539 U.S. at 574.

¹⁷⁴ The philosopher John Deigh wrote at the time in an editorial for *Ethics*, the preeminent academic journal for moral philosophy: "What is striking about this remark [i.e. 'Liberty presumes an autonomy of self. . .'] is its language. One would look in vain for similar language in the majority opinions of the major cases from the 1960s and 1970s on which this opinion rests. These are the famous cases in which the Court found a fundamental right of privacy in the penumbra and emanations of the rights enumerated in the Bill of Rights. The authors of those opinions, in explaining the value of the liberty this right of privacy guarantees, speak of traditional values going back to a time before the founding of the United States, the sanctity of the home and the privacies of life, the sacredness of marriage, and the security of individuals in their person and possessions from unwarranted governmental intrusions. Nowhere, however, does one find reference to anything like the 'autonomy of self' to which Justice Kennedy, the author of the majority opinion in the Texas case, appeals." *Editorial*, 114 *ETHICS* (Oct. 2003), available at <http://www.jstor.org/stable/10.1086/380103>.

¹⁷⁵ Presumably the Court could have overturned the anti-sodomy statute on alternative, publicly reasonable grounds, without appealing to the sectarian liberal values proclaimed by Justice Kennedy. There do not appear to be any publicly reasonable arguments for criminalizing private sex acts between consenting adults, so in principle there could have been a more narrowly tailored, liberty-based objection to anti-sodomy laws that avoided relying upon controversial comprehensive doctrines. I owe this clarification to Frank Michelman.

The pro-same-sex marriage arguments of philosophers and legal theorists are no better than those of the judges in *Goodridge* and *Lawrence*.¹⁷⁶ The non-public, moralistic character of arguments in favor of same-sex marriage is often obscured by a rhetorical maneuver, however, which frames the debate as if it were simply about providing equal and fair access to an agreed-upon, uncontroversial social good. In brief, such rhetorical arguments for same-sex marriage proceed as follows. First, “marriage” gets implicitly defined as *any* affective sexual relationship between two adults. Second, it is argued that since the state promotes “marriage,” it should promote it fairly and with equal respect, not denying access to anyone who is eligible. Third, it is argued that since gays and lesbians can obviously have affective sexual relationships, there is no reason to preclude them from marrying, because to do so would be to discriminate against them as a class. This argument is often quite successful rhetorically, but it relies on a question begging definition of “marriage.”

Mary Lyndon Shanley, for example, begs the question when she says, “Despite their differences, neither side [in the same-sex marriage debate] questions whether marriage is a good thing and whether it should be recognized by the state; their argument is over who should be able to marry.”¹⁷⁷ On the contrary, the debate is precisely about whether marriage, according to its historic meaning, is a good thing or not. Gay rights activists think that marriage, historically understood, is a bad thing because it has the effect of establishing heterosexuality as socially normative, and by implication, they argue that it “inflicts profound psychic damage” on people who embrace a homosexual identity as part of their self-image.¹⁷⁸ They propose abolishing marriage and replacing it with a new legal category that solemnizes any affective sexual relationship between any two adults and thus discourages sexual complementarity as a social norm. It is politically useful to *call* this new category “marriage,” too, because it conceals just how expressively significant the change is, and makes it more likely to convince wary voters to accept the change.¹⁷⁹ But to define “marriage” as a relation equally open to heterosexual and homosexual couples, as Shanley does, is first, simply to beg the question against the natural law defenders of traditional marriage, for whom sexual complementarity is marriage’s *sine qua non*, and second, to impose an alternative comprehensive doctrine. In other words, the natural law theorists claim that marriage is essentially heterosexual because they claim that only heterosexual sex is valuable.¹⁸⁰ Liberals like Shanley think that *any* kind of consen-

¹⁷⁶ See, e.g., Cass Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081,(2005) (“[M]arriage is a government run licensing system, no more and no less,” which happens to come with the conferral of material benefits and expressive legitimacy).

¹⁷⁷ MARY LYNDON SHANLEY, *Afterword*, in JUST MARRIAGE 109, at 110 (Deborah Chasman & Joshua Cohen eds., 2004).

¹⁷⁸ MARTHA NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW (Geoffrey R. Stone eds., 2010).

¹⁷⁹ It is noteworthy that although she professes to follow the limits of public reason, Elizabeth Brake argues for retaining the term “marriage,” even though she proposes replacing its substance with generic social networks of care, in order to help induce public acceptance of homosexuality and gay sex.

¹⁸⁰ See ROBERT P. GEORGE, IN DEFENSE OF NATURAL LAW (2001).

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sual sex is valuable, so they reject the natural law account and want to redefine “marriage.”

Consider the professedly Rawlsian, constitutional argument put forth by Frank Michelman in favor of same-sex marriage. Michelman states correctly that, within political liberalism, “no political value can inhere in hostility or opposition to same-sex partnerships ‘as such,’ which can only reflect some religious or otherwise sectarian ethical doctrine.”¹⁸¹ From the fact that opposition to same-sex unions *as such* would be sectarian, he concludes that same-sex unions *as such* must be legally endorsed. But this inference is fallacious. In order for legal recognition to be justified, there needs to be a positive case made in terms of public reasons for why the state should pick out and enshrine specifically *homosexual* relationships among all the other affective relationships that there are.

Why limit the entry conditions to a parenting partnership to people who happen to be engaged in a romantic sexual relationship? Surely two brothers, an aunt and her grown niece, or a priest and his housekeeper, say, might also wish to enter a legally supported parenting partnership in order to assist them in raising a child who has come under their care. Traditional marriage was in the past indeed conceived of as in part a parenting partnership and Michelman thinks that political liberalism requires broadening that partnership just a little bit to include his preferred class, which is the couple who happens to be engaged in a homosexual romance. But this selective extension of marriage to homosexual unions *as such*, which singles out homosexual relationships as specially significant, discriminates against other intimate relationships (e.g. fraternal, non-sexual ones) which appear to be at least equally good candidates for parenting as homosexual unions.

It is true that the recent statutes and decisions imposing gay marriage do not explicitly refer to homosexual orientation as the empowering criterion that makes two men or two women eligible for civil marriage.¹⁸² But they do so implicitly. These laws invariably maintain the traditional prohibitions against consanguinity in marriage, even as they redefine marriage to include couples of the same sex. If these laws really were blind to sexual orientation and erotic intimacy as such—as public reason requires—then they wouldn’t maintain consanguinity prohibitions. By maintaining consanguinity prohibitions, however, these laws presume that couples entering marriage are sexually intimate, which is why they wish to prohibit incest, and thus they channel the state’s affirmative endorsement of gay sex.¹⁸³ The selective extension of legal marriage to homosexual unions in this

¹⁸¹ Michelman, *supra* note 33, at 413.

¹⁸² Professor Michelman pointed this out to me in personal correspondence.

¹⁸³ Elizabeth Brake appreciates this point in effect when she notes that the state’s “special priority accorded to marriage and marriage-like relationships marginalizes other forms of caring relationships. To the extent that it sustains ‘amatonormativity’—the focus on marital and amorous love relationships as special sites of value—marriage undermines other forms of care.” BRAKE, *supra* note 70, at 5. What Brake fails to see is that the state’s prioritizing interest in heterosexual marriage isn’t necessarily “amatonormative” because heterosexual marriage, unlike gay marriage, is publicly justifiable in terms of orderly reproduction.

way illicitly deploys the law's coercive and pedagogical power to promote a controversial piece of sectarian liberal sexual morality.

Michelman's argument goes awry because he fails to attend to Rawls's explicitly functional conception of marriage as a procreative and childrearing partnership. Michelman, like others, neglects this question altogether. In a footnote he says:

My aim here is strictly limited to confirming the general receptivity of Rawlsian thought to fundamental complaint against a publicly and legally privileged form of domestic association that is closed to same-sex partners. I do not address the intriguing question of what this thought has to say about the justifiability of making marriage a publicly recognized, legally consequential status at all, as opposed to a purely "private" matter.¹⁸⁴

The "intriguing question" cannot be avoided. First of all, to do so obscures the basic needs of children and the interest that children have in their parents' marriage as a public good which meets those needs. The state interest in marriage is not merely as a benefit for adults; but Michelman is insensitive to this fact by failing to consider what the function of legal marriage is.

More generally, it is absurd to attempt to assess whether some individual or group has a claim on a public benefit, or liability to some public burden, without first determining what the state interest is in offering the benefit or imposing the burden. The nature of the state interest in the family will determine whether and what publicly reasonable arguments are available to justify restricting or expanding access to the legal category "marriage." Consider an analogy. Suppose that U.S. Medicaid policy had a health benefit that provided African-Americans with vouchers for a sickle-cell anemia diagnostic test. Caucasian, Latino, and Asian Medicaid recipients would not be eligible for the voucher. People of any ethnicity may suffer from sickle-cell anemia and might benefit from the test, so is there any publicly reasonable argument for restricting access to public benefits by the "suspect classification" of race? If we adopted Michelman's approach, we would immediately have to conclude *no*, thus "confirming the general receptivity of Rawlsian thought to fundamental complaint against a publicly and legally privileged" form of medical benefit that is closed to Caucasians, Latinos, and Asians. But this conclusion is absurd, since there is, in fact, a straightforward public reason for the imagined policy: people descended from sub-Saharan Africans have a genetic predisposition to sickle-cell anemia (since apparently the relevant gene also protects against malaria) and therefore it is reasonable for the state to allocate scarce resources using the otherwise suspect classification of race, since race happens to indicate likely presence of the disease.

Michelman is representative among Rawlsians who have failed to grasp the import of political liberalism's functional conception of marriage and the family as ensuring orderly social reproduction over time. Rawlsians tend to be sectarian liberals and they have relied illicitly on their comprehensive religious or secular doctrines about "liberated" sexual morality in order to single out homosexual relationships *as such* for special promotion, thereby violating the ideal of public reason and the political conception of justice. But homosexual relationships as

¹⁸⁴ *Id.* at 423, n. 64.

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such lack any claim in justice for state recognition. In this regard, homosexual orientation is on a political par with, say, a traditional order of chivalry or theology of sacramental rites. The Knights of Malta and the Jesuits, for example, may be legally recognized as non-profit charitable associations that indirectly contribute to the political common good, but they cannot, for the politically liberal state, be recognized *as* a titled nobility or sacramental priesthood, respectively. In the same way, a gay couple may be legally recognized as being party to a generic domestic dependency relationship, but this cannot be endorsed as a “marriage”.

Cass Sunstein has offered an argument for same-sex marriage based on U.S. constitutional law that differs from Michelman’s.¹⁸⁵ Sunstein’s argument is interesting because he hedges his claims in a way that betrays sensitivity to a counterargument against same-sex marriage in Rawlsian terms along the lines I am arguing here but he fails to address the counterargument nevertheless. Sunstein canvasses and rejects three possible constitutional routes for requiring the legal recognition of same-sex unions as marriages: via (a) the right to privacy and “substantive due process,” (b) the right to equal legal treatment without irrational animus, and (c) the right against legal treatment according to a “suspect classification.” Each of these grounds has its weaknesses, so Sunstein proposes a fourth strategy rooted in the equal protection clause. He claims that it is “artificial and unfortunate” for the law to divide gender into male and female—although noting reassuringly that “[t]here are men and women, to be sure”—because the “diversity of human character” in private life and public life alike cannot be captured by just two complementary categories. Sunstein thinks that the complementary categories of male and female traditional marriage “undergirds the system of caste based on gender” and discriminates against homosexual relations. This discrimination is really a form of prohibition, like old the prohibitions on miscegenation: “But prohibitions are invalid under the equal protection clause.”¹⁸⁶ Sunstein therefore concludes:

In terms of their purposes and effects, bans on same-sex marriage have very much the same connection to gender caste as bans on racial intermarriage have to racial caste. I am speaking here of real-world motivations for these bans, and I am assuming, as does the current law, that impermissible motivations are fatal to legislation. The claim from neutrality is implausible in this context for exactly the same reason that it was implausible in *Loving [v. Virginia]*. To say this is not to say that the ban on same-sex marriages is necessarily unacceptable in all theoretically possible worlds. In our world, the ban is like a literacy test motivated by a discriminatory purpose, or a veterans’ preference law designed to exclude women from employment.¹⁸⁷

From a politically liberal perspective, Sunstein’s argument fails. Note that he relies on empirical assumptions about what motivates support for traditional

¹⁸⁵ But Cass Sunstein does reproduce Michelman’s error of failing to examine the public function of civil marriage, which undermines his conclusion in favor of same-sex marriage. See Sunstein, *supra* note 176, at 2081.

¹⁸⁶ Cass R. Sunstein, *Homosexuality and the Constitution in SEX, PREFERENCE, AND FAMILY* 221 (David Estlund & Martha Nussbaum eds., 1998).

¹⁸⁷ *Id.* at 219.

marriage. He assumes that such motivations have a discriminatory purpose because presumably he thinks that they are rooted in animus or controversial religious beliefs. As I noted earlier, however, Martin Luther King's support of racial equality was, in the actual world, motivated by controversial religious beliefs, and this did not make the cause of racial equality illegitimate in a pluralistic democracy, because King's support could be re-stated in publicly reasonable terms. As with civil rights, so with traditional marriage. In the actual world, it is the case *in favor* of same-sex marriage that has impermissible motivations that are fatal to legislation, but unlike the civil rights movement, there is not an alternative, publicly reasonable argument available to same-sex marriage proponents.

William Eskridge is another prominent proponent of same-sex marriage who, like Michelman, frames the debate as between proponents of uncontroversial equality and neutrality (his own side) and perfectionist moralizers (his opponents).¹⁸⁸ This framing of the debate stacks the deck carefully in order to ensure that only opponents of same-sex marriage appear to be making contentious moral claims, and therefore are vulnerable to being excluded by public reason.¹⁸⁹ But Eskridge's argument is unsuccessful for the same reasons that Michelman's argument fails; his presuppositions are in fact just as controversial and comprehensive as the assumptions of the conservative perfectionists he attacks, and he never bothers to consider the possibility of a non-perfectionist, publicly reasonable defense of conjugal marriage, such as I have proposed here.

Carlos A. Ball argues that perfectionist politics is unavoidable, and because there is a widely held egalitarian argument for same-sex marriage, same-sex civil marriage should be recognized in law. Ball argues for legal recognition because, "when the State makes distinctions among intimate relationships in order to recognize and support some (but not all) of them, it must make assessments regarding the value and goodness of those relationships." Ball claims that once the state "is in the business of recognizing and protecting some intimate relationships and not others," then the state inevitably must take sides and legislate from some controversial comprehensive doctrine. Ball concludes from this that the public debate over legally recognizing same-sex unions cannot be about "whether the State should remain morally neutral on the goodness and value of those relationships," but about what sorts of intimate personal relationships are intrinsically valuable, all things considered.¹⁹⁰ Ball's argument falters because he never gives any persuasive reasons for thinking that perfectionism really is unavoidable. Where he does consider Rawls's political liberalism specifically, in fact, his analysis is curiously results-driven and ultimately question-begging.

It is no longer sufficient to argue that homosexual conduct is morally-neutral behavior deserving only toleration. If our society is going to recognize same-sex marriage, the supporters of such marriages must incorporate perfectionist

¹⁸⁸ William N. Eskridge Jr., The Relational Case for Same-Sex Marriage in *JUST MARRIAGE* 58, at 58-59 (Mary Lyndon Shanley et al. eds., 2004).

¹⁸⁹ *Id.*

¹⁹⁰ Carlos A. Ball, *Against Neutrality in the Legal Recognition of Intimate Relationships*, in *MORAL ARGUMENT, RELIGION, AND SAME-SEX MARRIAGE: ADVANCING THE PUBLIC GOOD* 75, at 79 (Gordon A. Babst et al. eds., 2009).

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ideals into their arguments—they must be prepared to speak not only in terms of individual rights but also in terms of collective *goods* and the moral *value* of same-sex relationships.¹⁹¹

Ball does not ask, is political liberalism true? Rather, he asks, will political liberalism get me the results I want? And what he wants is

... to provide the theoretical framework for a gay rights movement that is not only concerned with repealing sodomy statutes and guaranteeing nondiscrimination in employment and housing, but also aims to *attain society's acceptance of homosexual relationships*.¹⁹²

Ball's maneuver is simply beside the point. He is correct that political liberalism is incompatible with his moralistic program—just as it is incompatible with the moralistic program of natural law theory and other comprehensive doctrines—but this fact alone does not bear on the truth or falsehood of political liberalism.¹⁹³ Ball may be right when he declares, “The struggle for societal acceptance of same-sex relationships entails a frontal attack on the deeply held views of many Americans....”¹⁹⁴ If so, then this struggle is precluded by political liberalism, which has no room for frontal attacks against fellow citizens' conceptions of the good.

Unlike Ball, Ralph Wedgwood has offered an argument for same-sex marriage that is meant to be framed in morally neutral terms.¹⁹⁵ Wedgwood gives a conceptual analysis of “marriage” using his intuitions about what marriage involves—and extensive assertions about what “we” think—and he concludes that marriage shouldn't “exclude” homosexual couples. This conclusion is unsurprising; Wedgwood titles his article “The Fundamental Argument for Same-Sex Marriage,” so presumably it was safe to infer without reading the analysis that he

¹⁹¹ Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L.J. 1871, 1881 (1996-1997).

¹⁹² *Id.* at 1882.

¹⁹³ Ball's ultimate strategy seems rather cynical, for he recommends endorsing liberal perfectionism or liberal neutrality whenever it makes prudential sense for the sake of promoting gay rights: “The theoretical framework that I propose in this article is not meant to be appropriate in all contexts and circumstances. There may be instances, whether in litigating before a court or in lobbying a legislature on a particular issue, when relying on neutral ideals such as equality, tolerance, and privacy, and eschewing issues of morality and values, may make prudential sense.” *Id.* at 1881.

¹⁹⁴ *Id.* at 1927. Contrast Rawls: *The Idea of Public Reason Revisited*, 64 CHICAGO L. REV. 765, 776 (1997): “Central to the idea of public reason is that it neither criticizes nor attacks any comprehensive doctrine, religious or nonreligious, except insofar as that doctrine is incompatible with the essentials of public reason and a democratic polity.” And *id.* at 782: “... no one is expected to put his or her religious or nonreligious doctrine in danger, but we must each give up forever the hope of changing the constitution so as to establish our religion's hegemony, or of qualifying our obligations so as to ensure its influence and success. To retain such hopes and aims would be inconsistent with the idea of equal basic liberties for all free and equal citizens.”

¹⁹⁵ See Ralph Wedgwood, *The Meaning of Same-Sex Marriage* in THE NEW YORK TIMES, May 26, 2012. Available at <http://opinionator.blogs.nytimes.com/2012/05/24/marriage-meaning-and-equality/> (for a recent restatement of his argument).

thought same-sex marriage would accord with his intuitions. The three essential features that Wedgwood thinks define “modern Western marriage” are: “(1) sexual intimacy; (2) domestic and economic cooperation; and (3) a voluntary mutual commitment to sustaining this relationship.”¹⁹⁶ Homosexual relationships obviously can include these features, so he concludes that civil marriage should be extended to homosexual couples. Although Wedgwood does not seem to notice it, his analysis is rather overbroad, because if he is right, many pimps and prostitutes will turn out to be “married” to each other, since surely there are sexually intimate, domestically and economically cooperative pimps and prostitutes who are mutually committed to sustaining their relationship.

Wedgwood argues that the essential social function of civil marriage is therapeutic affirmation for certain people’s intimate relationships: the reason for civil marriage “is simply that many people *want* to be married, where this desire to marry is typically a serious desire that deserves to be respected.”¹⁹⁷ What they want is the common public status conferred by social recognition of their relationship. Thus civil “marriage furthers a fundamental interest in *mutual understanding*, both between the couple and the rest of society.”¹⁹⁸ It is no doubt correct that civil marriage has the *effect* of reinforcing a married couple’s social identity and status, but this cultural effect need not—and in a politically liberal society cannot—be the justificatory grounds for a publicly reasonable marriage policy, unless the particular conception of civil marriage is neutral relative to controversial comprehensive doctrines. By this score, Wedgwood’s argument, like the others, fails to justify enshrining same-sex unions in law.

VI. CONCLUSION

I have been arguing for a conception of civil marriage that happens to be the traditional one, but the argument I have given does not depend upon tradition, religion, or most notably, upon controversial philosophical doctrines about the natural law or human flourishing. I have made a publicly reasonable case for defining civil marriage as the union of a man and a woman, and for legally recognizing and promoting families headed by two married parents who are the biological mother and father of their children. The ground for such a policy is, as Rawls argues the ground of any marriage and family policy must be, the permanent and basic social need for orderly reproduction over time. A family headed by two married parents who are the biological mother and father of their children is the optimal arrangement for maintaining a socially stable fertility rate, rearing children, and inculcating in them the two moral powers requisite for politically liberal citizenship. Furthermore, I have canvassed the available arguments in favor of recognizing homosexual relationships (or polyamorous relationships, etc.) as civil marriages, and shown how these arguments depend essentially upon controversial

¹⁹⁶ Ralph Wedgwood, *The Fundamental Argument for Same Sex Marriage*, 7 J. POL. PHIL. 225, 229 (1999).

¹⁹⁷ *Id.* at 235.

¹⁹⁸ *Id.* at 236.

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moral doctrines drawn from various comprehensive liberal visions of the good life and fail to link same-sex marriage with the social need for orderly reproduction over time. The nonpublic and sectarian character of the case for same-sex marriage entails that liberals who are sympathetic with the idea of public reason—and this seems to be most liberals—should reject the case for same-sex marriage.

The publicly unreasonable nature of the arguments for same-sex marriage should resolve the contentious marriage debate along the lines of a principled, political consensus in favor of conjugal marriage, because the ideal of public reason applies quite broadly across the various partisan, legislative and judicial spheres in which this debate is engaged today. As Rawls argues:

[t]he ideal of public reason does hold for citizens when they engage in political advocacy in the public forum, and thus for members of political parties and for candidates in their campaigns and for other groups who support them. It holds equally for how citizens are to vote in elections when constitutional essentials and matters of basic justice are at stake.... It applies in official forums and so to legislators when they speak on the floor of parliament, and to the executive in its public acts and pronouncements. It applies also in a special way to the judiciary and above all to a supreme court in a constitutional democracy with judicial review.¹⁹⁹

If the rational basis standard of constitutional jurisprudence is the standard of public reason, then judges have a positive duty in upholding the Constitution to strike down the sectarian legislation that has established same-sex marriage. Furthermore, the broad scope of public reason requires liberal citizens to abandon their unreasonable advocacy for same-sex marriage that divides and destabilizes the public forum, and fails to treat as equals their fellow citizens who reasonably reject their sectarian arguments.

Some liberals might prefer to jettison their commitment to the ideal of neutrality if they recognized that neutrality, or public reason, required opposing same-sex marriage and supporting heterosexual marriage. As the gay activist and journalist Andrew Sullivan has cogently argued, however, liberalism

has most to lose when it abandons the high ground of liberal neutrality. Perhaps especially in areas where passion and emotion are so deep, such as homosexuality, the liberal should be wary of identifying his or her tradition with a particular way of life, or a particular cause; for in that process, the whole potential for liberalism's appeal is lost. Liberalism works—and is the most resilient modern politics—precisely because it is the only politics that seeks to avoid these irresolvable and contentious conflicts.²⁰⁰

Of course perfectionist liberals would disagree with Sullivan that neutrality is as central to the broad tradition of liberalism as he suggests. Nevertheless, perfectionist liberals who support same-sex marriage would be mistaken if they assumed that they are immune to the argument I have given here, simply because they reject its key premise, which is the idea of public reason.

¹⁹⁹ RAWLS, *supra* note 14, at 215-26.

²⁰⁰ ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* at 162-136(1996).

This would be mistaken because the concerns for orderly social reproduction and the rearing of children who are capable of forming their own conception of the good are concerns that implicate other substantive liberal values, in particular the preeminent value of autonomy. Although the task itself exceeds the scope of this essay, it would be possible craft a parallel, liberal perfectionist version of the publicly reasonable case for heterosexual marriage, because orderly social reproduction promotes autonomy. Even if the absence of same-sex marriage restricts the autonomy of those homosexual couples who might wish to be legally married, this restriction may very well be compatible with holding that a substantive conception of moral autonomy should be the governing value for politics. As Joseph Raz has argued:

[a] moral theory which values autonomy highly can justify restricting the autonomy of one person for the sake of the greater autonomy of others or even of that person himself in the future. That is why it can justify coercion to prevent harm, for harm interferes with autonomy. But it will not tolerate coercion for other reasons.²⁰¹

As we have seen, children are harmed when they are intentionally conceived and reared in situations that deprive them of the social bases of forming an identity and conception of the good.²⁰² In such situations, their ability to exercise autonomy is diminished, and children are denied what is due to them in justice.

One can harm another by denying him what is due to him. This is obscured by the common misconception which confines harming a person to acting in a way the result of which is that that person is worse off after the action than he was before. While such actions do indeed harm, so do acts or omissions the result of which is that a person is worse off after them than he should then be.²⁰³

Thus there are promising grounds for developing a liberal perfectionist argument, which is framed in terms of promoting autonomy, for enshrining heterosexual marriage in the law.

However that may be, the politically liberal case for heterosexual marriage as I have presented it is a philosophical argument, framed in terms of public reason, about the importance of family history to the development of one's narrative identity and conception of the good. This argument relies in part upon a number of plausible empirical claims, but like all empirical claims, these are subject to qualification and revision based on better data in the future. At the present moment, nationally representative, longitudinal studies of child rearing by homosexual couples do not exist. Probably the best study to-date is the NFSS and it establishes a significant correlation between parents who have had a same-sex relationship and dysfunctional outcomes for children. The existing studies that pur-

²⁰¹ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 419 (1986). Raz himself endorses same-sex marriage, but it is not clear that he should, given the considerations about orderly social reproduction, which he does not consider. *Id.* at 234.

²⁰² Recall that such cases do not include conventional adoption, in which the biological parents are for some reason incapable of rearing the children they have already had.

²⁰³ RAZ, *supra* note 201, at 416.

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port to show that homosexual parenting is harmless suffer from fatal methodological defects.²⁰⁴ I have cited some of the many reliable studies that robustly indicate the importance for children of having a married mother and father to whom they are biologically related.²⁰⁵ Although evidence for this claim, like *any* actual evidential claim, could be stronger by theoretical criteria, it is extremely strong for practical political purposes, and indeed, it is decisive. This is because, in politics, you can't beat somebody with nobody, and in the debate over marriage there isn't *any* competitor to the case I have made here, for there is no publicly reasonable argument in view that would support same-sex civil marriage. There may be good public reasons for establishing generic "civil unions" or "domestic dependency partnerships" in the law, as I have shown, but homosexual orientation cannot be a condition for entry into such a legal status.

The only problem that the politically liberal case on behalf of heterosexual marriage faces, it seems, is the extreme self-confidence of the many liberal proponents of legally recognizing homosexual relationships. But self-confidence is no substitute for reasonable argument, and the intrinsic value of any intimate sexual relationship as such is simply not a public matter for political liberalism. In a recent review article of several books arguing for same-sex marriage, Andrew Lister declares, "it is obvious that same-sex marriage is preferable to opposite-sex-only marriage," and he concludes that "[t]he case for same-sex marriage seems so strong to its proponents, that the issue seems to present no interesting normative problems—only the psychological problem of explaining resistance and the strategic problem of overcoming it."²⁰⁶ This attitude is no doubt widespread among liberals, but if liberals are going to participate as reasonable citizens in a pluralistic society animated by fairness, they will have to learn what John Rawls has to teach. Rawls's lesson is that reasonableness excludes political fundamentalism and requires recognizing the fallibility of one's beliefs and the duty of civility to moderate one's transcendent claims to having the whole truth. This lesson is especially important for the influential majorities within the academy, judiciary, and news and entertainment media that seem intent on legislating their deeply held convictions about sexuality. As Stephen Macedo aptly notes:

The liberal commitment to public reasonableness stands for the view that the mere fact of power—even of overwhelming numerical superiority combined with passionate conviction—is not enough to establish the legitimacy of laws and policies in the face of principled objections. [Because] ... the politically powerful need to provide an adequate public justification: reasons that can be openly presented to others, critically defended, and widely shared by reasonable people.²⁰⁷

²⁰⁴ See Affidavit of the University of Virginia sociologist, Professor Steven Lowell Nock, in *Halpern v. Attorney General of Canada*, Case No. 684/00 (Ont. Sup. Ct. Justice 2001) (describing serious methodological defects in studies and scholarship about the parenting of children by homosexual couples).

²⁰⁵ See Sections II-III *supra*.

²⁰⁶ Andrew Lister, *How to Defend (Same-Sex) Marriage*, 37 *POLITY* 409 (2005).

²⁰⁷ Macedo, *supra* note 28, at 299.

Liberals cannot reasonably expect everyone to endorse their personal views about sexual morality and the value of some intimate relationships, even when those views are accompanied by intense feelings of moral certainty. Therefore, liberals must limit their arguments for statutory and constitutional legislation about these matters by the specifically political values that “belong to the most reasonable understanding of the public political conception and its political values of justice and public reason.”²⁰⁸

The reasonable understanding of marriage by this standard is the understanding that happens to be the traditional one: between a man and a woman.

²⁰⁸ RAWLS, *supra* note 14, at 236.

LEGAL REALISM AND THE RHETORIC OF JUDICIAL
NEUTRALITY: RICHARD WRIGHT'S CHALLENGE TO
AMERICAN JURISPRUDENCE

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ABSTRACT

This article analyzes three key tenets of Legal Realism alongside Richard Wright's novel, Native Son. In the mid-twentieth century, Legal Realists such as Karl Llewellyn, Felix Cohen, and Fred Rodell wanted to overthrow the still-prevalent view of law as neutral and rule-centered, insisting that the "felt and often unstated necessities of the time" played a larger role than a priori rules in determining how judges decided cases. The Realists claimed the meaning of a law could only be assessed retroactively, based on its empirical function and consequences. Though the Realists initially conceived of their movement broadly and in interdisciplinary terms, that expansive focus has been lost in recent decades as scholars tend to focus on Realism as a specialized intellectual debate happening at a few top law schools. I recover Realist arguments outside of those specialized debates in order to revise our recognition of their potential for understanding the law's role in perpetuating racial injustice. I show how Richard Wright uses the hermeneutics of the Legal Realists to critique the rhetoric of legal neutrality and to expose the laws protecting real property as a sublimated system of racial segregation, one designed to consolidate economic power in the white upper-classes. He uses rape as a figure for the functional meaning of segregation, showing how segregation is experienced not only as a condition of profound isolation, but also as a form of violent occupation. I argue that reading Native Son as a jurisprudential text displays the depth of Wright's devastating critique of the mid-century American legal system. Furthermore, because Wright extends the Realist critique to race relations—something the Realists themselves never did—he constructs a functional critique of Realism itself, revealing its disturbing acquiescence in the majoritarian tyranny undergirding the status quo.

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I. INTRODUCTION

In his classic 1921 book on jurisprudence, *The Spirit of the Common Law*, Roscoe Pound recounts an episode from Mark Twain’s *Huckleberry Finn*:

When Tom Sawyer and Huck Finn had determined to rescue Jim by digging under the cabin where he was confined, it seemed to the uninformed lay mind of Huck Finn that some old picks the boys had found were the proper implements to use. But Tom knew better. From reading he knew what was the right course in such cases, and he called for case-knives. “It doesn’t make no difference,” said Tom, “how foolish it is, it’s the *right* way and it’s the regular way. And there ain’t no other way I ever heard of, and I’ve read all the books that gives any information about these things. They always dig out with a case-knife.” So in deference to the books and to the proprieties the boys set to work with case-knives. But after they had dug till nearly midnight and they were tired and their hands were blistered and they had made little progress, a light came to Tom’s legal mind. He dropped his knife and, turning to Huck, said firmly, “Gimme a case-knife.” Let Huck tell the rest:

“He had his own by him, but I handed him mine. He flung it down and says, ‘Gimme a *case-knife*.’”

“I didn’t know just what to do—but then I thought. I scratched around amongst the old tools and got a pickax and give it to him, and he took it and went to work and never said a word.

“He was always just that particular. Full of principle.”¹

Pound offers the anecdote to illustrate legal fictions—strategic linguistic workarounds that alter the operation of the law while leaving the formal text of legal doctrine unchanged.² As Pound writes, “when legislation or tradition pre-

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¹ ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW*, 166-67 (1921)[hereinafter *SPIRIT*].

² Legal fictions have been characterized as a “contrived condition or situation” for reaching justice by “devious means.” BALLENTINE’S *LAW DICTIONARY* 468 (3d ed. 1969). For the two most well-known treatments, see the chapter entitled *Legal Fictions* in HENRY SUMNER MAINE, *ANCIENT LAW* 21-43 (1861) and LON FULLER, *LEGAL FICTIONS* (Stanford U. Press 1967) (1930-1931). An excellent study of judicial strategies to avert application of the law is ROBERT COVER, *JUSTICE ACCUSED: ANTISLAVERY AND THE JUDICIAL PROCESS*

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scribed case-knives for tasks for which pickaxes were better adapted [...] the law has always managed to get a pickax in its hands, though it steadfastly demanded a case-knife and to wield it in the virtuous belief that it was using the approved instrument.”³ Because case-knives remain expressly the “right course in such cases,” legal fictions hide the fact that the law has been altered and so exacerbate the gap between judicial doctrine and judicial practice. Pound’s critique of legal fictions was just one part of his broader attack on Formalist conventions of judicial rhetoric that, he believed, created a growing mismatch between “law in books” and “law in action.”⁴ These “gaps” between legal doctrine and socio-empirical realities marked the extent to which conventions of judicial rhetoric provided a guise under which judges did their inevitably political, creative, and legislative work. He aided the development of the Legal Realist movement⁵ by pushing for a new jurisprudence that would close that gap by legitimizing the judiciary’s role in “social engineering.”⁶

Inspired by (though later dismissive of) Pound, the Legal Realists began to coalesce around dissatisfaction with the Formalist claim that law could be embodied in neutral and predictable written rules. Discursive claims to such a closed legal world, they argued, obscured the tension between the text of the law and the lived experience of it, between what judges *said* they were doing and what they *were* doing. Oliver Wendell Holmes⁷ insisted, “no one will ever have a

(1975) (analyzing the way antislavery judges mobilized uncertainties, gaps, and ambiguities in formal legal doctrine to mitigate the effects that would have followed from a strict application of slave laws).

³ POUND, SPIRIT, *supra* note 1, at 167.

⁴ *Id.*

⁵ Pound’s debt of influence is undeniable, even though Llewellyn, the self-proclaimed spokesperson for the Legal Realists, made Pound the object of ridicule and critique as the Realist movement became increasingly radical and Pound increasingly conservative. For his part, Pound later became a vocal critic of the Realist movement. For an account of the cantankerous exchanges between Pound and Llewellyn, see N.E.H. HULL, ROSCOE POUND AND KARL LLEWELLYN (1997).

⁶ See the chapter on “Legal Reason” for his “new theory of lawmaking as a social function.” POUND, SPIRIT, *supra* note 1, at 213. Pound’s account of the “the spirit of twentieth-century jurisprudence” is one in which judges and jurists are enabled to take account of “social facts,” to “insist on sociological study” of the impact of laws, to consider laws together with “the economic and social history of their time,” etc. He wanted the jurist to “keep in touch with life” and to use law in a utilitarian way, with social ends taking precedence over the strict application of abstract legal doctrines. *Id.* at 205.

⁷ As early voices criticizing Formalism’s “iron laws,” Oliver Wendell Holmes and Roscoe Pound laid foundation for the later Realists. Though an advocate of strict judicial restraint, Holmes’ understanding of the place of law within the larger context of society “[broke] down the walls of Formalism.” FRANCIS BIDDLE, MR. JUSTICE HOLMES 61 (1942 ed.). Holmes was deeply involved with the development of the “sociological” school of jurisprudence in Great Britain and his positivistic view of law was revered by the American Legal Realists. Formalism did not accurately describe the way Holmes believed legal rules were generated and, in 1881, he dubbed as failures “all theories which consider law only from its formal side.” OLIVER WENDELL HOLMES, THE COMMON LAW 26 (1881). Holmes instead emphasized an evolutionary paradigm in which “new principles from life”

truly philosophical mastery over the law who does not habitually consider the forces outside of it which have made it what it is.”⁸ Because of such outside forces, said the Realists, rules and logic do not wholly govern legal decision-making. Again in the words of Holmes:

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed.⁹

For evidence of the “felt necessities of the time,” the Realists turned to social science, the “empirical side of law,” beginning with attending to how courts actually decide cases rather than what courts say about why they decide as they do.¹⁰

II. LAW IN BOOKS VERSUS LAW IN ACTION—TWO APPROACHES TO JURISPRUDENCE

The great tragedy of the law—the slaying of a beautiful concept by an ugly fact.
--Joseph C. Hutcheson, Jr.¹¹

The best way to understand the difference between Formalism and Realism is to consider the Realists’ critique of some key judicial decisions that illustrate Formalist techniques.¹² *Lochner v. New York*, 198 U.S. 45 (1905) is often prof-

are absorbed into the law, while old ones are retained and slowly “sloughed off.” *Id.* at 36. His outward looking process limited the place of logic in favor of an avowed connection between the law and the rest of the world. *Id.* at 61.

In the 1910s, Roscoe Pound advanced the criticism of Formalism when he cited methods judges had historically found to circumvent legal rules while using Formalism’s rule-based rhetoric of neutrality and stasis. For example, Pound identified ways judges have found to curtail owner’s rights to property, to limit the rights of creditors to seek satisfaction from debtors, to impose liability in the absence of fault, among others. POUND, *SPIRIT supra* note 1.

⁸ HOLMES, *supra* note 7, at 173.

⁹ *Id.*

¹⁰ HERMAN OLIPHANT, *Facts, Opinions, and Value-Judgments*, 10 TEX. L. REV. 127, 138 (1932).

¹¹ JOSEPH C. HUTCHESON, JR., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274 (1928-1929).

¹² While Legal Realism cannot rightly be reduced to a reaction against Legal Formalism, that reaction is an important aspect. I use Formalism to refer to the text-centric approach to jurisprudence that is typically seen as emerging during the period following the Civil War and becoming dominant in the first part of the twentieth century. Brian Leiter, in his decades-long study of jurisprudence, has repeatedly demonstrated the reductive tendency of scholars to portray a vulgar and oversimplified version of Formalism that nobody actually subscribed to and that ignores the complexities of Formalism as a jurisprudential approach. See e.g. BRIAN LEITER, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEXAS L. REV. 267 (1997); BRIAN LEITER, *Legal Formalism and Legal Realism: What is the Issue?* 16 LEGAL THEORY 111, 120 (2010).

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ferred as a hallmark of Formalist legal thought. In *Lochner*, the Supreme Court struck down a New York law that limited bakers to 60 working hours per week. *Lochner*, a bakery owner, challenged the law, claiming it interfered with the bakers' right to contract. A divided court sided with *Lochner*,¹³ citing the "right of the individual" to be free to "enter into those contracts in relation to labor which may seem to him appropriate" without "unreasonable, unnecessary and arbitrary interference."¹⁴ In lauding the individual's right to contract, however, the court not only invalidated the societal interest in protecting health and safety, but also ignored the factual context surrounding the labor contracts. By striking down the law, the court enabled bakery owners to continue hiring non-union bakers to work extremely long hours in unsafe conditions for less than a living wage in a time of job scarcity. The bakers were in no position to bargain. But this context

Joining Leiter on many fronts, Brian Tamanaha cites statements from judges and scholars to illustrate that there was a substantial amount of "Realism" about the process of judging even during the so-called era of Formalism. See BRIAN TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010). On this point, Tamanaha's work misses the boat. The fact is that conventions of appellate legal rhetoric and argumentation in the late nineteenth and early twentieth centuries frequently presented the syllogistic deductive structure characteristic of Formalism despite what judges' personal views about jurisprudence may have been and regardless of what remarks judges may have been made in other forums about the nature of the judicial process. In fact, the disjunction between the language and form of a judicial opinion and the subtleties and complexities of judicial practice and belief was itself a key component of the Realist critique. I heartily concur that scholars, including the Realists, often oversimplify Formalism. However, because my primary focus is on Formalism as viewed by the Realists, their constructions of Formalism remain most relevant for my study. Thus, while aided by the work of contemporary legal historians, I've drawn largely from the texts of Legal Realists in order to give an account of Formalism that comports with the way it was defined by the Realists.

Although historians would be hard pressed to find a judge who defines his or her role as a "mechanical" application of pre-existing law, this view of judicial behavior retains considerable weight. The law's ritual concessions to this common place of jurisprudence are on full display during senate confirmation hearings where would-be justices of the Supreme Court are routinely expected to articulate their acceptance of precisely that role. Senate committee members, many with specialized legal training, are quick to pounce upon any comment that could be used to demonstrate that the nominee does not accept the very caricature of judging that Leiter and others dismiss as vulgar or non-existent.

Furthermore, whether or not judges in their scholarly writing subscribe to oversimplified Formalist tenets, the rhetorical conventions of the legal opinion reinforce them. Appellate opinions do not brook discussions of rule indeterminacy, admit to other equally-valid possible outcomes, take cognizance of the extent of judicial discretion, or explicitly acknowledge the role of politics and other "outside" influences on the outcome of a case. The rhetoric of law, if not the private beliefs of its practitioners, often does align with the Formalist caricature.

¹³ The voting was 5-4. Oliver Wendell Holmes authored the famous dissent.

¹⁴ *Lochner v. New York*, 198 U.S. 45, 56 (1905).

was not relevant to the decision.¹⁵ The concept of the right to contract *in the abstract* was dispositive.

Tauza v. Susquehanna Coal Co. (1917) provides another example.¹⁶ Here, a corporation chartered in Pennsylvania was being sued in New York and a dispute erupted over *where* the corporation was. State jurisdiction was a matter of that person's "presence" in the state, and in the later decades of the nineteenth century, corporations came to be considered "persons."¹⁷ But, of course, unlike a human person, a corporation is not physically "present" anywhere.¹⁸ Felix Cohen's critique of the *Tauza* decision demonstrates the difference between a Realist and a Formalist approach to the question of corporate "presence." Rather than taking up any relevant "economic, sociological, political, or ethical questions,"¹⁹ Cohen wrote, the court instead addressed itself to the formal metaphysical question: "where is a corporation?" Was this corporation *really* in Pennsylvania or in New York, or could it be in two places at once?"²⁰

Because the questions as framed by the court could not be decided by empirical investigation, Cohen claims they are identical in "metaphysical status" to the question of how many angels can balance on the point of a needle. "Nobody has ever seen a corporation," he writes, so

What right do we have to believe in corporations if we don't believe in angels? To be sure, some of us have seen corporate funds, corporate transactions, etc. (just as some of us have seen angelic deeds, angelic countenances, etc). But this does not give us the right to hypostatize, to "thingify," the corporation, and to assume that it travels about from State to State as mortal men travel.²¹

¹⁵ Nor did the court find relevant the fact that the case represented the conflict between Union bakers who favored the law limiting them to a 10 hour work day (bakers were paid by the day, not the hour) and non-union, mostly immigrant, bakers who were willing to live in "basement" bakeries and work 15-16 hours a day, 7 days a week. For analysis of the broad range of economic interests involved in the *Lochner* decision, see David E. Bernstein, *Lochner v. New York: A Centennial Retrospective*, 85 WASH. U. L.Q. 1469 (2005).

¹⁶ *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259 (1917). *Tauza* was one of several cases mined from the law of corporations whose Formalist approach is critiqued by Felix Cohen. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809-814 (1935). Corporate law was a natural place to turn for such examples, since the existence of the corporation itself rested on the fantastic legal fiction that a corporation is a person.

¹⁷ *Santa Clara Cnty. v. Southern Pacific R.R.*, 118 U.S. 394 (1886) is often cited as the source of the legal fiction granting corporations status as legal persons. For an early twentieth-century history of corporate personality, see John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655 (1926).

¹⁸ Contrary to its frequent use in common parlance, "corporation" references only a certain method of organizing a business. A corporation's existence is considered separate and distinct from that of its members. Furthermore, the "corporation" does not refer to the location of an office, factory, inventory, store front, workers, etc.

¹⁹ Felix Cohen, *supra* note 16, at 810.

²⁰ *Id.*

²¹ *Id.* at 811.

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The *Tauza* court's self-contained Formalist approach justifies the law tautologically by recourse to the law itself rather than by recourse to any factual or empirical inquiry into what the dispute meant for the corporation, for the plaintiff, or for society at large.

Formalist methods facilitated the expansion of American business interests and the emergence of a national economy,²² but Formalism's narrow reading practices were also regularly employed to erode Constitutional promises of equality.²³ So long as the literal meaning of words established equality "formally," the courts ignored both discriminatory intent and outcome,²⁴ echoing Anatole France's famous formulation of legal neutrality: "The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal their bread."²⁵

The case most recognizable today for embodying a disconnect between the law and empirical reality is *Plessy v. Ferguson*, the notorious 1896 Supreme Court decision that validated government sponsored racial segregation and helped ensconce the "separate but equal" doctrine.²⁶ *Plessy* upheld the constitutionality of a Louisiana law that required separate railcars for Blacks and Whites. Seven of eight justices concluded that, since the Act required both white and colored people to ride in their own racially designated and supposedly equally maintained railroad cars, the law was "neutral" and so did not run afoul of the equal protection clause. The majority insisted that the fallacy of *Plessy's* argument was "the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."²⁷ Since the act did not *explicitly* assign a "badge of inferiority," any such perception could only be the result of an interpretation added onto otherwise straightforward and neutral words, a supplement to denotation and thus not legally relevant to the meaning of the law. To reach the conclusion that segregation laws were neutral, the Court exploited the Formalist strategy of narrow reading in a way that boxed out context, history, and empirical fact as aids in interpretation. Although judges leveraged Formalist methods to reach highly political decisions aimed at thwarting attempts to secure racial and social

²² See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960* (1992)[hereinafter TRANSFORMATION II] and HULL, *supra* note 5, at 17-32.

²³ For analysis of the way that Formalism was used to counteract attempts to enforce the Thirteenth, Fourteenth, and Fifteenth Amendments, see JAMES ANTHONY WHITSON, *CONSTITUTION AND CURRICULUM* (1991). See also Robert L. Hale, *Rights under the Fourteenth and Fifteenth Amendments against Injuries Inflicted by Private Individuals*, 6 *LAW GUILD REV.* 627 (1946).

²⁴ Whitson wrote, "so long as [Blacks and Whites] were equal *formally*, according to the law, the courts [...] would not look past the legal formalism to acknowledge all the inequalities that continued to exist." *Supra* note 23, at 25.

²⁵ ANATOLE FRANCE, *THE RED LILY* (Winifred Stephens trans., Lane Publishers 1908) (1894).

²⁶ *Plessy v. Ferguson*, 163 U.S. 537 (1886).

²⁷ *Plessy*, 163 U.S. 537, 551.

justice, they used the rhetoric of Formalism to doggedly declare the neutrality of those decisions.

In 1954, when *Plessy* was overturned by *Brown v. Board of Education*,²⁸ the court was seen as admitting what people already knew—that “the ‘equality’ provided under segregation was nothing but a legal fiction.”²⁹ What has become increasingly clear is that even in 1896, there was widespread recognition that the *Plessy* court’s reliance on the statute’s “facial neutrality” was disingenuous. Many Northern states responded to the southern segregation agenda by passing legislation prohibiting racial segregation in schools and public accommodations.³⁰ Though these antisegregation statutes did little to prevent de facto segregation in the North, their enactment demonstrates the extent to which people realized government sponsored segregation was not racially neutral, despite what seven Supreme Court justices claimed.

In “The Secret History of Race in the United States,” Daniel J. Sharfstein studies the records in legal cases that required a determination of racial identity, records that “provide rare glimpses into the private lives and worldviews of real people” and their self-consciousness about race.³¹ Sharfstein concludes: “[i]t is no exaggeration to say that at the height of Jim Crow, people—even and perhaps especially the most rabid of racists—understood what a legal fiction [race] was.”³² Even as *Plessy* was handed down, many people recognized that race was a social construction, that the color line was artificial and arbitrary, and that the legal system strategically employed the concept of race to perpetuate inequality.

Stunningly, despite the fact that the Realists sought social context for legal decisions, and despite the fact that they were working during an era when lynching, government sponsored segregation, and legally protected private discrimination were at the forefront of legal debates in the United States, the Realists all but ignored the legal and jurisprudential issues involved with race. A study published by the Harvard Law Review Association found that, of the many hundreds of published works associated with Legal Realists, only three authors—Karl Llewellyn,³³ Felix Cohen,³⁴ and Robert Hale³⁵—addressed African-American race

²⁸ *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

²⁹ WHITSON, *supra* note 23, at 24.

³⁰ See DAVISON M. DOUGLAS, *JIM CROW MOVES NORTH: THE BATTLE OVER NORTHERN SCHOOL SEGREGATION, 1865-1954* (2005), especially “Legislation Reform: Banning School Segregation, 1865-1890,” at 61-122.

³¹ DANIEL SHARFSTEIN, *The Secret History of Race in the United States*, 112 *YALE L.J.* 1473, 1475 (2003).

³² *Id.* at 1476.

³³ Llewellyn supported the NAACP in the 20s and 30s, but his writing on race didn’t emerge until his 1954 article *Group Prejudice and Social Education*. It’s easy to see why the article was never canonized. In it he argues that race problems are caused by people living in “In-Groups.” From infancy, human beings are channeled into group ways that generate “Us-oriented” ideals. Llewellyn calls for social education as a means of teaching people to abandon “Us-group” ways and adopt a “Total Team” approach to unity. The argument is simplistic, campy, and falls short of the analysis typical of Llewellyn. Karl N. Llewellyn, *Group Prejudice and Social Education*, in *CIVILIZATION AND GROUP RELATIONSHIPS* (R.M. MacIver ed., 1954).

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issues at all, and none of their work on race has been included in the Realist canon.³⁶ Today, many recognize Legal Realism as the intellectual ancestor of the Critical Legal Studies movement of the 1970s and 80s, which rigorously addressed race issues, and of the Critical Race Theory of the 1990s and today. So strangely, the movement that supplied such a potent theoretical framework for critiquing race relations was never really put to such a use in its day—at least not in the legal archive.

Study of Realist thought has been short-changed by the inability of scholars to see beyond law school corridors. Legal Realism has nearly universally been viewed as a highly specialized intellectual debate waged in the pages of law reviews between a handful of “academic lawyers” from a few elite law schools.³⁷ A persistent misreading of Karl Llewellyn, who coined the term “Legal Realist,” is partly to blame. In a 1931 response to Roscoe Pound, Llewellyn produced a (in)famous list of 20 “Realists,”³⁸ mostly legal scholars.³⁹ Llewellyn’s list has been both used as evidence for how limited the “movement” was and highly criticized as incomplete. Some of this criticism is unfair. Llewellyn names twenty but claims “there are doubtless 20 more.”⁴⁰ He stipulates that his list is only a “fair sample,” chosen to represent a “wide range of views and positions.”⁴¹ Fur-

³⁴ Felix Cohen’s writings on race focus almost exclusively on Native Americans. When he makes reference to Blacks in America, it is typically a side note by way of comparison or contrast. His most generally applicable work on race is his article entitled *The Vocabulary of Prejudice*, which is a study of the way in which the “language of prejudice” translates into prejudicial attitudes and behavior. FELIX COHEN, *The Vocabulary of Prejudice*, in THE LEGAL CONSCIENCE (Lucy Cohen, ed., 1960). (1953).

³⁵ Robert Hale, whose work on race is discussed later in this article, critiqued the way in which American political and legal institutions fail to provide the rights promised under the Fourteenth and Fifteenth Amendments and the way states have eroded those amendments through their disingenuous separation of private from public action. While Hale is included in Realist canon by some later scholars, in his day he was seen as a Realist ally working in a non-legal field.

³⁶ Note, *Legal Realism and the Race Question: Some Realism about Realism on Race Relations*, 108 HARV. L. REV. 1607, 1608, 1620 (1995).

³⁷ Calvin Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689, 717 (1968).

³⁸ The exchange between Roscoe Pound and Karl Llewellyn began in 1930 when Llewellyn announced the arrival of “Legal Realism” as a new movement in law in *A Realistic Jurisprudence—The Next Step*. 30 COLUM. L. REV. 431 (1930). Pound answered with *Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931), in which he caricatured and dismissed the movement, without, however, citing a single writer then associated with Realism. In his 1931 *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931) [hereinafter *Some Realism*], Llewellyn, aided by Jerome Frank, responded to each of Pound’s caricatures by surveying 90 documents written by 20 different men he deemed undisputed Realists to show how little Pound’s assessments matched reality.

³⁹ The 20: Bingham, Lorenzen, C.E. Clark, Cook, Corbin, Moore, T.R. Powell, Oliphant, Frank, Green, Radin, Hutcheson, Klaus, Sturges, Douglas, Frances, Patterson, Tulin, Yntema, Llewellyn, *Some Realism*, *supra* note 38, at n.18.

⁴⁰ *Id.*

⁴¹ *Id.*

thermore, as William W. Fisher, Morton J. Horwitz, and Thomas A. Reed note, Llewellyn “lists in his text and notes about sixty-five people (in addition to the list of twenty) he associated with Realism.”⁴² The sixty-five included scholars from various fields. He not only names Roscoe Pound, Oliver Wendell Holmes, Benjamin Cardozo, Louis Brandeis, and Felix Frankfurter, but also economists Robert Hale, Adolf Berle, and James Bonbright, doctrinal writers Nathan Isaacs and Francis Bohlen, philosopher Felix Cohen, psychologist Thurman Arnold, and many others. In contrast with the use to which his list has often been put, Llewellyn clearly conceived of Legal Realism broadly and in interdisciplinary terms.

While recent legal historians have worked to reverse the falsely truncated map of Realist terrain by including a broader range of texts and thinkers, and by characterizing it as both a continuation of Pre-World War I Progressivism as well as a precursor to the Pragmatic Instrumentalism of the Warren Court in the 1960s,⁴³ their ambition has been disappointingly narrow. The debates tend to center on whether the Realist movement encompassed this law school or that law professor. N.E.H. Hull, for example, defines the Realists as a “cadre of American law professors” whose “heroic combat” “echoed though the pages of the Columbia Law Review and the Harvard Law Review.”⁴⁴ Hull broadens the archive, but only to include additional law professors.⁴⁵ Similarly narrow, Stewart Macaulay attacks the traditional account of Legal Realism that seats it at Columbia and Yale Law Schools to insist the movement actually started at the University of Wisconsin and then went to the University of Chicago.⁴⁶ An initially promising attempt by the Harvard Law Review to recognize how traditional accounts of Legal Realism “reflect the racial stratification of social and intellectual life during the Realist period” ultimately evidences the persistent academic tunnel vision

⁴² WILLIAM W. FISHER, MORTON J. HORWITZ, & THOMAS A. REED, eds. *AMERICAN LEGAL REALISM*, 51 (1993).

⁴³ See, e.g., BERNARD SCHWARTZ, *MAIN CURRENTS IN AMERICAN LEGAL THOUGHT* (1993) and DANIEL R. COQUILLETTE, *THE ANGLO-AMERICAN LEGAL HERITAGE* (1999).

Additionally, in their essay *The Struggle over the Meaning of Realism* in *AMERICAN LEGAL REALISM* (1993), FISHER ET AL. lay blame for the narrow construction of the Realist canon at the feet of Karl Llewellyn, who, as the self-proclaimed spokesperson for the Realists, allowed ignorance, error, and a personal battle with Roscoe Pound to influence the lists he published of Realist texts and thinkers, lists that historians have often simply taken for granted rather than doing their own search of the Realist terrain. See also Gilmore, who broadens Legal Realism to include judges, lawyers, and legislators—basically anyone with a role to play in the legal system. GRANT GILMORE, *THE AGES OF AMERICAN LAW* (1979). But see TAMANAHA, supra note 12, who attempts to reframe the categories of Formalism and Realism by rejecting the notion that there was anything like a Formalist “era” in American jurisprudence, an argument he makes by identifying so-called “Realist” points of view in legal thinkers, many of whom pre-date the Realist era, and some of whom are traditionally thought of as Formalists.

⁴⁴ HULL, supra note 5, at 313.

⁴⁵ Namely, and not remarkably, Roscoe Pound and other “Progressive-Pragmatists.” *Id.* at 305-06.

⁴⁶ Stewart Macaulay, *The New Versus the Old Legal Realism: “Things Ain’t What They Used to Be,”* 2005 WIS. L. REV. 365, 367 (2005).

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in constructing the Realists. The Review advocates including “non-white scholars [...] who were equally moved by the set of Realist ideas and inclinations.”⁴⁷ However, the list of “non-white scholars” ends up being a set of one—the high-profile civil rights lawyer and Dean of Howard University Law School, Charles Hamilton Houston. Even Brian Tamanaha’s recent work criticizing the reductive ways American jurisprudence has been periodized into Formalist and Realist “eras” focuses exclusively on writings of judges and legal scholars.⁴⁸

The work of judges and legal scholars may seem a reasonable focus for a study of jurisprudence. However, Legal Realism was grounded in the premise that understanding law requires understanding the broad range of phenomenon that exert force on what is rhetorically acknowledged as formal law. Therefore there is a certain irony in assuming that jurisprudence can be an insular field where “law” cannot. This assumption has led to the systematic exclusion of

⁴⁷ Note, *supra* note 36 at 1608. The Note identifies Charles Hamilton Houston as a black man whose work on ending segregation “exemplified the Realist approach to achieving progress in American race relations.” *Id.* Meanwhile, Houston has been omitted from every formal treatment of Legal Realism.

⁴⁸ The insularity with which the Realists are discussed leads historians and critics to overlook the revolutionary nature of the Realist agenda and the fervor of contempt with which the Realists were met. The emergence of Realism threatened legal institutions, a threat whose stakes were raised considerably by the onset of World War II as the law was shaped dramatically in response to Nazism and Stalinism. There was a national desire for law to have a stronger hold, and there was an increased fear of uncertainty, flexibility, and discretion that let to a “storm of criticism [falling] on Legal Realism.” HULL, *supra* note 5, at 239. Hull writes, “[M]odernism, with its inherent distrust of tradition, became ominous in the 1930s because other, more violent ideologies were hammering at the door [Stalinism, Nazism, Fascism, American communism, extreme right-wing groups, etc.]. The arrival of such angry, greedy players at the table raised the stakes of the ideological game, and Legal Realism was elevated, willy nilly, from a semiprivate, elite, academic subject to a matter of national concern.” *Id.* at 236-37.

Realism was seen as an attack on law that endangered national security. Ignatius Wilkinson, then Fordham Law School’s influential Dean, dubbed Legal Realism the single most pressing danger present in America, ranking its threat as more serious than that of communism or fascism. *See id.* at 238. Realism was accused of discarding religion, “dispens[ing] with the tried and true common law,” “encourage[ing] disrespect for the country,” and “open[ing] the door to European absolutism.” *Id.* at 239. Even the much-loved Justice Cardozo, after suggesting that judging involves more than deductive logic, was accused of “undermin[ing] that faith in the place of inescapable logic in the law which was fundamental to security.” SCHWARTZ, *supra* note 43, at 477. John Henry Schlegel summarized a few more of Realism’s critics: “Philip Mechem complained that Realists viewed ‘society and its more important institutions’ as a ‘great joke.’ Walter B. Kennedy saw and objected to the ‘cumulative effect of the constantly widening attack upon law, order [...], principles and rules.’ Father Lucey saw Realism as leading ‘from the thesis of Democracy and reason to the antithesis’ of the ‘Absolute State.’” JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* 3 (1995). The ferocity of this criticism is hard to understand if we accept Tamanaha’s claim that “Realism about judging was commonplace decades before the Legal Realists came on the scene.” TAMANAHA, *supra* note 12, at 67. The vehemence of the criticism with which the Realists were met belies Tamanaha’s claim that Realist ideas about judging were commonplace during an era known for its Formalism.

thinkers and writers outside of law proper whose insights were aligned with and who often facilitated the arguments of the Realists. Thus, one object in this article is to begin to open the Realist archive. Specifically, I will consider the relevance of the literary field by analyzing the way the premises of Legal Realism were addressed—and critiqued—by Richard Wright in his most famous novel, *Native Son*.

Published in 1940, at the end of the Legal Realist era, *Native Son* is set in the densely populated and harshly segregated Black Belt of 1930s Chicago. The novel tells the story of the struggle between Bigger Thomas, a young black man drawn into a tragic series of acts that include rape and murder, and the legal system that tracks him down and sentences him for his crimes. Bigger and his friends are petty thieves; they spend their days drinking, fighting, playing pool, and planning their next heist. Meanwhile, his mother and siblings are desperately poor and going under; their allotted time “on the dole” is about to expire. In *Book One* Bigger, just out of jail, is offered work as a chauffeur for the rich, white Dalton family. His first task is to drive young Mary Dalton to classes one evening. Instead, Mary has Bigger pick up her communist boyfriend Jan and take them to Chicago’s South Side so they can see what life is like for black people. Their clumsy and intrusive endeavors to demonstrate racial sympathy make Bigger angry and uncomfortable. Mary gets drunk, and upon returning home, Bigger must carry her to her bedroom. He is with her there when Mrs. Dalton, who is blind, enters the room. Terrified of being discovered in such a compromising situation, Bigger holds a pillow over Mary’s face to keep her quiet, accidentally killing her. Panicking, he then chops her body up with a hatchet, burns it in the furnace, and subsequently attempts to capitalize on the killing by sending a fake ransom note. When Mary’s bones are discovered in *Book Two*, Bigger becomes the target of a massive manhunt, spurred by newspaper portrayals of the killing as a sex crime. The black community on Chicago’s South Side is brutalized by violence and illegal searches until Bigger is finally captured and indicted on charges of rape and murder. *Book Three* details his “trial.”

I do not argue that Wright studied the Realists and explicitly responded to their agenda in *Native Son*, though, given some of the materials Wright drew from, that is plausible.⁴⁹ I do argue that reading *Native Son* as a text of Realist

⁴⁹ Wright scholar and biographer Keneth Kinnamon has assembled a list of the sources Wright consulted while writing *NATIVE SON*. Wright closely followed high profile legal cases, including the Scottsboro case, the Leopold and Loeb case, and Robert Nixon and Earl Hick’s cases. He kept files of newspaper clippings and generously sampled language, characters, and facts from the cases into *NATIVE SON*. Keneth Kinnamon, *NATIVE SON: The Personal, Social, and Political Background*, in *THE CRITICAL RESPONSE TO RICHARD WRIGHT* (Robert J. Butler ed., 1995). See also ROBERT J. BUTLER, *The Loeb and Leopold Case: A Neglected Source for Richard Wright’s NATIVE SON*, 39 AFR. AM. REV. 555 (2005). The lawyer Clarence Darrow served as the attorney for the defendants in the Scottsboro case and in the case of Leopold and Loeb. In section IV of this article I show how Wright incorporated Darrow’s Realist positions by sampling passages from Darrow’s courtroom arguments into *NATIVE SON*.

Wright also studied sociology which gave him yet another intersection with Realist issues. The Realists were highly influenced by the emerging field of sociology and turned

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jurisprudence allows us to see the power of Wright's critique of the legal system's role in creating and maintaining racial segregation in Chicago. Wright's engagement with jurisprudence in *Native Son* not only echoes Legal Realism, but challenges the academic orthodoxy that views it as a highly specialized debate happening in a few top law schools. Furthermore, because Wright brings Realist arguments to bear on issues of race and racism—something none of the canonical Realists were able to effectively do—Wright offers a constructive revision of Realism that reveals a frightening complicity between property law, conventions of legal rhetoric, and mob justice.

While, as Cheryl Wall reminds us, “segregation’s legacy informs the work of most 20th century black writers,”⁵⁰ racial segregation is not only *Native Son*’s central theme, it is a governing condition of its narrative. Wright’s “strategy of representation” is produced by the historical condition of segregation,⁵¹ and his text depends crucially on recognizing how law created those historical conditions—a challenge in Northern cities where racial segregation was believed to be a matter of practice and not of law. Utilizing the meaning-making methods of the Realists allows Wright to expose the emptiness of the Formalist account and to replace it with one drawn from the “life” rather than the black-letter law of segregation. I show how Wright fleshes out the extant though explicitly denied long-arm of the law as it prescribes the distribution of geographic space and structures the meaning of experience within that space. Ultimately, Wright reveals the capacity of supposedly neutral laws and judicial practices to colonize the black population living in Chicago’s mid-century ghetto.

In the following sections of this article, I train my focus on three specific tenets of Legal Realism that are interrogated by Wright in *Native Son*. In section two, I consider Wright’s critique of the rhetoric of judicial insularity. Through his depiction of the actual operation of judicial process, he posits an open rather than closed world of judicial analysis. In section three, I explain the implications of the way Wright redefines legally significant terms using the functional approach of the Realists that bases meaning on experience rather than on denotation. Finally, in section four, I analyze Wright’s Realist revision of the meaning of property law and its connection to racial segregation, violence, and criminal guilt.

to sociological methods and studies to supply the missing “empirical” side of the law. Wright worked with the Wirth family in Chicago who were studying the “urban ecology of the city” and was extensively involved with Horace R. Clayton, a prominent social scientist. Wright tried his own hand at sociology during the late 1930’s, working for the Federal Writer’s Project and writing on conditions in Chicago and in Harlem, NY. For more on Wright’s immersion in sociology and the Chicago School of Urban Sociology see CARLA CAPPETTI, *Sociology of an Existence: Richard Wright and the Chicago School*, in *THE CRITICAL RESPONSE TO RICHARD WRIGHT* (Robert J. Butler ed., 1995).

⁵⁰ CHERYL WALL, *Afterword*, 42 AFR. AM. REV. 163, 163 (2008).

⁵¹ *Id.* at 164.

III. BORDER BREACHING AND THE RHETORIC OF LEGAL INSULARITY

*The words a judge must construe are empty vessels
into which he can pour nearly anything he will.
--Judge Learned Hand⁵²*

The debate between Realism and Formalism was a dispute over sources—over which factors are allowed “in” to the space of the courtroom and so are allowed to play a role in judicial decision-making. The debate was over whether or not the written law itself—statute, constitution, and precedent—constituted the entire world of legal sources. For Formalists, a judge’s work was to find the dispositive rule within the written canon that resolves the case. Since the Formalist standard for the correctness of a decision was internal logical validity, the legal world was seen as ideally operating independently of politics, personal preference, and empirical fact, not to mention case-specific claims for justice, fitness, or morality. Formalist judges “need not—indeed, should not—address social goals or human values.”⁵³ The Realists, by contrast, believed that law has multiple sources—some explicit, “legitimate,” and doctrinal; others implicit and without formal legitimacy. Since, except in the simplest of matters, there are always multiple sources, deciding a dispute involves making value choices. The judge must select among alternatives where neither legal doctrine nor logical entailment are determinate.⁵⁴ Thus, for Realists, the standard by which selection is made is not a function of the written legal text, but comes from outside the range of texts that Formalists deemed legitimate.

This is not to say that judicial decision-making is capricious. Many Realists believed the law was “significantly predictable and uniform,” in part because the behavior of judges is circumscribed by legal tradition, by legal form, and by canons of professional responsibility.⁵⁵ But even within these constraints, the judge

⁵² LEARNED HAND, *THE SPIRIT OF LIBERTY, PAPERS & ADDRESSES OF LEARNED HAND* 81 (Irving Dilliard, ed., 2nd ed. 1960).

⁵³ Hanoeh Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 612 (2007).

⁵⁴ This has become an important legacy of Legal Realism—the challenge to the “orthodox claim that legal thought is separate and autonomous from moral and political discourse.” HORWITZ, *TRANSFORMATION II*, *supra* note 22, at 193 (1992). Presenting jurisprudence as a mathematical application of syllogism and deductive logic obscures choice, masking, the Realists claimed, the essentially political nature of law. Dagan, *supra* note 53, at 617-19.

⁵⁵ Felix Cohen, *supra* note 16, at 833 (“ignoring context obscures legal meaning, but attributing too much to judicial personality and ‘hunch’ theory over-magnifies ‘personal and accidental’ factors and denies the relevance of ‘significant, predictable, social determinants that govern the course of judicial decision’, decisions that are significantly predictable and uniform.”) Cf. Holmes, who also expressed a philosophy of judicial constraint: “I recognize without hesitation that judges do and must legislate but they can do so only interstitially; they are confined from molar to molecular motions. A common-law judge could not say, ‘I think the doctrine of consideration a bit of historical nonsense and shall not enforce it in my court.’ No more could a judge, exercising the limited jurisdiction of admiralty, say, ‘I think well of the common-law rules of master and

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has room to choose. As Judge Benjamin Cardozo explained in 1921, “we do not pick our rules of law full-blossomed from the trees.”⁵⁶ Though the judge uses traditional standards, these do not “automatically shape rules which, full grown and ready made, are handed to the judge.”⁵⁷ To be sure, “tradition, example, profession, duty to adhere to the spirit of the law, etc.” all provide restrictions, all “hedge and circumscribe” the action of every judge and every lawyer. But these restrictions are not complete. There are “open spaces” where “[judicial] choice moves with a freedom which stamps its action as creative.” The law emerging from this process is “not found but made” and “the process, being legislative, demands the legislator’s wisdom.”⁵⁸

In addition to formal and professional restraints, the Realists also claimed judicial behavior is shaped by the culture to which the judge belongs and the judge’s own temperament, beliefs, and prejudices—all “illegitimate” factors that the Formalists believed should and could be largely eliminated. The Realists’ turn to empirical social science was motivated, in part, by the desire to be better informed about the reasons why judges decide as they do, reasons that cannot be accounted for in the Formalist model. Thus the Realists insisted that Formalism was both empirically and normatively flawed. It did not describe the way judges did function, nor did it describe the way judges should function. Realists believed judges *do*, *must*, and *should* reach outside the insular world of concepts and logic to resolve legal disputes.

In *Native Son*, Wright’s narrates Bigger Thomas’ legal proceedings as a jurisprudential battle,⁵⁹ pitting the claim that law can and should be applied neu-

servant, and propose to introduce them here en bloc.” *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917).

⁵⁶ BENJAMIN NATHAN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 103 (1921).

⁵⁷ *Id.* at 104.

⁵⁸ *Id.* at 177.

⁵⁹ Early critics of *NATIVE SON* tended to dismiss the courtroom scenes in *Book Three*—particularly Bigger’s lawyer Max’s long speech in defense of Bigger—as an unfortunate and overwrought recitation of the communist party line. The introduction to Hakutani’s *CRITICAL ESSAYS ON RICHARD WRIGHT* provides a comprehensive and concise overview of Wright scholarship through 1982 and catalogues the critical responses to *Book Three* of *NATIVE SON*. In Irving Howe’s otherwise complementary review of *NATIVE SON*, he claims that Max’s speech is “ill-related to the book itself,” and calls it a “party-line oration.” Alfred Kazin claimed Max’s ideas were “crude Stalinist homilies.” Other critics who have responded to the courtroom scene “with a conditioned reflex” include Bone, McCall, Margolies, and Brignano. YOSHINOBU HAKUTANI ed., *CRITICAL ESSAYS ON RICHARD WRIGHT* 9-12 (1982).

Recent critics have offered more nuanced readings of the politics of *Book Three*, questioning the extent to which Max speaks for either Bigger or Wright. Paul Siegel, for example, argues that *Book Three* is integral to the novel as a whole, representing Bigger’s final achievement of a “belief in himself and in his people that could propel the ghetto millions toward a goal” of a “different and better form of society.” Paul N. Siegel, *The Conclusion of Richard Wright’s NATIVE SON*, 89 *PMLA* 517, 522 (1974). Also see KENETH KINNAMON’s *Introduction to NEW ESSAYS ON NATIVE SON* BY RICHARD WRIGHT 14-18 (1990) for an account of Wright’s own awareness of the aesthetic and political problems of *Book Three*.

trally against the claim that law is a social event, an imposition of societal and judicial desire. The tenacity of the Formalist account of judging, its resilience in the face of evidence to the contrary, is an important part of the way the law functions, according to the Realists. The legislative function of judges, they argue, has always been accompanied by rhetoric claiming otherwise. An analysis of Wright's portrayal of the language and rituals of the courtroom demonstrates this complicated distance between rhetorical constructions of jurisprudence and the actual process of judging. The beginning and end of Bigger's trial is set off by the ritual language of legal authority that insists the impersonal law, not men, is in control. What happens in between these brackets, however, is another story. In Wright's novel, the language of legal authority masks law's susceptibility to manipulation. The rhetoric of insularity and neutrality hides doctrinal pretense, "mask[s] normative choices and fabricate[s] professional authority."⁶⁰ I argue that Wright's dramatization of how the law operates in Bigger's case bears out the Realist position in such a way as to reveal some of the unacknowledged social and political interests facilitating racial discrimination, interests underwritten by the supposedly insular framework of legal discourse.

Formalist legal language gives law the trappings of authority while concealing the manipulability of legal doctrine.⁶¹ For the Realists, legal rituals, legal procedure, and specialized legal language are all methods used to conceal the "emptiness" of Formalism's doctrinal reasoning. Fred Rodell, a Realist, portrayed the law as an arena full of "a maze of confusing gestures and formalities," and a "hodgepodge of long words and sonorous phrases with ambiguous or empty meanings."⁶² The language and procedures of law, experienced by non-lawyers as "a foreign tongue" and an alien nation, creates the pretense that law "is, in the main, an exact science."⁶³

Wright's portrayal of Bigger's experience with the legal system exposes the human and social motivation behind what he casts as the law's mechanical operation. When Bigger is brought into court, the language of the courtroom is alienating. Bigger can only snatch bits and pieces of it. Wright's use of ellipses and

But these approaches continue to place the book within the context of the ongoing debate over Wright's political affiliations and commitments. According to Wright biographer Blyden Jackson, Wright's own commitment to the Communist party and communist ideals was on shaky ground during the time that he wrote *NATIVE SON*. He enthusiastically joined the party in 1932, but quickly became disillusioned. Wright respected the efforts the party made to gain "knowledge-in-detail of the lives of the workers of the world," but while he appreciated "communist social science" and ideals, he rejected the party and its practices. He became inactive long before 1936 and formally severed ties with the party in 1944. Blyden Jackson, *Richard Wright: Black Boy from America's Black Belt and Urban Ghettos*, in *THE CRITICAL RESPONSE TO RICHARD WRIGHT* 8-9 (Robert J. Butler ed., 1995). For a detailed account of Wright's involvement with and split from the Communist party, see DANIEL AARON, *Richard Wright and the Communist Party*, 28 *NEW LETTERS* 170 (1971).

⁶⁰ Dagan, *supra* note 53, at 613.

⁶¹ See also PIERRE BOURDIEU, *The Force of Law: Towards a Sociology of the Juridical Field*, 38 *HASTINGS L.J.* 805, 819-21, 841-43 (1987).

⁶² FRED RODELL, *Woe Unto You, Lawyers!* 130 (Pageant Books 1957) (1939).

⁶³ *Id.* at 125.

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long, attenuated clauses force readers to splice fragments together into a coherent narrative. Meanwhile, the ritualized, formal nature of the language makes the trial appear to be governed by impartial procedures insuring regularity, objectivity, and fairness.

“Hear ye, hear ye....” [...] “... this Honorable Branch of the Cook County Criminal Court.... now in session... pursuant to adjournment.... the Honorable Chief Justice Alvin C. Handley, presiding....”

[...]

“... indictment number 666-983.... the People of the State of Illinois vs. Bigger Thomas.... The Grand Jurors chosen, selected and sworn in and for the said County of Cook, present that Bigger Thomas did rape and inflict sexual injury upon the body... strangulation by hand.... smother to death and dispose of body by burning same in furnace.... did with knife and hatchet sever head from body.... said acts committed upon one Mary Dalton, and contrary to the statute in such case made and provided, against the peace and dignity of the People of the State of Illinois....⁶⁴”

The story of the alleged crime is here forced into a tightly constrained legal format that imparts a feeling of routinized repetition, the sense that this language has been repeated many times before, different facts notwithstanding. The language is impersonal and administrative. It strips away all explanatory context and transposes even the extraordinary violence of Mary’s body being dismembered and burned into the objective discourse of official legal process.

When the hearing has concluded, the voice of the court is heard again, detached, impartial, mechanistic:

“In view of the unprecedented disturbance of the public mind, the duty of this Court is clear [...]”

[...]

“In Number 666-983, indictment for murder, the sentence of this Court is that you, Bigger Thomas, shall die on or before midnight of Friday, March third, in a manner prescribed by the laws of this State.”⁶⁵

The judge finishes with “This Court finds your age to be twenty.”⁶⁶ In the course of the proceedings, there is nothing marking this final statement as a different kind of pronouncement than the death sentence just uttered. The language of the court creates the sense that finding someone’s age is the same kind of thing as sentencing them to die—indeed, everything said is part of the undifferentiated routine course of judicial business.

Wright emphasizes the mechanistic feel of the law when he describes Bigger’s experience of the courtroom as being “caught up in a vast but delicate machine whose wheels would whir no matter what was pitted against them.”⁶⁷

⁶⁴ RICHARD WRIGHT, *NATIVE SON* 369-70 (The Restored Text Est. by the Library of America Ed., Harper Books 1998) (1940).

⁶⁵ *Id.* at 417.

⁶⁶ *Id.*

⁶⁷ *Id.* at 370.

Wright portrays the mechanistic nature of Bigger's experience as a calculated part of the rhetoric that reassures us we are governed by laws and not by men. The official legal language casts the proceedings as though they were regular—the inevitable operation of objective law. Judicial agency is removed so it is the impersonal “court”—a standardized process and not a person—that both settles Bigger's age and sentences him to death. However, in contrast to this rhetoric, the actual proceedings do not feature the deductive, impartial application of rules. Instead, Wright exposes the legal machine as thoroughly human. The State Attorney Buckley's argument and the judge's response, though embedded in formal, objective process, are shown to be driven by fear, politics, and self-interest, the result of deliberate choices among legally significant alternatives.

Importantly, in *Native Son*, it is the very language of judicial neutrality that facilitates the mismatch between what the court avers it is doing and what it actually does, much like the facial neutrality of the statute in *Plessy* allowed Louisiana to accomplish ends that were, when put in context, clearly motivated by malice and prejudice. In similar fashion, Buckley ironically appeals to the judge's fear of the mob *through* the language of judicial neutrality. Thus the behavior of the court in *Native Son* gives credence to the Realist argument that the raw legislating power of the judge is accompanied by a rhetorical move denying that power. Buckley's argument begins with a Formalist posture, asserting that the law is “clean-cut,” “holy,” “dispassionate,” the “foundation of all our cherished values.” From these principles, he claims the required response to Bigger's crime is “unassailably certain.”⁶⁸ As a corollary, his strategy to discredit Max's [Bigger's lawyer] argument is to portray it as motivated by factors that have no proper place inside the objective discourse of law. Because Max will raise issues of race and class injustice, Buckley effectively brands him a Realist, accusing him of dirtying the otherwise autonomic operation of the law by raising the “viperous issue of race and class hate.” Such “evasive, theoretical, or fanciful interpretations,” he claims, are outside the letter of the law and thus outside the proper scope of the court.⁶⁹

Buckley's hyperbolic depiction prepares us to expect that Max's arguments will be shockingly out of place. Says Buckley: “Never in my life have I heard such sheer legal cynicism, such a cold-blooded and calculated attempt to bedevil and evade the law in my life!”⁷⁰ But when Buckley makes this accusation, Max hasn't even spoken yet. When Max does, he carefully incorporates his socio-empirical evidence into traditional legal argumentation, framing his argument with an appeal to the statutory law of Illinois that allows the Court “regarding a plea of guilty to murder [...] to hear evidence as to the aggravation or mitigation of the offense,” and buttressing this claim by evoking the recent case of Leopold and Loeb as precedent.⁷¹ To what is initially a classically formed argument, Max attempts to link the findings of social science. He looks for room within the accepted methods of legal argumentation for entering evidence on the social and

⁶⁸ *Id.* at 408.

⁶⁹ *Id.* at 373.

⁷⁰ *Id.* at 374.

⁷¹ *Id.* at 376.

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psychological ramifications of segregation. Ironically, then, it is Max, the leftist lawyer for the communist party, the lawyer who has been called a Realist (in different terms), who conserves the traditional methods of classical legal reasoning. He attempts to make room within them for empirical, sociological analysis.

It is Buckley, on the other hand, who presents a reactionary and racist argument, though framed with an appeal to judicial neutrality. Buckley explicitly appeals to judicial autonomy, while implicitly appealing, *in the very name of objectivity*, to public and political pressures. “Dressed in a black suit [with] a tiny pink flower in the lapel of his coat,” Buckley licks his lips, looks out over the crowd, turns toward the judge, and as a self-proclaimed “agent and servant of the law,” summons the “law of the land,”⁷² rhetoric understood as referring to a duty to carry out pre-existing law regardless of outside pressures and oblivious to personal prejudice. Though his re-election rides on the outcome, Buckley claims to have “no interest or feeling in this case beyond the performance of this sworn duty [to uphold the law];” he wants only for the “administration of law” to be allowed to “take its course.”⁷³ In this way, Buckley dresses the argument he will make in a (threadbare) cloak of disinterest, attempting to cover the fact that he is actually an agent, not of “the law,” but of the howling mob that he has helped incite and that is now gathered en masse outside the courtroom.

He tells the court that “man stepped forth from the kingdom of the beast the moment he felt that he could think and feel in security, knowing that sacred law had taken the place of his gun and knife.”⁷⁴ Even as his words are evoking an autonomous legal world, he strides to the window and lifts it up so that the court can hear the “rumbling mutter of the vast mob” crying “kill ‘im now!” “Lynch ‘im!”⁷⁵ Buckley demands the borders of the legal world be closed while he breaches them with his actions, letting the “outside,” the “gun and knife” from a supposedly irrelevant beyond, into the courtroom through the window—an outrageously inappropriate attempt at intimidation draped in Legal Formalism’s guise of neutrality.

Buckley’s speech dramatically demonstrates the way that the objective rhetoric of law can be manipulated to serve a calculated strategy of fear-mongering designed to aid a narrow set of commercial and private interests. Buckley argues, “the law is strong and gracious enough to allow all of us to sit here in this court room today and try this case with dispassionate interest, and not tremble with fear that at this very moment some half-human black ape may be climbing through the windows of our homes to rape, murder, and burn our daughters!”⁷⁶ This astounding passage encapsulates a core tenet of the Legal Realist argument: on the one hand, the law gains legitimacy from being dispassionate and grand, strong and certain, while on the other hand, fear is revealed as

⁷² *Id.* at 407.

⁷³ *Id.*

⁷⁴ *Id.* at 408.

⁷⁵ *Id.* at 373.

⁷⁶ *Id.* at 408. This is, in fact, a crime of which Bigger is accused. The State Attorney attempts to pin a number of unsolved rapes and murders on Bigger, including the rape of one Miss Ashton who, Buckley claims, “says [Bigger] attacked her last summer by climbing through the window of her bedroom.” *Id.* at 305.

the real commanding power behind the decision making. The strength and grace of the law is derived from its ability to rhetorically banish fear, racism, class oppression, and other “private” interests and desires, *no matter how clearly they constitute its moving force*. The law’s legitimacy comes from its status as objective and impervious to outside considerations, but through the window — a central trope in *Native Son* — the outside is continually let in.⁷⁷

While defining an inside and an outside, a window is an unstable border. It creates separation, but because it can be both seen through and opened, it also lets in. Once Bigger is captured, the ensuing scenes take place mainly within the courtroom and the jail — both sequestered spaces. But Buckley uses the windows in both places to destroy the sense of safety and remove, yielding instead a sense of pressure and imminent violence, of the mob crowding in on the legal proceedings. Buckley has referred to windows as the border breached by black rapists as they enter white homes to despoil white daughters, a border maintained out of fear that black men will not stay in their “prescribed corner.”⁷⁸ This border is protected by the relationship between the mob and the law — a relationship Buckley reminds the judge of frequently by drawing attention on at least three separate occasions to the window in the courtroom.⁷⁹ Buckley closes his argument with one such a reminder, saying

“Your Honor, millions are waiting for your word! They are waiting for you to tell them that jungle law does not prevail in this city! They want you to tell them that they need not sharpen their knives and load their guns to protect themselves. They are waiting, Your Honor, beyond that window!”⁸⁰

By continually pointing to the literal mob “beyond that window,” Buckley moves it into the supposedly protected judicial arena. What might have been an abstract appeal to “the people” becomes a thinly veiled threat of violence ready to erupt should the judge not answer the demands of popular opinion, though, to be sure, he must—and does—answer in the official language of the insulated court. The window here represents the permeable border between what the law *claims* is relevant and what *functions* as relevant in deciding Bigger’s fate.

The window plays a role in court, in jail, and each time Bigger is led to the courtroom, serving as a constant reminder of the circulation between the law and the mob. Each time he is escorted to and from the courtroom, he is led past a window where he sees a “vast crowd of people standing behind closely formed lines of khaki-clad troops,”⁸¹ “a sprawling mob held at bay by troops.”⁸² As Bigger waits in his cell for the judge’s sentence, the mob is ever present. Bigger

⁷⁷ At times Buckley appeals to the dispassionate rule of law; at other times he leaves all pretense to objectivity behind, openly stoking the fires of fear in and out of the courtroom. For example, Buckley claims only killing Bigger will “enable millions of honest men and women to sleep in peace tonight,” will shield “the infant, the aging, the helpless, the blind and the sensitive from the ravishing of men who know no law.” *Id.* at 408.

⁷⁸ *Id.* at 114.

⁷⁹ *Id.* at 373, 411, 414.

⁸⁰ *Id.* at 414.

⁸¹ *Id.* at 367.

⁸² *Id.* at 377; *see also id.* at 381.

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hears their “rumbling voice” “through a partly opened window.”⁸³ In much the same way as he opened the window to intimidate the court, Buckley uses the window to coerce Bigger into making an illegal confession.⁸⁴ Buckley “[leads] Bigger to a window through which [Bigger] looked and saw the streets below crowded with masses of people in all directions.”⁸⁵ These people want to lynch him, Buckley says, and they can’t be held back much longer. Buckley “let[s] go of Bigger’s arm and hoist[s] the window” open so that Bigger can hear the roar of voices calling for his death. Buckley says:

“See that, boy? Those people would like to lynch you. That’s why I’m asking you to trust me and talk to me. The quicker we get this thing over, the better for you. We’re going to try to keep ‘em from bothering you. But can’t you see the longer they stay around here, the harder it’ll be for us to handle them?”⁸⁶

Only a quick confession, Buckley urges, will ensure the law’s ability to insulate Bigger from a mob lynching.⁸⁷ The relationship between the mob and the law is close here—Buckley defines himself and the formal law as opposite the mob, yet the goal Buckley is hoping to achieve relies on keeping the mob close, allowing their alternative approach to killing Bigger to encroach on what he simultaneously wants to claim is other. The underlying and internally inconsistent claim is that the mob must be capitulated to if the “rule of law and not of men” is to remain intact.⁸⁸

Max explains the significance of the mob to Bigger’s trial when he tells the court “every time I thought I had discovered a vital piece of evidence bearing on [Bigger’s] fate, I could hear in my minds’ ear the low, angry muttering of that mob which the state troops are holding at bay beyond that window.”⁸⁹ He recognizes that the mob trumps all, undermines due process at every turn, renders “vital” evidence useless. The mob metaphorically surrounding the law controls its disposition, and is kept close as a tool in the prosecutor’s box, all while the law’s status as law depends on its ability to insist otherwise. The official proceedings are encircled by an ever-present, ever-threatening extra-legal “outside” that regulates and determines the official legal “inside,” seeping into what is supposed to be a closed system.

⁸³ *Id.* at 406.

⁸⁴ Aside from the coercion involved, Bigger’s confession is made without counsel present and after Max has instructed the State that Bigger is not to be questioned and will not sign any confessions.

⁸⁵ *Id.* at 303.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ The omnipresence of this outside force is underscored each time Bigger is moved out of the relatively quiet and sequestered jail. To shield defendants, there is an underground passage leading from the jail to the courtroom, but until he reaches the courtroom, Bigger must dangerously push through a violent throng of angry people filling the hallways of the courthouse as he is battered, spit on, and subjected to threats and dehumanizing “shouts and screams:” “That *sonofabitch!*”, “Gee, isn’t he *black!*”, “Kill ‘im!”, “turn ‘im loose”, “give ‘im what he gave that girl”, “let us take care of ‘im”, “burn that black ape.” *Id.* at 312, 333-34; *see also id.* at 381.

⁸⁹ *Id.* at 383.

Though both Buckley and the judge play key roles in the outcome of the court case, the mechanisms of the court are human on another level—they reflect the broader cultural thinking and general prejudice. Prosecutor and judge play their roles as participants in a larger social dynamic. While Realists are sometimes accused of claiming that things as trivial as what a judge had for breakfast determined the outcome of judicial cases, this is the extreme Realist position, advanced by few.⁹⁰ In general, the Realists conceived of law as a “social institution” and legal results as “large-scale social facts” that “cannot be explained in terms of the atomic idiosyncrasies of personal prejudices of individuals.”⁹¹ “A truly Realistic theory of judicial decisions,” Felix Cohen writes, “must conceive of every decision as something more than an expression of individual personality, as concomitantly and even more importantly a function of social forces,”⁹² from which the judge can never escape.

Because of the social pressures surrounding the issues of black crime, the color line, and the rape of white women, Bigger’s death sentence is wholly predictable. The inevitability is emphasized when the judge takes but “one hour” to make his decision, in spite of Max’s plea to “[carefully consider] the evidence and discussion submitted.”⁹³ The foregone conclusion makes the whole apparatus of the judicial process seem just for show. This sense is heightened when, although Bigger has pled guilty, the court allows the State to put on its entire case. Over Max’s objection—“there is a plea of guilty here!”⁹⁴—Buckley presents evidence supporting every element of the crimes, a dramatic case of overkill where the legal proceedings are out of kilter with the issue explicitly before the court. Wright makes it clear that something other than the objective execution of neutral law is going on. A *partial* list of the witnesses the State calls includes:

1. Mrs. Rawlson, to authenticate Mary’s earring found in the furnace.
2. Peggy, the housekeeper, to identify Bigger as the boy hired by the Daltons.
3. Britten, a private investigator, to tell how he suspected Bigger.
4. A newspaperman, to explain how Mary’s bones were discovered in the furnace.
5. Fourteen additional newspapermen, to corroborate the first newsman’s testimony.

⁹⁰ The claim is often attributed to Jerome Frank, who in his analysis of the personal and idiosyncratic influences on legal decision-making rendered him the *enfant terrible* of Legal Realism. See JEROME FRANK, *LAW AND THE MODERN MIND* (1930). However, the claim that extraneous non-legal factors such as food might have an influence on judicial decision-making has, in fact, been scientifically tested. See, e.g., Shai Danziger, Jonathan Levav and Liora-Avnaïm-Pesso, *Extraneous Factors in Judicial Decisions*, 108 PROC. NAT’L ACAD SCI. U.S. 6889 (2011).

⁹¹ Felix Cohen, *supra* note 34, at 125.

⁹² *Id.* at 843.

⁹³ WRIGHT, *supra* note 65, at 415.

⁹⁴ *Id.* at 379.

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6. Five experts, to authenticate Bigger's handwriting on a fake ransom note.
7. A fingerprint expert, to prove Bigger touched Mary's bedroom door.
8. Six doctors, to prove Bessie had been raped.
9. Four waitresses, to testify Bigger was seen eating with Mary Dalton.
10. Two white women, Bigger's former teachers, to testify he was "dull" but "sane."
11. Jan, Mary's communist boyfriend, to explain the evening spent with Bigger.
12. Bigger's friends, G.H., Gus, and Jack, to testify of their past criminal exploits.
13. Doc, the poolroom owner, to tell how Bigger was "mean and bad, but sane."
14. Sixteen policemen, to identify Bigger as the man they captured.
15. The manager of the movie theater, to testify Bigger masturbated during movies.
16. A man from juvenile court, to testify Bigger spent three months in reform school.
17. Five doctors, to testify Bigger was sane.⁹⁵

In addition to calling more than 63 witnesses, Buckley presents every scrap of physical evidence, including, among many other items, Mary's burnt earring, the hatchet blade Bigger used to cut off her head, and a rum bottle Bigger drank from and discarded in the snow.⁹⁶ Buckley displays Mary's charred bones, and then assembles "the furnace, piece by piece, from the Dalton basement" on a platform in the courtroom. The court allows a white girl, "just Mary's size," to crawl inside the furnace in front of the courtroom full of reporters and spectators to "prove beyond doubt that it could and did hold and burn the ravished body of innocent Mary Dalton."⁹⁷

Through the parade of witnesses and spectacle of physical evidence, Wright shows how the record in the case offers the form of legal validity without substance. All evidence aimed at proving Bigger's guilt is irrelevant since Bigger has already pled guilty. Max is correct—"something more than revenge is being sought upon a man who has committed a crime."⁹⁸ The court is not intent on "soberly [...] seeing that the law is executed," or on seeing "that retribution is dealt out in measure with the offense," or even at insuring "that the guilty and only the guilty is caught and punished."⁹⁹ The trial is being used to further political and economic ends, ends which rely on the discursive methods for establishing legal authority and judicial neutrality. What appears to be being decided

⁹⁵ *Id.* at 378-380.

⁹⁶ *Id.* at 380.

⁹⁷ *Id.*

⁹⁸ *Id.* at 383.

⁹⁹ *Id.* at 385.

masks an alternative purpose that works through the twin aspects of rhetorical insularity and actual manipulability of the judicial process. Max condemns it as a farce: “An outright lynching would be more honest than a ‘mock trial!’”¹⁰⁰ The trial, staged with the forms of official legal procedure, lends an air of legitimacy to a process that would otherwise be criminal, a disturbing complicity between official legal process and mob violence that calls into question the validity of the procedures supposedly designed to ensure impartiality, fairness, and guide the court to truth. Max’s argument here mirrors what Leiter has called a “distinctive Realist thesis”—the claim that “judges [apply] largely nonlegal norms to recurring situation types while reciting general legal doctrines that are mere window dressing and obscure the normative considerations influencing their decision.”¹⁰¹

Also using a metaphor of “dressing,” Learned Hand claimed that the judge “must preserve his authority by cloaking himself in the majesty of an overshadowing past; but he must discover some composition with the dominant trends of the time.”¹⁰² Hand saw this method of cloaking as a positive force that preserved the consistency and legitimacy of the common law; however, Wright insists that such a cloak hides the extent to which the judge is moved by the racist and mob-driven trends of the time.¹⁰³ Rather than discovering that the Emperor *has no* clothes, the courtroom scenes in *Native Son* reveal that the Emperor *is only* clothes. When they are stripped away, we discover there is no Emperor inside or, more correctly, we discover the Emperor is any form that fits the shape of the clothing, and in *Native Son*, many [white] forms can be made to fit. Bennett Capers observes, “the law” is metonymically represented in *Native Son* by a series of white figures—“by the white police force, by Buckley, the white State Attorney, by the white judge, and perhaps most figuratively by the white Mrs. Dalton, the sole witness to Mary Dalton’s death, her blindness suggesting Lady Justice itself.”¹⁰⁴ I add, above all these, the “white blur” of the lynch mob that shadows Bigger’s legal proceedings. But while these stand in for the law, the law cannot be filled with just any shape. The expectation that legal meaning be articulated in a manner logically consistent with precedent functions as a strong constraining force, along with the social morality within which a judge consciously or unconsciously functions. As Karl Llewellyn explained, the law is not the exercise of pure brute power. A reflection of conventional morality, the law’s need for recognition that will give it legitimacy leads it to be exercised with reference to the “*recognized going order* of the Entirety concerned.”¹⁰⁵ While law monopolizes legitimate force, Wright’s focus is on how it also wields power in less

¹⁰⁰ *Id.* at 384.

¹⁰¹ Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue?* 16 LEGAL THEORY 111, 120 (2010).

¹⁰² LEARNED HAND, *Mr. Justice Cardozo*, 39 COLUM. L. REV. 9, 9 (1939).

¹⁰³ *See also* Bridges v. Calif., 314 U.S. 252, 300 (1941) (Frankfurter J.) (conceding that “if it is true of juries it is not wholly untrue of judges that they too may be ‘impregnated by the environing atmosphere.’”).

¹⁰⁴ BENNETT CAPERS, *The Trial of Bigger Thomas: Race, Gender, and Trespass*, 31 N.Y.U. REV. L. & SOC. CHANGE 1, 28 (2006).

¹⁰⁵ KARL N. LLEWELLYN, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355, 1364 (1940).

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transparent ways by working for “entrenched interests,” legitimizing them, even when, as in Bigger’s trial, those entrenched interests cannot be given explicit legal sanction.

IV. SEGREGATION AS OCCUPATION—A FUNCTIONAL APPROACH TO LEGAL MEANING MAKING

“[Judicial] decisions themselves are not products of logical parthenogenesis born of pre-existing legal principles but are social events with social causes and consequences.”

*--Felix Cohen*¹⁰⁶

While Formalists believed in the possibility and desirability of a “rule-bound judgment that prohibits consideration of purposes or consequences,”¹⁰⁷ the Realists insisted that the meaning of a concept cannot be determined ontologically, but must be understood functionally, its meaning made contingent on its consequences. As Felix Cohen explains, the meaning of a law cannot be rightly determined when isolated in the moment it is rendered. Ascertaining legal meaning requires consideration of the *behind* and the *beyond*: “probing behind the decision to the forces which it reflects” and “projecting beyond the decision the lines of its force upon the future.”¹⁰⁸ This “functional” method shifts the way legal meaning is understood,¹⁰⁹ leading Hanoch Dagan to characterize it as a “jurisprudence of ends” rather than a “jurisprudence of rules.”¹¹⁰ Functional legal meaning cannot be deduced; it can only be provisionally established *ex post facto* from an interpretation of motive, context, outcome, and a projection of future impact.

In *Native Son*, the meanings of Bigger’s actions are inseparable from the crowded, segregated conditions in which he lives, conditions representative of the three decades following 1910 when Chicago became a key destination in the mass migration of black Americans out of the South. Prior to 1900, African Americans were scattered throughout white neighborhoods in the North. Northern segregation began to develop during the first half of the twentieth century alongside the migration of Southern blacks into the industrial communities of the

¹⁰⁶ Felix Cohen, *supra* note 16, at 847.

¹⁰⁷ TAMANAHA, *supra* note 12, at 166.

¹⁰⁸ Felix Cohen, *supra* note 16, at 843.

¹⁰⁹ This shift is missed by many students of the Realists. Looking for doctrines and bodies of law that were changed by the Realist movement, they come up short-handed and conclude that the Realists’ impact was short-lived, a conclusion that is difficult to reconcile with others who insist the Realists’ impact was permanent and touched the very grounding assumptions of American law. Those who look for the impact of Realism in revolutionary and immediate doctrinal change are looking in the wrong place. The most fundamental changes occurred at the level of judicial reasoning. The *methods* of judicial thought changed. Thus, even if the same decision was reached that would have been reached by a Formalist, the route taken to reach that decision was altered. This resulted in changes in some areas of law, but in others, the change was only apparent over time.

¹¹⁰ Dagan, *supra* note 53, at 631.

North.¹¹¹ At one point, black Americans were moving to Chicago at a rate of 5,000 per week. Each decade, the city's black population more than doubled, exploding from 44,000 in 1910, to 278,000 by 1940 when *Native Son* was published.

Racial segregation in urban Chicago presented a different landscape and experience than racial segregation in the South. In the South, even when public places were segregated during the Jim Crow era, Blacks and Whites frequently lived side-by-side.¹¹² Where there was residential segregation in the South, the black communities tended to be located on the peripheries of towns rather than in centers. This, combined with the amount of open, rural space, made southern Blacks more mobile and less crowded. The North did not experience the same kind of segregation in public spaces as did the South, but where separation between white and black living spaces was accomplished in the North, it was often accomplished completely.¹¹³ Additionally, rather than white neighborhoods occupying the centers of town with black neighborhoods on the outside, black neighborhoods in the urban North were often completely enclosed, creating cramped conditions and a near total lack of privacy. Wright highlights these conditions in the novel's opening scenes that depict the lack of space and privacy facing black families as the four members of the Thomas family struggle to get dressed and fed in their "tiny, one-room apartment."¹¹⁴

Chicago was segregated as a matter of fact, not a matter of law, at least not as a matter of public law. But though there were no laws explicitly mandating residential segregation in Chicago, as well as most of the North, the emergence of the Northern black ghetto "was the result of the deliberate housing policies of the federal, state, and local governments and the intentional actions of individual American citizens," actions that were given judicial sanction at the very highest level.¹¹⁵ Chicago's segregation was more complete than any de jure segregated

¹¹¹ See e.g. MARC SEITLES, *The Perpetuation of Residential Racial Segregation in America: Historical Discrimination, Modern Forms of Exclusion, and Inclusionary Remedies*, J. LAND USE & ENVTL. L. (1996), available at <http://www.law.fsu.edu/journals/landuse/vol141/seit.htm>. (White landowners responded to the "threat" of new black workers by segregating cities by streets, locking black families into the least desirable segments of the city. As the black workers moved into the city, industry moved out, relocating from the city to the suburb where land was cheap and taxes were low.)

¹¹² *Id.* The most famous study of segregation in the United States by Massey and Denton has concluded that Blacks and Whites in the early twentieth-century "regularly interacted in a common social world, sharing cultural traits and values through personal and frequent interaction." *Id.*

¹¹³ A 2005 study of residential segregation in Chicago concludes that the city remains segmented by race and that race continues to be a key factor in White's housing decisions. MARIA KRYSAN, REYNOLDS FARLEY, AND MICK P. COUPER, *In the Eye of the Beholder: Racial Beliefs and Residential Segregation*, 5 DU BOIS REVIEW: SOCIAL SCIENCE RESEARCH ON RACE 5 (2008).

¹¹⁴ WRIGHT, *supra* note 65, at 4.

¹¹⁵ These policies included the placement of Interstate Highways, urban renewal projects that designated black areas as "blighted" (and thus subject to redevelopment causing black inhabitants to relocate) and the FHA's discriminatory ratings systems used to evaluate the

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Southern city, largely accomplished through racially restrictive housing covenants that became commonplace throughout the country after 1926 when the Supreme Court validated their use.¹¹⁶ Included in leases and deeds, the covenants prohibited the property from being sold to or occupied by black persons. White property owners banded together into neighborhood associations to create entire neighborhoods bound by the restrictive covenants. Not only were the covenants regarded as binding upon owners and renters who included or agreed to such a provision in their deed or lease, but also on owners and renters whose property fell within a neighborhood where such covenants were widespread—even when their individual contract included no such clause. Once in place, the restrictions were difficult to overcome. The covenants became an enforceable part of the contract and “ran” with the property, meaning they were transferred with the home so that the contractual obligation to exclude Blacks was passed from owner to owner.¹¹⁷

risks of mortgage loans. From 1930 until 1950, 3 of every 5 loans in the United States were purchased with funds from an FHA loan. Less than 2% of those loans were made to non-white people. The FHA designated itself the “protector of all-white neighborhoods” and sent field agents to ensure Blacks were kept from buying in white communities. State and local governments used facially neutral zoning ordinances and land use controls such as minimum lot and floor space regulations to maintain a color line. Today, public housing for elderly black people tends to be exclusively in poor areas, while public housing for elderly Whites is typically not located in poor neighborhoods. HUD has repeatedly been found liable for racial discrimination. Massey and Denton concluded in their study of Apartheid in America that African Americans in 1993 were still “unambiguously among the nation’s most spatially isolated and geographically secluded people, suffering extreme segregation across multiple dimensions simultaneously.” DOUGLAS S. MASSEY & NANCY A. DENTON, *AMERICAN APARTHEID—SEGREGATION AND THE MAKING OF THE UNDERCLASS* 103 (1993).

¹¹⁶ A typical covenant included in a lease read: “No person or persons of African or Negro blood, lineage, or extraction shall be permitted to occupy a portion of said property.” A typical covenant included in a deed read: “The lot, nor any part thereof, shall not be sold to any person either of whole or part blood, of the Mongolian, Malay, or Ethiopian races, nor shall the same nor any part thereof be rented to persons of such races.” Many such covenants remain on the books even today. See

<http://depts.washington.edu/civilr/covenants.htm> for an extensive database collecting the racially restrictive covenants used in Seattle, Washington. These restrictions became enforceable parts of the contract. The court reversed itself in 1948 by holding that it would no longer enforce these covenants. But that did little to prevent private discrimination in housing, a practice that continued unfettered until the Housing Rights Act of 1968.

¹¹⁷ A selective bibliography of influential articles on racially restrictive housing covenants, organized chronologically in ascending order: Robert C. Weaver, *Race Restrictive Housing Covenants*, *J. OF LAND & PUB. UTIL. ECON.*, Aug. 1944, 183; D.O. McGovney, *Racial Residential Segregation by State Court Enforcement of Restrictive Agreements, Covenants or Conditions in Deeds is Unconstitutional*, 35 *CAL. L. REV.* 5 (1945); Robert L. Hale, *Rights under the Fourteenth and Fifteenth Amendments against Injuries Inflicted by Private Individuals*, 6 *LAW. GUILD REV.* 627 (1946); James A. Crooks, *Racial Covenant Cases*, 37 *GEO. L.J.* 514 (1949); James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United*

Beginning around 1910, Northern landlords enclosed Chicago's massive population growth within a rigorously contained geographical area that became known as the Black Belt, a narrow (7 blocks wide) strip of land on the south side of the city, extending about 7 miles.¹¹⁸ Though by 1940 almost ¼ of Chicago's population was black, the geographical area in which Blacks lived had expanded very little and, especially relative to population, constituted a tiny portion of the overall city.¹¹⁹ This "color line" in Chicago was every bit as strict as, and ultimately more difficult to combat than, the government sponsored color lines of the South.¹²⁰ At the time Wright was living in the Black Belt and working on

States, 22 HOW. L.J. 547 (1979); A. Leon Hibbinbotham, Jr., F. Michael Higginbotham, & S. Sandile Ngcobo, *De Jure Housing Segregation in the United States and South Africa: The Difficult Pursuit for Racial Justice*, 1990 U. ILL. L. REV. 763 (1990); Joe T. Darden, *Black Residential Segregation Since the 1948 Shelley v. Kraemer Decision*, 25 J. OF BLACK STUD. 680 (1995); Alex M. Johnson, Jr., *How Race and Poverty Intersect to Prevent Integration: Destabilizing Race as a Vehicle to Integrate Neighborhoods*, 143 U. PA. L. REV. 1595 (1995); Douglass S. Massey, *Getting Away with Murder: Segregation and Violent Crime in Urban America*, 143 U. PA. L. REV. 1203 (1995); Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. U. L. REV. 881 (1998); Kevin Fox Gotham, *Urban Space, Restrictive Covenants and the Origins of Racial Segregation in a United States City, 1900-1950*, 24 INT'L J. OF URB. & REGIONAL RES. 616 (2000); Nancy A. Denton, *The Role of Residential Segregation in Promoting and Maintaining Inequality in Wealth and Property*, 34 IND. L. REV. 1199 (2001); Florence Wagman Roisman, *Teaching about Inequality, Race, and Property*, 46 ST. LOUIS U. L.J. 665 (2002); GERSHUN AVILEZ, *Housing the Black Body: Value, Domestic Space, and Segregation Narratives*, 42 AFR. AM. REV. 135 (2008).

¹¹⁸ BLYDEN JACKSON, *Richard Wright: Black Boy from America's Black Belt and Urban Ghettos*, in *THE CRITICAL RESPONSE TO RICHARD WRIGHT 7* (Robert J. Butler ed., 1995). "[The] Black Belt of Chicago in the 1920's [...] was] a teeming wedge within Chicago's South Side, extending 7 miles south from Chicago's Loop, almost uniformly more than a mile wide, and growing like any good American boom town in everything except, significantly, its geographical boundaries, its 44,000 Negro inhabitants in 1910 having become 109,000 in 1920 and moving on to become the 237,000 of 1930." *Id.*

¹¹⁹ For a stunning graphic representation of Chicago's geographical racial distribution across the first four decades of the twentieth century, see "Chicago's Ghetto," www.uic.edu/orgs/kbc/Archives/Guggenheim/photo_gallery.htm.

¹²⁰ The officially sanctioned regime of government sponsored segregation could be constitutionally undone, and in fact, was undone. But segregation accomplished by private action, by racial groupings in neighborhoods, has been much more difficult to address—especially in a constitutional system that distinguishes between private and public action to determine whether rights have been breached. This was a distinction that the Legal Realists spent a lot of time critiquing. Today, segregation as a matter of governmental action is constitutionally prohibited and racially restrictive housing covenants are likewise unconstitutional. But the North remains more segregated along racial lines than the South. For example, if we focus on one aspect of segregation—segregated schools—we find that in the South, segregation was mandated by law and universally complied with. Every southern state had laws prohibiting racial mixing in schools. But in the North, the official story was much different. In fact, only one northern state mandated school segregation (Indiana, until 1949) and many northern states had laws prohibiting racial segregation in schools. But despite the formal legal system, schools in the North were nonetheless largely segregated. Using racially restrictive housing covenants, owners penned black

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Native Son, over 75 percent of Chicago's black population lived in the Black Belt.¹²¹ This huge population boom, contained within nearly unchanging geographical boundaries, gave the Black Belt in 1940 a population density of 90,000 per square mile (by comparison, in 2007, Delhi had a population density of 75,512 per square mile).¹²² The consolidation of black Chicagoans resulted in a teeming and productive black culture, but it also fostered extreme crime rates and crippling poverty, both exacerbated by rampant unemployment, sky-high inflation, and exorbitant housing costs caused by the scarcity borne of segregation.

In an early scene in *Native Son*, Bigger and his friend Gus are standing on a street corner in the Black Belt, complaining about the restrictions on them created by racial segregation. Through this conversation, we are able to trace Bigger's thinking through three versions of the meaning of segregation. The first is a Formalist definition, the second critiques the Formalist definition by confronting it with projections of its own future consequences, and the third replaces the Formalist definition with a functionalist version of the lived meaning of segregation. Through this portrayal of the process of meaning making, Wright rejects the Supreme Court's Formalist reasoning that any "badge of inferiority" accompanying segregation was the result of a "construction" placed onto neutral words. Instead, Wright offers a Realist basis for an experiential construction of the lived meaning of segregation, meaning derived from the lives of the people suffering (and those benefiting) from it.

Bigger complains to Gus: "We live here and they live there. We black and they white."¹²³ This initial expression is starkly Formalistic, isolating the simplest fact of segregation from both antecedent and consequent, reducing segregation to its most austere tautological terms. The second definition is offered some lines later when Bigger returns to the Formalistic rendering, but this time refuses to isolate the definition of segregation from its consequences. He says: "Every time I get to thinking about me being black and they being white, me being here and they being there, I feel like something awful's going to happen to me..."¹²⁴ Here Bigger confronts the formal meaning with its projected consequences and

citizens into designated areas. Even where there were no such covenants at work, neighborhoods tended to be racially divided for custom, convenience, and because black families often wanted to send their children to predominantly black schools. In Chicago, as with many of the northern urban areas, it was racially restrictive housing covenants that accomplished much of the segregation by neighborhood.

¹²¹ In July of 1940, while Wright was serving as editor, *The Crisis* published "Iron Ring in Housing," an expose on the impact of racially restrictive housing covenants on the living conditions of black citizens of Chicago. The article claims "the iron ring of restrictive covenants which surrounds the Negro community has prevented its normal expansion in spite of the fact that the colored population has more than doubled in the last two decades. Within the community practically no living units have been built and few new residences have been made available during the past twelve years." *Iron Ring in Housing*, THE CRISIS, July 1940, at 205-210.

¹²² Data on population density can be retrieved from <http://www.prb.org/> (last visited Aug. 3, 2012).

¹²³ WRIGHT, *supra* note 65, at 20.

¹²⁴ *Id.*

so ties the formal version of segregation to the destructive violence of the novel, violence belied by the formal “we live here, they live there.”

In the third and final definition, Bigger again reformulates the meaning of segregation, this time directly reversing the initial Formalist construction. Bigger, who has just told Gus that “we live here, they live there,” now says:

“Gus?”

“Hunh?”

“You know where the white folks live?”

“Yeah,” Gus said, pointing eastward. “Over across the ‘line’; over there on Cottage Grove Avenue.”

“Naw; they don’t,” Bigger said.

“What you mean?” Gus asked, puzzled. “Then, where do they live?”

Bigger doubled his fist and struck his solar plexus.

“Right down here in my stomach,” he said.

[...]

“Every time I think of ‘em, I feel ‘em,” Bigger said.

[...]

“That’s when I feel like something awful’s going to happen to me....”

Bigger paused, narrowed his eyes. “Naw; it ain’t like something going to happen to me. It’s.... It’s like I was going to do something I can’t help....”¹²⁵

Literally, segregation means a physical division between Black and White; it can be represented neutrally and formally; it means white folks live “over across the line”—a matter of geographical separation. But as a matter of *lived experience*, segregation means the *absence* of physical and psychological separation between Black and White. As a matter of lived experience, segregation means the actual population of Bigger by the Whites—they live inside him, “right down here in [his] stomach.”¹²⁶

As Bigger and Gus talk, vehicles pass by in front of them, stirring up little bits of white paper littering the road. The bits of white paper portend the dormant presence of whiteness in what is supposedly black space. Bigger’s claim that functionally segregation means occupation is borne out as Whites come to occupy every corner of the Black Belt, first figuratively as an omnipresent force and then literally as white mobs invade the Black Belt searching for Bigger. Thus segregation converts Whites into a faceless aggregate; Bigger sees them not as

¹²⁵ *Id.* at 21-22.

¹²⁶ Wright repeatedly emphasizes this reversed account of the meaning of segregation. For example, when Bigger is on the lam, he fantasizes about quenching his thirst using language and imagery that recalls Bigger’s description of Whites living inside of him. Bigger imagines warming a bottle of milk, seeing the white milk spill over his black fingers, and then, lifting the bottle to his mouth to drink, finishing with a description of the white milk pouring down his throat, coating his insides. *Id.* at 247.

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people, but as a “great natural force” like a “stormy sky looming overhead, or like a deep swirling river stretching suddenly at one’s feet in the dark,” life-threatening to any who “go beyond certain limits.”¹²⁷ Wright characterizes this white force as controlling Bigger from the outside-in, as “ruling” over him, constituting his “fear and shame,”¹²⁸ and “conditioning him in his relations to his own people.”¹²⁹ Segregation permeates black folk’s relations to the white world and to other black people—their families, their friends, their selves—despite, Wright emphasizes, the lack of positive law putting the reality into words: “Each and every day of their lives they lived with it; even when words did not sound its name, they acknowledged its reality. As long as they lived here in this prescribed corner of the city, they paid mute tribute to it.”¹³⁰

During the tense scenes when Bigger is on the run, things that were once black become covered in whiteness. The ever-present threat hinted at by the swirling and settling bits of white paper becomes a literal threat as the snow storm becomes a blizzard, the weather mirroring the mobilization of the white forces of the law to track and capture Bigger. Retreating to the Black Belt to hide, the falling snow impairs his vision and is so deep Bigger struggles to walk through it. As investigators close in, the silent, heavy snow becomes more and more hostile, “fill[ing] the world with a vast white storm”¹³¹ that respects no boundary between white and black space. The hunt for Bigger ends on what was once a black rooftop, now made white with snow, on top of a water storage tank described in the same terms as Bigger has used to describe white people generally—“something huge and round and white looming up in the dark,”¹³² a “white looming bulk.”¹³³

White men organize vigilante groups with the full backing of the Chief of Police. “[R]ecurring waves of Negro crime,” the papers report, “made such a procedure necessary.”¹³⁴ As a result, the figurative omnipresence of whiteness becomes a literal omnipresence as a “blanket” warrant allows mobs of white men to invade the Black Belt, pushing their way into room after room until nearly the entire zone has been penetrated. Meanwhile the rights of black people living there are of absolutely no account: “several hundred Negro employees” lose their jobs; schools are closed; doors are kicked down; people and homes are searched by mobs with guns; black men are beaten in their own neighborhoods; and in one night alone “several hundred Negroes resembling Bigger Thomas” are arrested.¹³⁵

Like the Northern system of de facto segregation, the mute character of this gathering of white power is a key component of Wright’s critique. Part of the functional difference between segregation in Chicago and its southern cousin is

¹²⁷ *Id.* at 114.

¹²⁸ *Id.*

¹²⁹ *Id.* at 115.

¹³⁰ *Id.* at 114.

¹³¹ *Id.* at 194.

¹³² *Id.* at 265.

¹³³ *Id.* at 266.

¹³⁴ *Id.* at 244.

¹³⁵ *Id.* at 244.

the absence of positive law establishing segregation and white power in the North. Without such laws, white power in the North appears to be created *sui genesis*—a natural fact rather than a man-made condition. This obscures the human actors and motives driving the legal mechanisms that consolidate white power and set at naught hard-won rights.

V. IMPERIUM AND DOMINIUM—PROPERTY AND TAKING

*We have no system for doing justice, not the slightest in the world.*¹³⁶
--Clarence Darrow

A functional inquiry into the role that laws protecting private property play in *Native Son* reveals a contradiction in the nature of property that the Realists did not clearly identify, although their methods make it visible. I argue that, in *Native Son*, property rights are inseparable from the practice of segregation. Thus the racialized sexual violence associated with segregation is intrinsic to the maintenance of property and creates alternate grounds on which individual guilt can be constituted, grounds that implicate Mr. Dalton in the killing of his own daughter and that revise our understanding of Bigger's guilt. Through this critique of segregation and property rights, Wright brings the Realists' concerns into the realm of race discrimination and so offers a supplement to and functional critique of Legal Realism itself.

Legal Formalism rested on *laissez-faire*, the notion of a "self-executing, decentralized, competitive market economy."¹³⁷ *Laissez-faire* included the belief that the regulation of property rights belonged to the "private" realm of the market, not the "public" realm of the government.¹³⁸ Relations between economic actors were to be governed not by public law, but by private contracts.¹³⁹ Any infringement by judge or legislator on the right to make contracts was seen as a violation of the law of the free market. Lawrence Friedman has argued that the rhetoric of supremacy surrounding contract rights has always exaggerated the actual hold that contract had on the law,¹⁴⁰ but both the hold and the rhetoric of contract diminished considerably in the opening decades of the twentieth centu-

¹³⁶ CLARENCE DARROW, *Address to the Prisoners in the Cook County Jail*, available at BUREAU OF PUBLIC SECRETS, <http://www.cddc.vt.edu/bps/CF/darrow.htm> (last visited Apr. 13, 2011).

¹³⁷ HORWITZ, *TRANSFORMATION II*, *supra* note 22, at 194.

¹³⁸ NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 30 (1995).

¹³⁹ From this perspective, the market served as the foundation of social justice determined by equality of "opportunity." The supposed neutrality of the process was what mattered, not the neutrality or fairness of the outcome. If a contract met established procedures regarding offer, acceptance, and consideration, whatever outcome resulted from that process was "just." In reality, gender, race, class, marriage status, and many other factors, altered the extent to which a contracting party was "free," and courts did not inquire into whether or not there was an actual "meeting of the minds" between parties, much less into whether the transaction was at arms length, the parties had equal bargaining power, etc. The concept of contract as supreme, and not the practice, was controlling.

¹⁴⁰ See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW*, 532-536 (1985).

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ry, partly because of the new kinds of property that emerged alongside the rise of the business corporation. The concepts of corporate property, of shareholder's property in a corporation, as well as the growth in intangible forms of wealth such as business goodwill, copyright, and patent rights, forced the law away from the traditional view of property as a physical "thing," an "object of sense," and towards an increasingly abstract model of property.¹⁴¹ As the legal idea of property became ever more abstract, the concept of property itself "became more and more vulnerable to certain fundamental contradictions that the earlier, more modest, physicalist understanding of property had been able to conceal or suppress."¹⁴²

These difficulties were particularly pronounced in the law of eminent domain. The right of eminent domain allows the state to seize private property without the owner's consent so long as the property is taken for public use and the owner is justly compensated. Private property can be taken "for public use only," which the Supreme Court has construed as meaning a use *by* the public or a use *benefiting* the public. Expropriating property without pay or for private use is illegal "taking," prohibited by the Fifth Amendment.¹⁴³ The Realists' analysis of the nature and function of the laws protecting private property amounted to a powerful critique of the division between public and private use, the very distinction relied on in discriminating between a lawful exercise of eminent domain and an unlawful "taking."

When property was defined as a physical object, to determine if a taking had occurred, courts had to determine whether the object had been physically appropriated, i.e., had been "actually taken, in the physical sense of the word."¹⁴⁴ But as Horwitz explains, as property became increasingly intangible and incor-

¹⁴¹ HORWITZ, TRANSFORMATION II, *supra* note 22, at 145. *See, e.g.*, Swayne's dissent in *Slaughterhouse Cases*, 83 U.S. 36, 127 (1873), where he made the fairly radical claim that "property is everything which has exchangeable value." The Swayne dissent was an early attempt to create an abstract definition of property, an attempt that thereafter "began to creep into constitutional definitions given by state and federal courts." HORWITZ, TRANSFORMATION II, *supra* note 22, at 146. In the first *Minnesota Rate Case*, decided in 1890, nearly twenty years after *Slaughterhouse*, "the Supreme Court itself made the transition and changed the definition of property from physical things having only use-value to the exchange-value of anything." *Quoted in* HORWITZ, TRANSFORMATION II, at 146-47.

¹⁴² HORWITZ, TRANSFORMATION II, *supra* note 22, at 145.

¹⁴³ In relevant part: "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. V. The state's power of eminent domain was recognized long before the Fifth Amendment, but the Fifth Amendment, ratified in 1791, imposed the limitations of public use and compensation on the federal government. While the Fifth Amendment does not apply to the states, the limitations on eminent domain were extended to the states through the Fourteenth Amendment's due process clause. *Chicago Burlington & Quincy R.R. v. City of Chicago*, 166 U.S. 226 (1897).

¹⁴⁴ HORWITZ, TRANSFORMATION II, *supra* note 22, at 147. The distinction was drawn between "direct" and "consequential" injuries to property. While consequential injuries may reduce the value of land, they did not amount to a physical trespass and thus were non-compensable. The law of eminent domain, even as late as the 1870's, "turned on various judicial definitions of what sorts of physical intrusions constituted a taking," the key being whether the activity "physically appropriate[d] the land." *Id.* at 146.

poreal, “judges were pressed to redefine the nature of interference with property rights more abstractly, not as an invasion of some physical boundary but as any action that reduced the market value of property.”¹⁴⁵ This more abstract definition of property forced the bench to make functional inquiries into the market consequences of actions that impinged on property.

John Lewis’s *Treatise on the Law of Eminent Domain* in 1888 was an early attempt to shape the new understanding of property that would take hold in American legal culture.¹⁴⁶ Lewis argued that legal doctrine on what constituted a taking “attacked the question wrong end first, so to speak, through the word *taken* instead of through the word *property*.”

We must ... look beyond the thing itself, beyond the mere corporeal object, for the true idea of property.... The dullest individual among the *people* knows and understands that his *property* in anything is a bundle of rights. [...] If property, then, consists, not in tangible things themselves, but in certain rights in and appurtenant to those things, it follows that, when a person is deprived of any of those rights, he is to that extent deprived of his property ... though his title and possession remain undisturbed.¹⁴⁷

This passage shows the transformation of property from tangible object to a set of severable rights that included ownership, possession, and use, among other things, and the corresponding broadening of what infringement of property rights can mean.

A key concept that the physicalist notion of property had obscured, and that the Realists brought to the foreground, was that the set of rights constituting property does not create a relationship between an owner and an object, but between an owner and other people. As Morris Cohen¹⁴⁸ explains, “a property right is a relation not between an owner and a thing, but between the owner and other individuals in reference to things. A right is always against one or more individuals.”¹⁴⁹ Thus, the essence of property is “always the right to exclude others.”¹⁵⁰

¹⁴⁵ *Id.* at 147.

¹⁴⁶ JOHN LEWIS, *TREATISE ON THE LAW OF EMINENT DOMAIN IN THE UNITED STATES* (1888), available at Making of Modern Law: Legal Treatises, 1800-1926.

¹⁴⁷ *Id.* at 45.

¹⁴⁸ Some may question my inclusion of Morris Cohen as a “Realist.” The inclusion of Roscoe Pound and Lon Fuller may also be questioned. These men are often considered critics of Realism, but I see them as constructive voices sympathetic to the movement and so draw from their texts in reconstructing some of the Realist arguments. To be sure, there was a considerable amount of dialogue and disagreement within the movement. There are obvious points of difference between Cohen and Llewellyn, say, and the differences between Pound and Llewellyn have become legendary. However, as I argue in the opening pages of this article, defining Realism is a notoriously difficult task, and I do not take Llewellyn as the standard from which Realists are to be measured. Although M. Cohen, Fuller, and Pound may have critiqued other Realists, they share a broad range of distinctive concerns about extra-legal influences, the insufficiency of legal rules as decisive principles, the need for an empirical approach to judging, etc. See Lon Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429, 443, 446-47 (1933-1934).

¹⁴⁹ Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8, 12-13 (1927).

¹⁵⁰ *Id.* at 12.

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Traditional legal thought uses the concept of “sovereignty” or “*imperium*” to describe public law—the rule over individuals—and that of “property” or “*dominium*” to describe private law—the rule by individuals over things. The shift in focus from owners and objects to owners and others reveals what the Realists saw as a faulty distinction between these public and private spheres of law. This is because the functional redefinition of property collapses the distinction between *imperium* and *dominium*.¹⁵¹ Morris Cohen again:

the law of property helps me directly only to exclude others from using the things which it assigns to me... to the extent that those things are necessary to the life of my neighbor, the law thus confers on me a power limited but real, to make him do what I want. [¶] [W]e must not overlook the actual fact that dominion over things is also imperium over our fellow human beings.¹⁵²

Thus property rights, far from being a neutral framework outside of the coercive and political power of the state, are actually just another instantiation of it. Since property *is* what it allows an owner to *do*—property rights confer upon owners power over non-owners, particularly when the thing in question is necessary to the life or well-being of the non-owners.

Robert Hale’s groundbreaking 1923 essay, “Coercion and Distribution in a Supposedly Non-Coercive State”¹⁵³ fueled the Realist’s critique of the classical view. Hale argued that the premises behind the market economy were debatable social choices that depend upon political preference and social purpose. Property, then, is not an innate or “natural” right, but a man-made right, the result of law, not the basis for it. Hale re-conceptualized “freedom” of contract, the hallmark of the belief in a neutral market system, insisting that contracts are neither neutral nor self-executing, but are creations of law. Within this de-naturalized view of contract, the non-owner can refuse to yield to the owner’s terms, can withhold consent from the contract, but such a refusal is always done within a system of coercion. A labor contract provides an example: “[the worker] must eat. While

¹⁵¹ While the distinction between public and private law is a bedrock principle of American law, picked up by Blackstone in the earliest codifications of American common law, during the nineteenth century, the separation of private from public spheres grew ever more fixed. Fisher et al. identify many important doctrinal developments resulting from this separation, along with a slew of “attitudes” that accompanied the new doctrines. Among them: “Private parties should be enabled and encouraged to enter into whatever voluntary contractual relations they please in order to advance their own conceptions of their best interests. Whereas government officials are obliged when making decisions to strive to advance the public good, private parties have no legal or moral duty to take into account the impact of their choices and actions on the common weal. The state has a responsibility to ensure that private parties are not forced into contractual relations they do not desire [...], but should not seek to impose on private parties substantive conceptions of what kinds of exchanges are fair or unfair. If it respects these limits on its legitimate power, the state cannot fairly be held responsible for the distribution of wealth and power in the society—that is for the outcomes of the voluntary transactions of private parties.” FISHER ET AL., *supra* note 42, at 98-99.

¹⁵² M. Cohen, *supra* note 149, at 12-13.

¹⁵³ ROBERT L. HALE, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923).

there is no law against eating in the abstract, there is a law which forbids him to eat any of the food which actually exists in the community—and that law is the law of property.”¹⁵⁴ Property rights represent a political choice to cede the sovereign power of the state to certain individuals—owners—a choice that vests in them coercive power, a choice that is neither neutral nor inevitable, but political, the result of human decision-making.¹⁵⁵

Hale’s insights on property gestured toward a new way of understanding racial segregation, picked up on by Louis Jaffe in a rare comment on race relations by a Realist:

[P]roperty [...] equips the possessor with great powers of exclusion—enforced or sanctioned by the law—not in any way depending on consent, and this power to exclude is a source of regulating others’ conduct, either as it prescribes complete exclusion or partial [...] Professor Robert Hale [...] has pointed out that the exclusion of the negro in the south from inns, theatres, public places is a full-fledged regime of law with the private owners of property laying down the terms and the courts providing the sanctions, the principal one of which is the action of trespass. By this method these states have eluded the prohibition of the fourteenth amendment against the passage of discriminatory laws.¹⁵⁶

Hale’s depiction of segregation as a “full-fledged regime of law” refers to the way that the traditional view of private property as control over objects and not over people allows the state to use private property to accomplish political goals, while relying on the rhetoric of the “private” nature of property to mask the political and social interests underlying state action.

Hale is referring to de jure segregation in the South, but I extend his analysis to the North where the legal instruments enabling de facto segregation created a regime of law as fully as did the de jure segregation in the South. In fact, given Hale’s analysis, the distinction between de facto and de jure disappears—in both cases segregation is accomplished by law. In cases of de facto segregation, the role of the law is simply less visible—and that, in itself, serves political ends. We see this when we look at how, in *Native Son*, the bundle of abstract rights that constitute property can be mapped spatially onto the city of Chicago, rematerializing property to reveal its contradictions and so showing how the substance of a right to property is, figuratively and literally, the right to segregate. It is the power to erect a partition marking off space and to prohibit the uninvited intrusion into it by others. In this way, the nature of property rights implies the spatial partitioning that is the hallmark of residential segregation.

To flesh out this argument, I turn to some of the speeches and writing of Clarence Darrow, a legal figure closely tied to Wright and to *Native Son* who

¹⁵⁴ *Id.* at 472.

¹⁵⁵ Hale helped the Realists reverse the Classical view of marketplace justice. Rather than process, they looked to outcomes: if the outcome was unfair, then the process must have been. HORWITZ, *TRANSFORMATION II*, *supra* note 22, at 194.

¹⁵⁶ LOUIS JAFFE, *Law Making by Private Groups*, 51 HARV. L. REV. 201, 217 (1937). At this time, the action of “Trespass” applied to any unlawful interference with one’s person or property.

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addressed Realist concerns.¹⁵⁷ Bigger's lawyer Max is modeled after Darrow, a renowned Chicago lawyer known for defending unpopular causes and controversial defendants. Wright followed his work as a defense lawyer in the Scottsboro case where nine black teenagers were falsely accused of gang raping two white girls and in the Leopold and Loeb "thrill murders" case, upon which the legal narrative of *Native Son* is extensively based.¹⁵⁸ The argument Max makes to the judge in defense of Bigger is largely drawn—nearly word-for-word in many places—from Darrow's argument in defense of Leopold and Loeb.

In his notorious 1902 "Address to the Prisoners in the Cook County Jail," Darrow uses the language of spatial partition to describe property law:

[Fellows who have control of the earth] fix up a sort of fence or pen around what they have, and they fix the law so the fellow on the outside cannot get in. The laws are really organized for the protection of the men who rule the world. They were never organized or enforced to do justice. We have no system for doing justice, not the slightest in the world.¹⁵⁹

Darrow's rhetoric echoes that of Hale, Cohen, and Jaffe. The function of property law is to consolidate power by fencing off access to things and places. Thus, segregating things is inseparable from segregating people—*imperium is dominium*.

Darrow's belief that law exists to consolidate property had radical implications for his views on criminal law, views that Wright incorporated into *Native Son* through Max. Max tells the judge that Bigger's actions are the wholly predictable result of the socio-economic conditions under which he lived. In response to centuries of oppression, Max argues, black Americans have had to "adjust," to create their "own laws of being; their own notions of right and wrong," a "new form of life," that "expresses itself, like a weed growing from

¹⁵⁷ Clarence Darrow began his career as counsel for the railroads, but resigned during the Pullman Strike of 1894 in order to represent the union officials who had been enjoined from striking. He was known for representing John Scopes in the Scopes Monkey Trial in 1925; for securing pardons for three of the Haymarket rioters in 1893; for his defense of the dynamiters of the *Los Angeles Times* in 1911; and for his defense of the 'thrill' murders in the Loeb-Leopold trial in 1924." He became known as "the attorney for the damned," and his clients were often "labor organizers, Socialists, Communists, and others on the leftist fringe." SCHWARTZ, *supra* note 43, at 434.

¹⁵⁸ Darrow defended 19-year old Nathan Leopold and Richard Loeb in 1924. The two rich, white boys, who lived in the same area as the fictional Daltons, murdered 11 year old Bobby Frank, apparently because they wanted to experience taking a life and believed they were intelligent enough to commit the perfect crime. Darrow's defense strategy was to admit guilt in order to avoid a jury trial and then make a plea to the judge for their lives. In one of the most famous arguments in American legal history, Darrow argued that the boys' lives of privilege caused them to kill. The strategy was successful. Despite massive outcry and strenuous efforts on the part of the State, Leopold and Loeb were both given life in prison. Robert Butler has outlined some of the important similarities between the Leopold and Loeb case and *NATIVE SON*, see Butler *supra* note 49, but more work needs to be done on the significance of the connection between Clarence Darrow and *NATIVE SON* and between Legal Realism and thinkers associated with the Progressive movement more generally.

¹⁵⁹ DARROW, *supra* note 136.

under a stone, in terms we call crime.”¹⁶⁰ The key to Max/Darrow’s argument is that “crime” is created by the same people who designate that way of being as unlawful. Not only do they have the power to determine what is lawful, they have the power to organize access to property in such a way as to make violation of the law necessary. Max’s words coincide with Darrow’s when Darrow argued that prisoners in jail are not responsible for their crimes.¹⁶¹

There is no such thing as a crime as the word is generally understood. [...] I do not believe that people are in jail because they deserve to be. They are in jail simply because they cannot avoid it on account of circumstances which are entirely beyond their control and for which they are in no way responsible.¹⁶²

The act of punishing, Darrow argued, has no relation to guilt and only exacerbates the underlying social causes of crime, preeminent among which are the property laws that segregate and perpetuate poverty in order to consolidate profit. Max, echoing Darrow, fleshes out the implications of this view of property for our understanding of responsibility:

We marked up the earth and said, ‘Stay there!’ [¶] We planned the murder of Mary Dalton, and today we come to court and say: ‘We had nothing to do with it!’ But every school teacher knows this is not so, for every school teacher knows the restrictions which have been placed upon Negro education. The authorities know that it is not so, for they have made it plain in their every act that they mean to keep Bigger Thomas and his kind within rigid limits. All real estate operators know that it is not so, for they have agreed among themselves to keep Negroes within the ghetto-areas of cities.¹⁶³

Marking up the earth, segregating it based on race, is the underlying cause of Bigger’s “crimes,” crimes constructed by the legal apparatus protecting property rights.

It is on this point of how to apportion blame between society and the individual that Max’s voice clearly separates from Bigger’s.¹⁶⁴ *After* Max has indicted

¹⁶⁰ WRIGHT, *supra* note 65, at 391.

¹⁶¹ Darrow’s entertaining but biting preface: “Some of my good friends have insisted that while my theories are true, I should not have given them to the inmates of a jail. Realizing the force of the suggestion that the truth should not be spoken to all people, I have caused these remarks to be printed on rather good paper and in a somewhat expensive form. In this way the truth does not become cheap and vulgar, and is only placed before those whose intelligence and affluence will prevent their being influenced by it.” Darrow, *supra* note 136.

¹⁶² *Id.*

¹⁶³ WRIGHT, *supra* note 65, at 394-395.

¹⁶⁴ Some Wright scholars, like Keneth Kinnamon, make no distinction between Max’s point of view and Bigger’s. Kinnamon argues the novel maintains a “thoroughly communistic point of view,” an argument he bases partly on the courtroom scenes which, referencing Max’s positions only, he concludes are “decidedly ‘leftist’” and a repetition of the “communist party line.” Kinnamon, *supra* note 17 at 18. On the other hand, Donald Gibson insists that critics who equate Max with Bigger do not “see” Bigger. Donald Gibson, *Wright’s Invisible NATIVE SON*, in *THE CRITICAL RESPONSE TO RICHARD WRIGHT* 36 (Robert J. Butler ed., 1995). For Gibson, the third book of *NATIVE SON* is the story of

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ed the white world, and the white world alone, for Bigger's actions, Bigger nonetheless takes responsibility for them, claiming, in an (in)famous line "what I killed for, I am."¹⁶⁵ The constitutive tension between the social and the individual produces a basic philosophical question at the heart of the novel's treatment of guilt—once a social context for an action has been sought and a social or systemic answer given, what meaning does individual guilt have? This question, when posed about *Native Son*, usually centers on the extent to which Bigger's actions are the result of forces beyond his control, making the poor, urban black man the helpless product of his environment.¹⁶⁶

"Bigger Thomas the private person," the "isolated, solitary human." *Id.* at 36. From this perspective, Max's account is one more discourse that effaces Bigger. While Gibson is right to separate Bigger from Max, viewing the third book as the story of the isolated, solitary individual misses the point of the two perspectives contained in the novel—the social and the individual.

¹⁶⁵ WRIGHT, *supra* note 65, at 429.

¹⁶⁶In 1940, when *NATIVE SON* was published, to be realistic in a literary sense meant to "adopt the techniques of naturalism" characterized by distance or separation between the narrator and the subject matter of the text. MICHAEL DAVITT BELL. *CULTURE, GENRE, AND LITERARY VOCATION* 191 (2001). As June Howard explains, narrative detachment enables a hierarchical division between the 'brute' other and the omniscient, 'scientific' narrator." *Quoted in* BELL, *id.* at 194. Determinism governs lower class characters whose conditions provide the subject matter for naturalism while the articulate, middle-class narrators, unlike the objects of their investigation, *understand* the forces at work, stand outside of them, and are exempt from their control. *Id.* at 194. Thus while naturalism offers up new forms of life as literary matter, they are only available as spectacle, controlled and contained by the voice of the narrator and by deterministic forces that render them ever victims, never actors—objects of investigation. I argue the theory of inexorable non-human forces, whether in legal or sociological discourse, is precisely the position that Wright is mobilizing the insights of Legal Realism to combat.

The success and critical reception for *NATIVE SON* rested heavily on Wright's engagement with naturalism and social science. Upon publication, *NATIVE SON* was evaluated as a naturalistic text. See JOHN M. REILLY ed., *RICHARD WRIGHT: THE CRITICAL RECEPTION* (1978) (gathers and analyzes dozens of reviews of *NATIVE SON*). Dorothy Canfield Fisher wrote the initial Introduction to *NATIVE SON* which claimed "the story of Bigger Thomas bears out the studies in racial barriers carried out by the American Youth Commission," a social scientific study of black youth and crime in 1930s Chicago. Fisher refers to *NATIVE SON* as a "report in fiction" and describes Bigger as one "whose behavior-patterns give evidence of the same bewildered, senseless tangle of abnormal nerve-reactions studied in animals by psychologists in lab experiments." DOROTHY CANFIELD FISHER, *Introduction* to *RICHARD WRIGHT, NATIVE SON* (Harper 1940).

The novel's supposed naturalism became the flash point for later critics, most famously James Baldwin who publicly castigated Wright for portraying Bigger Thomas as a social creation, without agency. Their attacks contributed to a firestorm of controversy that continued unabated through the 1960's and into the 70's and included not only Baldwin and Wright, but Ralph Ellison, Chester Himes, Horace Clayton, Eldridge Cleaver, Irving Howe, and many others. For an excellent analysis of the history and points of contention triggered by *NATIVE SON*, see HAKUTANI, *supra* note 59, especially... *Farther and Farther Apart: Richard Wright and James Baldwin*, by Fred L. Stanley, which provides a chronology of Wright and Baldwin's relationship.

While the issue of Bigger's agency has been hashed and rehashed in the decades following Baldwin's critique, what has not been examined is the culpability of the individual white man, an issue that has important ramifications for understanding the grounds upon which individual versus societal guilt is constituted. Of the four white male characters, Mr. Dalton is the most interesting and difficult case because while he is clearly victimized by Bigger's actions, he is also implicated in the system that gave rise to Max's condemnation.¹⁶⁷

Baldwin's criticism stemmed from what he saw as Wright's use of the distancing inherent in naturalism, a technique that made Bigger into a "social and not a personal or human problem," insuring that when he is thought of it will be in terms of "statistics, slums, rapes, injustices, [and] remote violence." JAMES BALDWIN, *Many Thousands Gone*, in CRITICAL ESSAYS ON RICHARD WRIGHT 107 (Yoshinobu Hakutani, ed., 1982) (1951). By portraying Bigger as a product of social forces, but as completely alienated from his own community and people, Baldwin believed that Wright had obliterated Bigger's humanity and cut away the important dimension which black people bear to each other. Thinking of Bigger in strictly social terms obscured what is a "dense, many-sided and shifting reality." *Id.* at 118. Baldwin felt Wright had created Bigger in the image of the white man's myth of the dangerous, angry, ignorant, and self-destructive black man, incarnating and thus perpetuating the stereotype.

By contrast, Donald Gibson deems Baldwin "responsible for the perception of Bigger Thomas as a social entity and that alone." DONALD B. GIBSON, *Wright's Invisible NATIVE SON*, in THE CRITICAL RESPONSE TO RICHARD WRIGHT 37 (Robert J. Butler ed., 1995). I agree. Baldwin fails to account for Bigger's position as both victim and actor, or for the critical stance taken by Wright towards Jan and Mary, who are portrayed as representing the social scientific perspective. Baldwin's criticism also rests in part on the faulty conflation of Wright's voice with Max's. For example, regarding the novel's court scenes, Baldwin writes, "it is useless to say to the court where a heathen sits on trial that *they* are responsible for him and his crimes, therefore let him live to articulate this meaning. [...]. The court, judge, jury, witnesses, spectators already know this and that is why they will kill him." BALDWIN, *supra* note 157, at 118. The argument Baldwin references is Max's, not Bigger's.

The best analyses of the novel have been those that are able to see Wright's engagement with naturalism as complex. Samuel Stillen was the first, and remains one of the best, to see Wright as attempting something more than maximally embodying a pre-existing naturalist framework. SAMUEL STILLEN, *The Meaning of Bigger Thomas*, in RICHARD WRIGHT: THE CRITICAL RECEPTION (John M. Reilly, ed., 1978) (1940). In 1940, Stillen noted the psychological aspects of the novel that are not in line with traditional naturalism, going so far as to place NATIVE SON into a new genre of "dramatic Realism." Bigger is a complex character comprised both of elements of his environment as well as elements of freedom and free will. Critics who overlook this, Stillen wrote, reflect their own failure to read dialectically, a necessary skill for encountering Wright. *Id.* at 83.

Recognizing Wright's critique of the naturalized, deterministic rhetoric of the law makes it even more difficult to believe that, in the same novel, Wright would be adopting that very rhetoric in a non-critical way as it relates to social science. In fact, to see Wright's critique of the rhetoric of law is to see how that critique also applies to the rhetoric of social science. Both, my reading of Wright insists, are rhetorics that obscure reality while serving the interests of those in power.

¹⁶⁷ There is little nuance when it comes to Buckley. He's a "bad" man. Max and Jan are more complicated. While they are both portrayed as "good," Jan unwittingly plays a causal role in Mary's killing through his misguided attempts at unwonted familiarity with

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Dalton is a philanthropist, a “supporter of the NAACP” who has given “over five million dollars to colored schools.”¹⁶⁸ Max belittles Dalton’s financial contributions, accusing him of “try[ing] to undo this thing in a manner so naïve as dropping a penny in a blind man’s cup,”¹⁶⁹ but Max does not give Dalton’s dedication its due. At some risk to his own person and property, Dalton actively seeks out and employs young black men who have been in trouble with the law. When he offers Bigger a job living and working in his home, Bigger already has a long criminal record that includes a pattern of violence and has just returned from juvenile detention where he was sent for stealing tires. In addition to room and board, Dalton provides Bigger the opportunity for an education and pays him 25% more than the “pay calls.”¹⁷⁰ Most significantly, when Dalton learns that the Thomas family is about to lose their apartment, he comes to their aid, interceding in the midst of the trial to prevent the eviction of the family of the man who killed and brutally mutilated his daughter.¹⁷¹

But Dalton is able to help them because he owns the building in which they live.¹⁷² That is the rub. Housing costs in the Black Belt are *double* that of White communities, despite the dilapidated condition of the Black neighborhoods and the paucity of well-paying jobs. *Native Son* shows how the disparity is maintained by segregation practices, not by any supposedly neutral market fluctuations. In fact, Bigger eludes the police by hiding in the many vacant and abandoned apartment buildings in the Black Belt. However, when the police are closing in, Bigger looks for an un-rented flat in an occupied building but is unable to find one.¹⁷³ The scarcity that has supposedly sent prices sky-high is not natural; it has been fabricated by the white landowners who have privately agreed to fix housing prices while leaving large areas unoccupied to ratchet up demand for the remaining space. Black Chicagoans can do nothing but pay. The widespread use of racially restrictive housing covenants mean there are no options for living outside that narrow strip of the city.¹⁷⁴ So while Dalton may be altruistically motivated by a desire to help the black people of Chicago, as a white landowner who participates in maintaining the system of artificial scarcity, he creates the conditions for and then benefits financially from their exploitation. As Max puts it, guilt trails white actions, but self interest keeps [white people] from atoning for their wrongs.¹⁷⁵

Bigger. But for his actions, Mary would not have died. Altruistic Max, while true friend to Bigger and his only mouthpiece, sees the world very differently than Bigger in the end. As I argue in this article, they fundamentally part ways over the issue of the source and meaning of Bigger’s violence.

¹⁶⁸ WRIGHT, *supra* note 65, at 53, 56.

¹⁶⁹ *Id.* at 393.

¹⁷⁰ *Id.* at 50.

¹⁷¹ *Id.* at 302.

¹⁷² *Id.* at 173.

¹⁷³ *Id.* at 248.

¹⁷⁴ *Id.* at 249. In Bigger’s words, “[n]o white real estate man would rent a flat to a black man other than in the sections where it had been decided that black people might live.” *Id.*

¹⁷⁵ *Id.* at 387.

Clarence Darrow's statement that there is no such thing as "crime" really means that there is no such thing as personal guilt for crimes that are the result of social forces. The jails are filled with people who commit "crime" out of financial necessity or psychological compulsion—neither of which he believes are culpable states. But while the people "in" jail have no personal accountability, the "rich men" and "property owners" like Dalton seem to. Darrow writes,

Whenever the Standard Oil Company raises the price of oil, I know that a certain number of girls who are seamstresses, and who work after night long hours for somebody else, will be compelled to go out on the streets and ply another trade, and I know that Mr. Rockefeller and his associates are responsible and not the poor girls in the jails.¹⁷⁶

Here Darrow's notion of systemic responsibility gives way to personal responsibility, but personal responsibility in relation to the property owners, not the prostitutes. The owners seemingly have the ability to be guilty in a way that the poor do not. Darrow continues:

[T]o take all the coal in the United States and raise the price two dollars or three dollars when there is no need of it, and thus kill thousands of babies and send thousands of people to the poorhouse and tens of thousands to jail, as is done every year in the United States — this is a greater crime than all the people in our jails ever committed, but the law does not punish it. Why? Because the fellows who control the earth make the laws. If you and I had the making of the laws, the first thing we would do would be to punish the fellow who gets control of the earth.¹⁷⁷

Crime as defined by the law is, for Darrow, no measure of guilt. Agency here is given to the owners while it is denied to the "criminals." Access to property is access to agency.

As in the case of the seamstress turned prostitute,¹⁷⁸ property law and the resulting system of segregation create the conditions that lead to Mary and Bessie's deaths, making those crimes both predictable and inevitable. I say "inevitable" because Wright is illustrating the necessity of the violence portrayed in *Native Son*. The continued justification of property depends upon violence committed by black men, or at least on the shared *belief* in the reality of that violence. Segregation, and the economic booty that results from it, is maintained by fear, fear that simultaneously causes and is stoked by racial violence. Fear is omnipresent in Bigger's life. Although to Bigger fear seems to be a natural fact, fear mongering is a deliberate ploy used by those in power to keep both white and black people "in their place." The spectacle of Bigger's trial and death, then,

¹⁷⁶ Darrow, *supra* note 137.

¹⁷⁷ *Id.*

¹⁷⁸ While Bigger's violence may not be the immediate result of poverty, the connection exists. His family's time on the dole is about to expire, leaving them to face hunger and homelessness. The job offered by the Dalton's—a job taken in order to hold off the threat of the total poverty born of segregation—makes Bigger uncomfortable and creates the conditions that lead to Mary's death and then to Bessie's.

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becomes a “bloody symbol of fear to wave before the eyes of [the] black world,”¹⁷⁹ fear employed to further the segregation agenda and generate profits.

Evidence of the link between violence and the segregation agenda is found in a newspaper article that uses Mary’s death to insist that “residential segregation is imperative” and to push for de jure racial segregation of “parks, playgrounds, cafes, theatres, [...], street cars,” and schools.¹⁸⁰ Segregation, the article claims, is necessary for the purpose of minimizing black men’s “direct contact with white women.”¹⁸¹ But if “the injection of an element of constant fear” is used to control the black population, fear plays a similar role in manipulating the white population. The white citizens of Chicago are goaded into action and belief on the theory that they are preserving the safety of their homes and families. Max characterizes Bigger and the mob in the same terms—both as strangers who instinctively hate each other out of fear. Manipulated by strategies of fear mongering, both groups are portrayed as “powerless pawns in a blind play of social forces.”¹⁸²

I resist any simplistic model of the powerless person tossed about by irresistible social forces; instead, my emphasis is on the way that this simplistic model itself contributes to the longevity of the color line in Chicago. Yes, the physical distance prescribed by segregation perpetuates social distance and causes people to be divided into two masses—white and black—between which there is a gulf that extends on both sides. As Bigger puts it, “white folks and black folks is strangers. We don’t know what each other is thinking.”¹⁸³ But the problem is deepened when instead of individual white people, there is a white “world,” the aggregation and naturalization that is a phenomenon of segregation and which maps whiteness and blackness spatially. For Bigger, whites are not human; they are “a sort of great natural force” that he regards as a singular, monolithic thing.¹⁸⁴ The same is true of white attitudes towards blacks. The dehumanizing language used by the papers and the mob to describe him, along with the fact that several *hundred* men are mistaken for Bigger, evidences how little his individuality or personhood is recognized. Thus Bigger feels he is facing the white world as a component of the natural world,¹⁸⁵ a world in which Dalton exists “high up, distant, like a god.”¹⁸⁶ This transition from people to “world” is a useful abstraction that allows segregation to be used to create financial windfall and political advantage for a select few.

The spatial mapping of black and white worlds makes people feel they are facing inexorable, unalterable natural forces rather than other individuals or institutions with human origins. Max explains how this conflation of people and forces arises in the urban context:

¹⁷⁹ WRIGHT, *supra* note 65, at 276.

¹⁸⁰ *Id.* at 281.

¹⁸¹ *Id.*

¹⁸² *Id.* at 390.

¹⁸³ *Id.* at 351.

¹⁸⁴ *Id.* at 114.

¹⁸⁵ *Id.* at 396.

¹⁸⁶ *Id.* at 174.

We must deal here, on both sides of the fence, among whites as well as blacks, among workers as well as employers, with men and women in whose minds there loom good and bad of such height and weight that they assume proportions of abnormal aspect and construction. When situations like this arise, instead of men feeling that they are facing other men, they feel that they are facing mountains, floods, seas: forces of nature whose size and strength focus the minds and emotions to a degree of tension unusual in the quiet routine of urban life. Yet this tension exists within the limits of urban life, *undermining* it and *supporting* it in the same gesture of being.¹⁸⁷

People become part of the natural environment, mapped onto the city itself. Human individuality is erased in the act of becoming part of either the Black Belt or the white world. When Bigger met Jan and Mary, they were not “real” to him, but were part of the natural force that Bigger thinks repeatedly of as a looming “white mountain.”¹⁸⁸ Similarly, to the white people of Chicago, Bigger is not an individual human being, he is a natural phenomenon—a representative of “blackness” incarnate.

The conflation of human agency with forces of nature undermines urban life because it estranges Blacks and Whites, threatening their ability to live together peaceably in close urban proximity and triggering racial violence. But it also supports the “limits of urban life” by creating the conditions that prop up segregation. Because black and white people are strangers, they must be kept separate. So while segregation sets limits, it also depends on the regular breach of them. Without those frequent and bloody breaches, the fear that sustains the color line could not be generated. The violence of segregation, then, rests on a process of abstraction that transforms individuals into racially and geographically separated worlds maintained by the periodic violent infringement on that separation.

Though Darrow offered a compelling critique of the systemic causes of criminal behavior, any construction of law that erased human agency was subject to another of the Realists’ critiques—when law is isolated from “reality,” its outcomes, its workings, are seen as inevitable, inexorable forces of logic, impersonal outcomes of the “system” rather than the result of human choice and preference. If Dalton is guilty, it must be through the way he exercises power over property. But if property rights are innate, part of the natural make up of the world, then it makes as little sense to hold him accountable for the use of them within his world than it does to hold Bigger accountable for actions determined by the make up of his.

Wright mobilized the methods of Legal Realism to create a functional critique of property, segregation, and the extra-legal forces controlling the rule of law, but by ending the novel with Bigger and Max parting ways, Wright closes with some Realism about Legal Realism. As Bigger awaits his sentence, Max tries to get Bigger to see that his fate is aligned with the working classes generally who, in solidarity, could resist and change the status quo. But Bigger slides past this appeal. He sees Max’s speech as confirming the morality of his actions,

¹⁸⁷ *Id.* at 387.

¹⁸⁸ *Id.* at 361, 419, and 423.

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saying Max “makes me feel I was kind of right.”¹⁸⁹ Bigger’s voice, silent through the entire court proceedings, now “drowns out [Max’s] voice,” as Bigger insists on making his actions equal and reciprocal to the social forces. The reciprocal formulation is repeated twice. First: “I ain’t trying to forgive nobody and I ain’t asking for nobody to forgive me.” And then: “They wouldn’t let me live and I killed.”¹⁹⁰ Both actors—the individual and¹⁹¹ the corporate—have taken life, or will take life, on a reciprocal plane.

Bigger’s functional interpretation of his own actions, renders our Realist Max bewildered and terrified. Bigger confesses “what I killed for, I *am!*”¹⁹² Continuing, he claims:

It must have been good! When a man kills, it’s for something.... I didn’t know I was really alive in this world until I felt things hard enough to kill for ‘em. [...] I know what I’m saying real good and I know how it sounds. But I’m all right. I feel all right when I look at it that way....¹⁹³

Bigger’s logic is simple: “What I killed for I am,” “what I am must be good,” thus, what I killed for must be good. The value of his own life is a function of his being willing to kill to preserve it; violence is equivalent to the exercise of property rights that created the social conditions within which he acted.

This logic creates distance between Bigger and Max who “back[s] away” and “plead[s] despairingly” with him, with eyes “full of terror.” Wright underscores the separation between them. Max wants to “go to” Bigger, but is unable,¹⁹⁴ until finally, a crying Max leaves, “grop[ing] in the dark for his hat,” “feel[ing] for the door, keeping his face averted.”¹⁹⁵ Staggering, nervous, discomforted, Max is wholly out of his element; meanwhile, Bigger is at ease, calling out goodbyes and asking Max to “tell Jan hello.”¹⁹⁶ Using the functional approach of the Realists to trace Max’s argument out to its logical end, Bigger asserts that violence is a natural and acceptable response to social conditions—in fact, that violence is necessary to take the full measure of his value as a person.

VI. CONCLUSION — SECRET ROOTS AND THE SURRENDER OF LAW TO LIFE

The Realists began as enthusiastic, brash, and buoyant. Consider the words of Realist Henry Steele Commager who described sociological jurisprudence as a “new way of thinking about law and applying it. It was a shift from absolutes to relatives, from doctrines to practices, from passive—and therefore pessimistic-

¹⁸⁹ *Id.* at 428.

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 428.

¹⁹² *Id.* at 429.

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 430.

determinism to creative—and therefore optimistic—freedom.”¹⁹⁷ But the political controversies that erupted in the 1920s and intensified throughout the mid-twentieth century led to a “storm of criticism” directed towards Legal Realism.¹⁹⁸ As Edward Purcell explained in his article *American Jurisprudence between the Wars*, one flashpoint for the national controversy was the ethical relativism that some Realists had posited as liberating. There were those who believed that the perceived ethical relativism of the Realists meant “that no Nazi barbarity could be justly branded as evil.”¹⁹⁹ By identifying law with “the actions of government officials,”²⁰⁰ the Realists were seen as giving “even the most offensive Nazi edict the sanction of true law.”²⁰¹ Thus, the Realists had unintentionally raised “fundamental questions about the possibility and validity of democratic government at a time when the country needed reassurance and conviction.”²⁰²

Edward Purcell defines the fault line between Legal Realists and their critics as the division between ethical relativists and ethical absolutists.²⁰³ Thus, Holme’s cynical view of the role that morality plays in the law puts him on one side of the Realist/non-Realist divide while Pound’s ideal view of the law and its potential to bring about greater justice puts him on the other.²⁰⁴ I argue that the

¹⁹⁷ Quoted in COUILLETTE, *supra* note 43, at 559. It is difficult to reconcile the confidence they displayed in the scope of their own accomplishments with the critical estimation of their own record. Some see that record as dismal. See, *i.e.* BRIAN LEITER, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEXAS L. REV. 269 (1997). While in my estimation, Leiter overlooks important ways in which Legal Realism changed the face of American law, even Horwitz, whose judgment of the Realist’s lasting impact is much kinder, claims that Legal Realism, as a constructive movement, was a failure. HORWITZ, TRANSFORMATION II, *supra* note 22, at 210.

Leiter focuses too much on hunch theory and assesses the Realist contribution shallowly, claiming that judges continue to do what they already do, becoming more explicit about legislative aspects of judging and addressing policy alongside tradition. Of course, his assessment reveals his own blind spot. He underestimates the Realists because he does not take adequate account of consequentialism. He claims the Realists were ineffective at changing the law, but they altered the way that law was taught and made room for a new kind of acceptable legal analysis. Although the rhetoric of judicial conservatism remains, the process of legal analysis has been altered. If Leiter is correct that the influence of Legal Realism is no longer seen, it is because their methods have become self-evident, part of the fabric of our jurisprudence rather than an isolated historical moment. For more on the lasting impact of Legal Realism see SCHWARTZ, *supra* note 43.

¹⁹⁸ HULL, *supra* note 5, at 239. For a discussion of the virulent attacks on Legal Realism, see *supra* note 16.

¹⁹⁹ Edward A. Purcell, Jr., *American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424, 441 (1969).

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 437.

²⁰³ *Id.* at 444. See also *id.* at 434-446 for Purcell’s analysis of the debates between the Realists and their critics around the issue of relativism.

²⁰⁴ *Id.* at 427. Purcell deems Roscoe Pound, Morris Cohen, and Lon Fuller non-Realists for the same reason. While they all “knew the severe limitations of deductive logic and were committed to some form of legal empiricism,” they also insisted “that some supralegal moral standard was necessary.” *Id.* at 444. On the other side of this divide,

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issue of morality in the law is better seen as a subject of concern *within* Legal Realism, as thinkers whose views divided on this issue were largely aligned on others. During the 1940s, as public outcry against them grew, many Realists began to retreat, defending themselves by claiming they had never rejected ethical goals in law.²⁰⁵ At this time, it was Lon Fuller, more than any other, who recognized that the more basic question was not whether a particular person subscribed to a set of moral values in the law, but whether “the basic philosophical and methodological assumptions that characterized Realism left any rational basis for affirming the legitimacy of an ethical goal.”²⁰⁶

Fuller also recognized the issue was more complex than simply affirming a set of ethical values. The conceptualist, he explained, is not “ignorant of the discrepancy between Is and Ought. He is simply undisturbed by it.” But to the Realist, it provides “acute distress.”²⁰⁷ The distress comes from having but two choices: “the Is may be compelled to conform to the Ought, or the Ought may be permitted to acquiesce in the Is.”²⁰⁸ Neither option is satisfactory. Defining the Ought is a difficult matter. Fuller wrote, “life resists our attempts to subject it to rules; the muddy flow of Being sweeps contemptuously over the barriers of our Ought,” and thus we struggle to say exactly and finally “what our Ought is.” So instead, Fuller remarked, the Realist is beckoned to “let the Ought acquiesce in the Is, to let law surrender to life.”²⁰⁹

Fuller’s warning about Realism allowing law to surrender to life referenced its largely descriptive agenda. Rather than realizing Pound’s dream of law mobilized in the interest of an alternate and more just society, many Realists focused exclusively on the hidden anomalies (and regularities) between legal rhetoric and practice, exposing the unacknowledged forces acting on and reflected in law. But Realism provided little guidance on what normative goals the law should embody, other than the goal that law should transparently reflect reality. This work made [arguably] little substantive difference. In fact, by having law “mirror” social reality more completely and more transparently, Realism “ended up endowing the Is with normative content,” and so “[s]ocial reality — the Is — became the source of the Ought.”²¹⁰

Purcell places Walter Wheeler Cooke, Underhill Moore, Walter Neeles, Jerome Frank, Edward Robinson, and Thurman Arnold as Realists who, to some degree, reject morality in law. *Id.* at 436-438. Jerome Frank is generally thought of as the most extreme. Frank claimed argued that the desire for consistency and authority, Frank claimed, manifested a psychological weakness derived from dysfunctional father/child relationships where law was substituted for the desire for the “powerful authority figure” of the father. *Quoted in* Purcell at 432.

I disagree with this method of categorization and find Pound, M. Cohen, and Fuller all important voices articulating Realist concerns, the fact that they part ways with other Realist thinkers on some points notwithstanding.

²⁰⁵ Purcell, *supra* note 199, at 441.

²⁰⁶ *Id.*

²⁰⁷ Fuller, *supra* note 148, at 461.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ Horwitz, *supra* note 22, at 211.

Llewellyn's work provides an excellent illustration of Fuller's concerns. Llewellyn insisted that there was no place for "prescriptive ideals" in juristic science.²¹¹ As I have shown, he wanted to increase the predictability of the law by creating greater congruence between law and lay norms, which he saw as a key factor influencing legal decision-making. In Llewellyn's words, "by and large the *basic order* of our society, and for that matter in any society, *is not produced by law* Law plays only upon the fringes."²¹² Thus law maintains the order given by society. Llewellyn appears here untroubled about claiming that the only prescriptive ideal the law should embody is greater transparency between law and the order given by society.

In *Native Son*, however, Richard Wright, expresses the trouble underlying Llewellyn's position as it relates to the rights and treatment of racial minorities. Wright's portrayal of the role the mob plays in the justice system suggests that Llewellyn was overly optimistic about the uniformity and desirability of "lay norms." For Wright, to align law with lay norms endows the mob with legitimacy. Furthermore, to the extent that Bigger's violence is representative of an alternate set of "lay norms," it becomes increasingly difficult to separate the officially sanctioned violence emanating from the legal system from the violence of either the mob or the Bigger Thomas's of the world. Wright's concerns are mirrored in those expressed privately by Oliver Wendell Holmes, as his early optimism about the role of the law in social engineering gave way to a pragmatic recognition of the shadow cast by the mob over the legal system. Writing in 1881, Holmes penned, "[t]he very considerations which judges most rarely mention, and always with an apology, are the secret root from which the law draws all of the juices of life. [...] Every important [legal] principle... is in fact and at bottom the result of more or less definitely understood views of public policy."²¹³ But a few decades later, he had glimpsed the dangers of that secret root. In 1910 he wrote in a letter to Sir Frederick Pollock, "I am so skeptical as to our knowledge about the goodness or badness of laws that I have no practical criterion except what the crowd wants. Personally, I bet that the crowd if it knew more wouldn't want what it does—but that is immaterial."²¹⁴ By 1926, he knew the secret root of law was the mob. In a letter to John C. H. Wu, Holmes wrote that when it comes to "the development of a *corpus juris*, the ultimate question is what do the dominant forces of the community want and do they want it hard enough to disregard whatever inhibitions may stand in the way?"²¹⁵

The relationship between law and morality divides Max and Bigger in the novel's closing scene. Max privileges the Ought, believes in the use of law for progress and change. Bigger, however, through his experience with the legal system, has learned the power of the Is and its ties to the mob ever circling the courtroom. *Native Son* ends without resolving this breach between Max and Big-

²¹¹ HULL, *supra* note 5, at 314.

²¹² Quoted in Fuller, *supra* note 148, at 449.

²¹³ FRANCIS BIDDLE, MR. JUSTICE HOLMES 35 (1942 ed.).

²¹⁴ MARK DE WOLFE HOWE, HOLMES-POLLOCK LETTERS, 1874-1932 163 (1941).

²¹⁵ MAX LERNER ed., THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS, AND JUDICIAL OPINIONS 432 (Transaction Publishers 2010) (1943).

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ger. Thus, the greatest question of both Legal Realism and *Native Son* —the question of the Is and the Ought—is the question they both leave unanswered.

DISSENT AS A SITE OF AESTHETIC ADAPTATION IN THE WORK OF OLIVER WENDELL HOLMES JR.

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ABSTRACT

This article considers Oliver Wendell Holmes Jr. as a writer in the aesthetic, pragmatic tradition of Ralph Waldo Emerson and William James. Holmes, like Emerson, has been compared to Nietzsche, and may be said to have ushered in an era of postmodern jurisprudence in America. Holmes's aesthetic pragmatism anticipates the antifoundationalism of Richard Rorty and lends itself to rhetorical superfluity, especially in the medium of dissent. Holmes turned the dissent into an aesthetic medium both pleasurable and memorable; in so doing, he ensured that future judges, practitioners, academics, and other commentators would revisit his dissents. By revisiting Holmes's dissents, these individuals were revisiting legal reasoning, and judges in particular were vindicating that reasoning and perhaps even transforming that reasoning into law. Section one contextualizes Holmes's ideas within the broader currents of American jurisprudence and postmodern philosophy in the nineteenth and twentieth centuries. This section shows that Holmes was a transitional and transformational force in American legal thought and that he ushered in an era of postmodern judging. Section two spells out the concept of pragmatist aesthetics as a judicial framework. It suggests that Holmes is an Emersonian who falls within the pragmatic-aesthetic tradition. This section builds on themes about postmodernism, but focuses above all on Holmes's style and creativity. Although classical pragmatism is not postmodern, and although Holmes is not a postmodernist, Holmes's pragmatism enabled the development of postmodern jurisprudence. Against entropy, Holmes stood for mobility and expediency, the implications of which were more postmodern than Holmes

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probably intended. Section three considers this postmodern jurisprudence and synthesizes sections one and two while analyzing the dissent as a communicative and rhetorical medium. This final section is both biographical and theoretical; it brings together the three principal themes of this piece: pragmatism, aesthetics, and postmodernism.

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I. INTRODUCTION

Before the tenure of Oliver Wendell Holmes Jr., Supreme Court justices rarely dissented. Dissents seemed discourteous.¹ They unsettled the supposed unity of the Court. They implied fragmentation and disorder, which flew in the face of any jurisprudence prizing science, linearity, consistency, and reason. After Holmes's tenure, dissents became common; dissenting judges were no longer stigmatized.² The Court began to leave behind the Enlightenment and to enter into postmodernity.

The author of what Louis Menand calls "vibrant dissents,"³ Holmes was the first "Great Dissenter." He inaugurated the widespread and frequent use of dissents. His careful logic, poetic prose, and playful tone drew attention to his dissents, which, in keeping with his pragmatist methodology, ensured the preservation of good ideas for future generations. Influenced by William James, to whom he never gave due credit, and by Ralph Waldo Emerson, whom he knew as a boy and with whom he corresponded as a young man, Holmes treated dissents as a theater for acting out methods and signals of pragmatism. He turned the dissent into an aesthetic medium that was both pleasurable and memorable; in so doing,

¹ See *From Consensus to Collegiality: The Origins of the 'Respectful' Dissent*, 124 HARV. L. REV. 1305 (2011). For this reason, modern justices include the phrase "I respectfully dissent" in their dissents. ("For the first century of the Court's history, a typical dissenting speech act read as a long, prolix apologetic justifying the dissent's deviation from the majority opinion.")

² See John P. Kelsh, *The Opinion Delivery Practices of the United States Supreme Court 1790-1945*, 77 WASH. U. L. Q. 137, 170-78 (1999).

³ LOUIS MENAND, *THE METAPHYSICAL CLUB* xxix (2001).

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he ensured that future judges, practitioners, academics, and other commentators would revisit his dissents. By revisiting Holmes's dissents, these individuals were revisiting legal reasoning, and judges in particular were vindicating that reasoning and perhaps even transforming that reasoning into law. Holmes put his pragmatism and prose to work to enable non-law to become law, or to prevent good logic from being exhausted. He ensured the preservation of text and argument by making them appealing to the senses. All of this has to do with what Menand dubs the experiment of democratic participation, the purpose of which is "to keep the experiment going."⁴

Dissents keep the judicial experiment going, especially when they are useable. They are useable when they are citable, and they are citable, by and large, when they are aestheticized or memorable. Holmes's dissents were both aestheticized *and* memorable—so much so that they activate what Richard Poirier, as against Richard Rorty, calls superfluity or superfluency: rhetorical excesses and syntactical spurts that trope and energize past ideas to thwart intellectual stasis. In this respect Holmes is an Emersonian.

Holmes is also a precursor to postmodernism. His work anticipates the jurisprudence of the critical legal theorists and inaugurates the postmodern Court. More skeptical about "truth" than William James, Holmes stops short of Richard Rorty on matters of metaphysics. His pragmatism is not postmodern even if it paved the way for postmodernism. His complex notions of truth, to cite just one example, have radical implications for a society regulated by laws about which individuals swear oaths "to tell the truth, the whole truth, and nothing but the truth, so help me, God." Be that as it may, Holmes cannot be lumped together with such later figures as Luce Irigaray, Jean Baudrillard, Zygmunt Bauman, Gilles Deleuze, or Félix Guattari, although a comprehensive case could be made that his jurisprudence relates to the ideas of thinkers like Michel Foucault and Jean-François Lyotard. His postmodernism—if that is the right word—could not be tied to politics of liberation or the aesthetics of rupture and do not deal definitively with such philosophical questions as subjectivity. Furthermore, the political and artistic ramifications of modernism had hardly reached their zenith as Holmes penned his judicial writings; to the extent that postmodernism is a response to modernism, Holmes was not postmodern.

Holmes's notions of truth are tied to experience. In his opinions, dissents, and articles, Holmes celebrates the ballast of experience even though he crows about experiential limitation. From his maxims, one gathers that he thought that experience teaches society to adapt to change and to shape philosophies to remain reasonable and practical in new environments. His jurisprudence seems to champion progress to prevent ideational inertia, and his literary flourishes seem to stimulate sensation, provoke thought, and enable kinetic thinking. His "truth" is a fluid category of discourse dependent upon cultural and social circumstances. It is a Darwinian truth with traits that vary or conform to survive. In short, Holmes is a transitional and transformational figure on the Supreme Court because his jurisprudence, unlike the jurisprudence of other justices sitting during his long tenure, is shot through with the epistemologies, metaphysics, and aesthetics that gained

⁴ *Id.* at 442.

popularity under Emerson, C.S. Peirce, William James, and George Santayana. Epistemology, metaphysics, and aesthetics of this kind are not reducible to any clear-cut category, and that is to some extent their point.

This article will proceed as follows. Section one will contextualize Holmes's ideas within the broader currents of American jurisprudence and postmodern philosophy in the nineteenth and twentieth centuries. This sweeping section will show that Holmes was a transitional and transformational force in American legal thought and that he ushered in an era of postmodern judging. He was not a postmodernist, yet his ideas about "truth" and "true law" anticipated the skeptical thinking of Rorty, and Holmes's inquiries into legal history resemble Nietzschean and later Foucaultian genealogy. Holmes's philosophy of judicial restraint, moreover, smacked of Nietzschean perspectivalism, and Holmes's language philosophy dealt with semiotics and signification and their implications for law as a system of commands. Section one is broad in scope and cannot possibly expound on all the connections it makes between Holmes and postmodernism. Nevertheless, it lays the groundwork for future inquiry.

Section two spells out the concept of pragmatist aesthetics as a judicial framework. It suggests that Holmes is an Emersonian who falls squarely—or, in Emersonian terms, circularly⁵—in the pragmatic-aesthetic tradition. This section is theoretical, but, I hope, pragmatic. It builds on themes about postmodernism, but focuses above all on Holmes's style and creativity. Although classical pragmatism is not postmodern, and although Holmes is not a postmodernist, Holmes's pragmatism enabled the spread of postmodern jurisprudence. Against entropy, Holmes stood for mobility and expediency, the implications of which were more postmodern than Holmes probably intended.

Section three considers this postmodern jurisprudence and synthesizes sections one and two while analyzing the dissent as a communicative and rhetorical medium. This final section is both biographical and theoretical; it brings together the three principal themes of this piece: pragmatism, aesthetics, and postmodernism.

II. HOLMES AND THE ADVENT OF THE POSTMODERN COURT

The twentieth-century heralded a shift in American legal thought. That this shift coincided with Holmes's tenure on the Supreme Court ought to come as no surprise to those familiar with Holmes's pragmatism. Holmes joined the Court in 1902. At this time, Langdellian pedagogy and jurisprudence had taken hold in America just as the Court began to overrule previous decisions and to undertake new discursive experiments with old rhetorical media. The tendency of the Court to overrule corresponds with the tendency of justices to dissent. Both tendencies mark a transition or transformation in jurisprudence "from the classical thought of the nineteenth century to the fragmented, postmodern thought of the late twen-

⁵ See, e.g., RALPH W. EMERSON *Circles in ESSAYS: FIRST SERIES* (2003).

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tieth century.”⁶ Against Enlightenment rationality, uncompromising teleology, and scientific protocols, the postmodern Court is characterized by “the agency of particular Justices, fragmented discourse, the collapse of larger narratives within substantive areas of the law, and the absence of the nineteenth century’s grand narrative of scientism.”⁷ If Langdellian jurisprudence epitomized the scientific or orthodox jurisprudence of the Enlightenment, then postmodern jurisprudence was a break from Langdellian models and methods. “If Langdell gave the new jurisprudence its methodology,” Grant Gilmore once said, “[then] Holmes, more than anyone else, gave it its content.”⁸

This essay is not bold enough to define “postmodern” or “postmodernism.” Maybe postmodernism is a political or aesthetic enterprise of the kind championed by Jean-François Lyotard.⁹ Maybe postmodernism is, as Fredric Jameson believes, a period or age that we are (or were) in.¹⁰ Conservatives of some stripes inveigh against the radicalism of postmodernism while leftists of some stripes, including European intellectuals such as Jürgen Habermas, denounce postmodernism as conservative. Definitions of “postmodern” or “postmodernism” betray the term as soon as they purport to describe it. With Judith Butler, this author takes the position that “I don’t know about the term ‘postmodern.’”¹¹ Postmodernism has nameable qualities, but cannot be named. The singular term “postmodern” is not postmodern. It cannot summon forth the plurality of meanings it is supposed to represent.

Holmes is just as hard to pin down as the term “postmodern.” Conservatives and liberals part company with him, and conservatives and liberals claim him as one of their own. “Liberals no longer consider Holmes a progressive, a friend of labor, or a champion of civil rights,” explains one author, “and conservatives find no comfort in his atheism, moral relativism, or embrace of Malthusian tenets. As an emissary of judicial restraint, he is honored largely in the breach, as today conservatives and liberals alike practice judicial activism.”¹² Another author contends that a “cherished American myth is that Oliver Wendell Holmes, Jr., was liberal,” and that “Holmes, in fact, was as profound, as civilized, and as articulate a conservative as the United States has produced.”¹³ Others have shared this view. Max Lerner says that “[o]n the whole [Holmes’s] were the views of an aristocratic conservative who did not care much either for business values or for the

⁶ Andrew M. Jacobs, *God Save this Postmodern Court: The Death of Necessity and the Transformation of the Supreme Court’s Overruling Rhetoric*, 63 U. CIN. L. REV. 1119, 1120 (1995).

⁷ *Id.* at 1121.

⁸ GRANT GILMORE, *THE AGES OF AMERICAN LAW* 48 (1977).

⁹ See, e.g., JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington and Brian Massumi trans., Manchester Univ. Press 1984).

¹⁰ See, e.g., FREDRIC JAMESON, *POSTMODERNISM, OR, THE CULTURAL LOGIC OF LATE CAPITALISM* (Verso 1991).

¹¹ Judith Butler, *Contingent Foundations: Feminism and the Question of Postmodernism*, in *FEMINISTS THEORIZE THE POLITICAL* 6 (Judith Butler & Joan Scott eds., 1992).

¹² Gerald Caplan, *Searching for Holmes Among the Biographers*, 70 GEO. WASH. L. REV. 769, 770 (2002).

¹³ Irving Bernstein, *The Conservative Mr. Justice Holmes*, 23 NEW ENG. Q. 435 (1950).

talk of reformers and the millennial dreams of the humanitarians.”¹⁴ Lerner portrays Holmes as “a great spokesman of our Constitutional tradition because [Holmes] was a great enough conservative to stretch the framework of the past to accommodate at least some of the needs of the present.”¹⁵

Richard Posner provides his own take on Holmes’s politics:

Holmes’s reputation has fluctuated with political fashion, though never enough to dim his renown. Although many of his opinions took the liberal side of issues, the publication of his correspondence revealed—what should have been but was not apparent from his judicial opinions and occasional speeches—that, so far as his personal views were concerned, he was liberal only in the nineteenth-century libertarian sense, the sense of John Stuart Mill and, even more, because more laissez-faire, of Herbert Spencer. He was not a New Deal welfare state liberal, and thought the social experiments that he conceived it to be his judicial duty to uphold were manifestations of envy and ignorance were doomed to fail. [...] Hostile to antitrust policy, skeptical about unions, admiring of big businessmen, Holmes was a lifelong rock-ribbed Republican who did not balk even at Warren Harding.¹⁶

Holmes was apparently many things, and perhaps all we can say of his politics is that they defy simple classification. As early as 1916 Justice Felix Frankfurter came to this conclusion: “Only the shallow would attempt to put Mr. Justice Holmes in the shallow pigeonholes of classification.”¹⁷ The amorphousness of his thought makes Holmes an unusually suitable subject for a study in post-modernism.

Without Holmes, the postmodern Court, whatever it is, may never have materialized. Holmes brought about a foundational, anti-foundational change in the way justices considered precedent. His jurisprudence “was carried through by Roscoe Pound and the Legal Realists” and later the critical legal theorists.¹⁸ Its methodology “was to render law and legal theory increasingly instrumental.”¹⁹ This instrumentalism altered the landscape of U.S. legal theory, which today “consists of what some have called ‘postmodern jurisprudence,’ a plethora of competing approaches, each representing a particular normative or interest group perspective, each arguing that law should serve the interests they tout.”²⁰ Holmes differs from the legal realists and the sociological jurists in one very im-

¹⁴ OLIVER WENDELL HOLMES, *THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS* xxx (Max Lerner ed., Boston, Little, Brown and Co., 1943).

¹⁵ *Id.* at xlvi.

¹⁶ *Introduction* in *THE ESSENTIAL HOLMES; SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS AND OTHER WRITINGS OF OLIVER WENDELL HOLMES*, xv (Richard Posner ed., 1992).

¹⁷ Felix Frankfurter, *The Constitutional Opinions of Justice Holmes*, 29 HARV. L. REV. 683, 698 (1916).

¹⁸ Brian Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociological Studies, and the Fact-Value Distinction*, 41 AM. J. JURIS. 315 (1996).

¹⁹ *Id.*

²⁰ *Id.* at 316.

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portant respect: they believe that the question “What rule is instrumentally best?” can be settled scientifically whereas Holmes recognizes that even this question assumes a kind of formalism. This point of difference reinforces the suggestion here that we should consider Richard Rorty, Michel Foucault, and Friedrich Nietzsche rather than John Stuart Mill (to whom William James dedicated his lecture series *What is Pragmatism?*) when we think of Holmes.

Holmes was just as postmodern as Nietzsche and his disciple Foucault, since Holmes used the word “inquiry” in the same sense that Nietzsche and Foucault used the word “genealogy” to reject assumptions about origins and to rebuff those who presumed the ability to trace ideas to their roots. Holmes opens his essay “Ideals and Doubts” by saying that “we have been preoccupied with the embryology of legal ideas.”²¹ He adds that “explanations, which, when I was in college, meant a reference to final causes, later came to mean tracing origin and growth.”²² One wonders whether Holmes’s jurisprudence is not at its core like a Nietzschean or Foucaultian genealogy of Anglo-American law, despite Holmes’s reference to origins in the previous quotation; after all, his “one book, *The Common Law*, was not a systematic theoretical framework, but rather a synthesis of Anglo-American private law doctrine, supplemented by a good bit of legal history and a few now-famous jurisprudential observations.”²³

This essay is not the first to link Holmes to Nietzschean thought. Another author has said that one “need only recognize Holmes as the Nietzschean that many of his writings reveal—a figure who not only saw Darwinian struggle as the order of the universe but also venerated power, conflict, violence, death, and survival.”²⁴ Still another author has referred to Holmes’s philosophy of judicial self-restraint as “a set of commitments amounting to a full-blown metaphysics and theory of value, broadly Nietzschean in cast and doctrine.”²⁵ Even more to the point is the claim that “Holmes’s philosophical views were, with a few instructive divergences, strikingly similar to those of Nietzsche.”²⁶ Holmes’s “interest was in spirit and even in details of doctrine and literary timbre very close to Nietzsche’s root problem: How, in a godless world filled up with senseless destruction, can one find meaning and avoid sinking into nihilism, ‘the radical repudiation of value, meaning, and desirability’?”²⁷

The philosophy of judicial restraint—or deference to local legislators—is of a piece with Nietzsche’s perspectivalism in that it is an “intellectual *Gemeinschaft*”²⁸ that starts from the premise that a judge sits in a privileged position and cannot fully understand the cultural and discursive formations that generated the laws of a particular place at a particular time. Therefore, judges should not pre-

²¹ Oliver Wendell Holmes, Jr., *Ideals and Doubts*, 10 U. ILL. L. REV. 1 (1915).

²² *Id.*

²³ Thomas C. Grey, *Plotting the Path of the Law*, 63 BROOK L. REV. 19, 20 (1997).

²⁴ Albert W. Alschuler, *The Descending Trail: Holmes’ Path of the Law One Hundred Years Later*, 49 FLA. L. REV. 353, 358 (1997).

²⁵ David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 DUKE L.J. 453 (1994).

²⁶ *Id.* at 465.

²⁷ *Id.*

²⁸ *Id.* at 452.

sume that their beliefs about law amount to something “righter” or “better” than the beliefs of those who created the law to fit their own cultural and social climate. The perspective of a judge is not superior to the perspective of a litigant or a party; it is simply different. It is all the judge has to work with because a judge cannot be someone else or think what someone else thinks, although a judge may broaden his perspective by accounting for the perspectives of others.

One commentator overtly links Holmes’s pragmatism with budding postmodernism: “[S]ince modern pragmatism has important links to the various strands of postmodern thought, it should not surprise us that there is a strong postmodern flavor [...] in Holmes’s jurisprudence. Indeed, there is much about the pragmatism of Holmes’s time that anticipates what we have come to call postmodernism.”²⁹ Another commentator remarks that “Holmes’s skepticism points in the direction of postmodernism.”³⁰ This second commentator qualifies his claim by saying that the “main message” of “The Path of the Law” was “that there is no basis in reason or morality for discovering legal truth,” and also by adding that “[l]ingering doubts about faith and reason seem to push Holmes in the direction of postmodernism.”³¹ Holmes’s pragmatism enabled postmodern jurisprudence just as the pragmatism of Peirce, James, and Dewey enabled Rorty’s postmodern epistemology and metaphysics. In the late nineteenth and early twentieth centuries, there was a striking parallel between lines of American jurisprudence and lines of American philosophy generally. This parallel led to a possibly permanent reconstruction of American legal thought:

Pragmatic philosophy, applied to law through the work of Holmes and the Legal Realists, broke the back of essentialist/conceptual formalism. Beliefs about law are unlikely to return to the old vision of law standing apart, above and pure, with its own nature and set of necessary relations with society, untainted by the conflicts within society.³²

Holmes’s contributions to postmodern jurisprudence have to do first of all with language philosophy. Holmes rejected the notion that words correspond with truth. His position stands in contradistinction to natural law theory, which in its most simplistic manifestation holds that there is one universal, discoverable system of laws that precede human promulgation, and that language can mirror natural law if humans employ the right words and concepts in the right situations. For Holmes, however, it is not that the right word is needed to express the truth of an idea. It is that the truth of the idea cannot reside in the word. In *Towne v. Eisner*, he says, “A word is not a crystal, transparent and unchanging; it is the skin of a living thought and may vary greatly in color and content according to the circum-

²⁹ Catherine Pierce Wells, *Old-Fashioned Postmodernism and the Legal Theories of Oliver Wendell Holmes, Jr.*, 63 BROOK. L. REV. 59, 75 (1997).

³⁰ Gary Minda, *Commentary: The Dragon in the Cave*, 63 BROOK. L. REV. 129, 142 (1997).

³¹ *Id.* at 143.

³² Brian Z. Tamanaha, *Pragmatism in U.S. Legal Theory: Its Application to Normative Jurisprudence, Sociolegal Studies, and the Fact-Value Distinction*, 41 AM. J. JURIS. 315, 353 (1996).

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stance and time in which it is used.”³³ Likewise, he says in a landmark dissent that courts “are apt to err by sticking too closely to the words of a law where those words import a policy that goes beyond them.”³⁴ Words, for Holmes, were vehicles for policy, but their meaning was not fixed. Words could constitute law to the extent that they made people act certain ways, but they did not signify transcendental realities or first principles.

Although the jurisdiction, structure, and meaning of language may impress upon the law, not even precise words obtaining as law can bring about complete congruency between the disciplinary properties of language and the disciplinary properties of law that individual minds internalize. In other words, law and language are dominated by rules, yet rules do not refer to unmediated realities but rather to judgments about the quality of realities. Law is made up of and constitutes language. If language cannot adequately express the way human intellect apprehends shapes and outlines of reality, then law cannot correspond with intelligible, expressible reality. In law as in language, or in law *as* language, no accord exists between signifier, signified, and referent. There might be a temporary appearance of accord that enables law to gain force among the *polis*. That appearance, however, does not represent an alignment of the phenomenal world with speech and thought. It does not signify truth or natural law, and it does not seek to render absolute qualities of some physical object. Rather, it represents an interim command of one group of judges or legislators over a *polis* that accepts or follows that command.³⁵ I pause here to note that I am not so much describing Holmes’s language-based jurisprudence as I am teasing out its implications.

To issue a command that a *polis* will accept, a judge or legislator must impart the conviction that law can be known by the processes of reason, or that the immediacy of feeling or the logic of experience reveals the real and true nature of law. Nevertheless, law remains a command. No matter what philosophical clothing they wear, no matter how prettily or profoundly they are ornamented, words constituting law command individuals to do or not to do something, even if they are produced through the filtering mechanisms of the common law rather than by legislative fiat. Law may forbid the *polis* from acting in a certain way, or it may forbid the State from restraining the activities of the *polis*. Regardless, law commands one set of people or groups to refrain from acting at the same time that it enables another set of people or groups to act. Either an activity is forbidden, or the regulation of an activity is forbidden. Law is therefore always double-edged: it enables action even as it restrains action. By telling someone he *cannot* act in one way, a law tells someone else—an agent of the State, for example—that he *may* act in another way. If Law X says that no person shall jaywalk, it also authorizes Person Z, an agent of the State, to penalize a person who jaywalks. Law, in short, is wordplay, regardless of how unaware of that a judge or legislator may be.

³³ *Towne v. Eisner*, 245 U.S. 418, 425 (1918).

³⁴ *Olmstead v. United States*, 277 U.S. 438, 469 (1928).

³⁵ We know from several biographies that Holmes was influenced by the command theory of law put forward by John Austin, even if Holmes never expressly adopted Austin as his model.

If law is language, and language is contingent, then law is contingent. Holmes's ontology of law is not so far removed from Derridean—or, better yet, Saussurean—theories about the arbitrariness of the sign. The arbitrariness of the sign has implications for truth and law, and for true law. A signifier does not share the properties of the signified or the referent; it is a mark or utterance that stands in the place of the signified, which stands in the place of the referent. Law is a signifier because it is language: not just any language, but language about values. What it signifies is not a concrete referent with qualities that can be observed by everyone at all times. One commentator explains that “because Holmes was a metaphysical realist, he believed that values are either part of the objective order of things or else they are arbitrary. But values are not part of the order of things; hence they are arbitrary.”³⁶ Holmes himself stated that “one's own moral and aesthetic preferences are more or less arbitrary.”³⁷ Saying that moral and aesthetic preferences are arbitrary is not the same as saying that words are arbitrary. Yet moral and aesthetic preferences can be expressed only in words or actions, and the latter cannot be described except in words.

Holmes seemed to treat law as a system of arbitrary signification, although the arbitrariness of the sign did not lead him to reject general principles. In terms that recall Emerson's sonorities about the Oversoul, Holmes proclaimed that although in the law he found himself “plunged in a thick fog of details—in a black and frozen night, in which were no flowers, no spring, no easy joys,”³⁸ he nevertheless discovered that “law is human—it is a part of man, and of one world with all the rest,”³⁹ and as such, law is also “a humble instrument of the universal power.”⁴⁰ Law may obtain universally in individual consciousness, perhaps by inspiring the human will, but there are separate and countless individuals, each with his or her own consciousness. Law is “universal” to the extent that it is general enough to be agreed upon by most reasonable individuals. Therefore, the complex signification of language and the arbitrariness of the sign do not, for Holmes, preclude universalities even though they have broad ramifications for the ontology of law.

Holmes's ontology of law is another aspect of his postmodernism. It leads to speculation about truth and moral definiteness. “All I mean by truth,” he said, “is the road I can't help travelling [*sic*]. What the worth of that can't help may be I have no means of knowing.”⁴¹ Elsewhere, he remarked that truth was “simply what I can't help accepting.”⁴² Perhaps drawing from Emerson's praise of intui-

³⁶ Luban, *supra* note 25, at 475.

³⁷ 1 OLIVER WENDELL HOLMES, HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932 104 (Mark Dewolf Howe, ed., 1941).

³⁸ HOLMES, *Law as Calling, Life as Art*, in THE MIND AND FAITH OF JUSTICE HOLMES, *supra* note 14 at 36.

³⁹ *Id.*

⁴⁰ *Id.* at 37.

⁴¹ HOLMES, *supra* note 37, at 100.

⁴² Letter from Oliver Wendell Holmes Jr., to Lewis Einstein, in 1 THE HOLMES-EINSTEIN LETTERS: CORRESPONDENCE OF MR. JUSTICE HOLMES AND LEWIS EINSTEIN, 1903-1935 16 (James Bishop Peabody ed., 1964).

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tion, Holmes suggests in these lines that truth is whatever he feels or senses when he encounters a thing or an event. Truth in this respect is out of an individual's control. It is what happens to us. It is what occurs before meaning is imposed upon circumstances. What is true is what transpires. Law may be true, but only in the sense that Holmes means.

The Path of the Law challenges the notion of pure and true law as indicia of moral definiteness. Interestingly enough, Holmes says in this piece that he *is* laying down "some first principles."⁴³ Yet his first principles constitute a "body of dogma or systemized prediction."⁴⁴ Law is not an absolute, tangible thing, but a prediction about how men will behave. As such, Holmes's laws—and his first principles about laws—are not foundations, but guesses about activities that are subject to chance and variation. The main point of *The Path of the Law* is "to understand the limits" of man's understanding of law—a result of man's limited understanding of himself and his society—and to "point out and dispel a confusion between morality and law."⁴⁵ Law is true because people follow and enforce it. That does not mean that law is also moral. "If you want to know the law and nothing else," Holmes says, "you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience."⁴⁶ This "Bad Man" heuristic has become one of the most cited, criticized, and celebrated aspects of Holmes's jurisprudence. It implies that unjust laws are still laws, that moral deliberation has no effect on the legality of a command, and that judges should not agonize over the unknowable psychologies of litigants.

Holmes drove jurisprudence away from the natural law theories promoted by early Americans such as Thomas Jefferson and other political theorists. One could argue that Holmes drove jurisprudence in the direction of quotidian practice and away from abstract political theory. A student of the Enlightenment, ever the Newtonian, Jefferson sought to demonstrate that the laws of nature were concrete referents in the phenomenal world. Laws of nature, like the laws of gravity, regulated human activity.⁴⁷ Jefferson supposed that these referents, these natural laws, could be studied and understood through application of the scientific method. Yet Jefferson was never able to prove or experiment with such referents. He could not demonstrate that law was a manifestly knowable element of the tangible universe. Against Jefferson, Holmes realized that the verifiable qualities of law were discernible not in physicality but in language.

Natural law theories had their counterparts in England, most notably in the works of William Blackstone, but Jefferson's jurisprudence was grounded in science whereas Blackstone's was rooted in church canon and the Bible. Theories of natural law in early America were employed and deployed to justify the separa-

⁴³ Oliver Wendell Holmes Jr, *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ See Allen Mendenhall, *Jefferson's 'Laws of Nature': Newtonian Influence and the Dual Valence of Jurisprudence and Science*, 23 CAN. J. L. & JURIS. (2010).

tion of the races on the suppositional grounds of “natural” racial inferiority.⁴⁸ Holmes sought to divorce jurisprudence from these natural law precedents, not because he disagreed with their *telos* or objected to their reasoning, but because he did not like their outcomes. Morality was not the reason he disliked their outcomes; he disliked their outcomes because they led to bad results—because they led to social arrangements that did not work well. His jurisprudence therefore did not cling to universal principles that would apply always and everywhere; rather, it treated law as a property of language that was subject to variation and incapable of ascertaining or representing absolute truth.

From originalism to textualism to strict constructionism to other, less formalist approaches with no set taxonomy, legal hermeneutics and judicial interpretive strategies since Holmes have examined law as a property of language rather than language as a property of law. Implicit in these approaches is the idea that law does not precede language; it *is* language. Therefore, language does not describe law; it ratifies and constitutes law. Law is not just couched in language; it is language that refers to other language that refers to a particular state of human affairs. Law is truth only to the degree that language is truth. Indeed, to realize the linguistic nature of truth or morality, and hence to doubt one’s knowledge about truth or morality, is to become civilized. “To have doubted one’s own first principles,” Holmes declared, “is the mark of a civilized man.”⁴⁹ Holmes did not altogether dismiss truth or first principles, but he suggested that they ought to be doubted and that their expression is just that: an expression. Words about truth or first principles are merely representations. They do not *constitute* truth or first principles.

Holmes and William James shared the idea that truth was a linguistic creation of social consensus and an instrument for communication. Both men spoke of truth in economic terms. James referred to the “cash value” of ideas, by which he meant either the ability of an idea to become agreed upon, or the quality of a thing that makes it observable to human senses and knowable to the human mind.⁵⁰ In a famous dissent, Holmes professed that “when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good

⁴⁸ See Allen Mendenhall, *From Natural Law to Natural Inferiority: The Construction of Racist Jurisprudence in Early Virginia*, PEER ENGLISH (forthcoming 2012).

⁴⁹ Holmes, *supra* note 21.

⁵⁰ See WILLIAM JAMES, VARIETIES OF RELIGIOUS EXPERIENCE 443 (1922). (“The guiding principle of British philosophy has in fact been that every difference must *make* a difference, every theoretical difference somewhere issue in a practical difference, and that the best method of discussing points of theory is to begin by ascertaining what practical difference would result from one alternative or the other being true. What is the particular truth in question *known as*? In what facts does it result? What is its cash-value in terms of a particular experience). See also WILLIAM JAMES, PRAGMATISM, A NEW NAME FOR SOME OLD WAYS OF THINKING 89-90 (1909). (“Berkeley’s criticism of ‘matter’ was consequently absolutely pragmatistic. Matter is known as our sensations of colour, figure, hardness and the like. They are the cash-value of the term. The difference matter makes to us by truly being is that we then get such sensations; by not being, is that we lack them. These sensations then are its sole meaning.”).

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desired is better reached by free trade in ideas.”⁵¹ He attached the following maxim to this claim: “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”⁵² Elsewhere, Holmes said that our “test of truth is a reference to either a present or an imagined future majority in favor of our view.”⁵³ These remarks by Holmes recall James’s remark, roughly a decade earlier, that “[t]he true is the name of whatever proves itself to be good in the way of belief, and good, too, for definite, assignable reasons.”⁵⁴

Truth is a flexible concept to Holmes and to James. Insofar as natural law is supposed to signify an absolute truth about the governance of human relations, Holmes’s Jamesian theories about truth reject natural law and figure law as a product of discourse. Natural law is a foundation. It essentializes. It is absolute. It affirms. Holmes’s jurisprudence, however, doubts. It is about fallibilism. It attends to what we do not know rather than to what we know (or think we know). Natural law cannot be “true” according to Holmes’s conception of truth:

When I say a thing is true, I mean that I cannot help believing it. I am stating an experience as to which there is no choice. But as there are many things that I cannot help doing that the universe can, I do not venture to assume that my inabilities in the way of thought are inabilities of the universe. I therefore define the truth as the system of my limitations, and leave absolute truth for those who are better equipped. With absolute truth I leave absolute ideals of conduct equally on one side.⁵⁵

It is no wonder that Holmes can be read as a precursor to postmodernism. His theories of truth seem to lend themselves to Rorty’s argument that “edifying philosophy aims at continuing a conversation rather than at discovering a truth.”⁵⁶ This essay is not the first to compare Holmes and Rorty on the issue of truth.⁵⁷

Holmes’s conception of law relates to James’s conception of *pure experience*. One of Holmes’s most quoted maxims is that the “life of the law has not been logic; it has been experience.”⁵⁸ James, who was, incidentally, Emerson’s godson, once proclaimed that truth “happens to an idea.”⁵⁹ One could argue that Holmes believed that law is what happens to an idea about regulating the *polis*. James also remarked that “truth is a relation inside of the sum total, obtaining between thoughts and something else, and thoughts [...] can only be contextual

⁵¹ *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J. dissenting).

⁵² *Id.*

⁵³ Oliver Wendell Holmes, Jr., *Natural Law*, 32 HARV. L. REV. 40, 41 (1918).

⁵⁴ JAMES, PRAGMATISM, A NEW NAME FOR SOME OLD WAYS OF THINKING *supra* note 50, at 76.

⁵⁵ Holmes, *supra* note 21, at 1.

⁵⁶ RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 373 (1979).

⁵⁷ See, e.g., PETER GIBIAN, OLIVER WENDELL HOLMES AND THE CULTURE OF CONVERSATION 128-30 (2001).

⁵⁸ OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Kessinger Publishing 2005) (1881).

⁵⁹ William James, *Pragmatism’s Conception of Truth* in THE WORKS OF WILLIAM JAMES, PRAGMATISM 97 (Fredson Bowers & Ignas Skrupskelis eds., 1975).

things.”⁶⁰ What I take James to mean here is that any knowledge or awareness of experience comes by way of particularized and individualized context. Experience is a broad category encompassing basic units of contextual familiarities and sensations. “[T]he pure experiences of our philosophy,” James says, are “in themselves considered, so many little absolutes,” and a “pure experience can be postulated with any amount whatever of span or field.”⁶¹ Only from an apparent consciousness of the internalization of externalities and discrete facts may one broaden his understanding into a state worthy of the label “articulable experience.”

A judge makes decisions like everyone else makes decisions—by aggregating and evaluating bits of data registered and verified first by sensation and then by sustained thought—and James’s psychology found its way into Holmes’s ideas about what judges do as decision-makers. The human mind, selective and purposive as it is, cannot comprehend experience except by amassing and filtering pieces and particles of information. Seemingly aware of this limitation on human faculties, Holmes’s dissents give us lines like “General propositions do not decide concrete cases.”⁶² Or: “The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified.”⁶³ Or: “The character of every act depends upon the circumstance in which it is done.”⁶⁴ The point by now should be clear: Holmes does not wish to sacrifice the intelligibility of pure experience by neglecting or dismissing specificity, circumstance, setting, and situation as consequential and constituting components of knowledge.

Fixation on the absolute authority of one legal principle or another leaves no room for considering other, exacting and possibly competing principles about people and their relation to law and society; nor will such fixation satisfactorily account for the several, constituent elements of experience. Therefore, the prudent judge ought not to privilege grand moralities or teleology over the more empirically determinable consequences of deciding one way or another. “The aim of the law,” Holmes says, “is not to punish sins, but is to prevent certain external results.”⁶⁵ The aim of the law, in other words, is to deal first with the ontologically and empirically testable or knowable; only after that can law be expressed as sets of principles or rules. Holmes takes care to avoid generalization, which too often takes on the vocabulary of absolutism. He wrote to his friend Morris R. Cohen that “I always say that the chief end of a man is to frame [general propositions] and that no general proposition is worth a damn.”⁶⁶ The problem for Holmes is not that law is unquantifiable or untrue as general experience, but that

⁶⁰ WILLIAM JAMES, *ESSAYS IN RADICAL EMPIRICISM* 134 (New York, Longmans, Green, and Co., 1912).

⁶¹ *Id.* at 135.

⁶² *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J. dissenting).

⁶³ *Southern Pacific Company v. Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J. dissenting).

⁶⁴ *Schenck v. U.S.*, 249 U.S. 47, 52 (1919) (Holmes, J. dissenting).

⁶⁵ *Commonwealth v. Kennedy*, 170 Mass. 18, 20 (Mass. S. Ct. 1897).

⁶⁶ 1 *HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932* 118 (Mark DeWolfe Howe eds., 1961).

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law is quantifiable and true relative to a limited supply of assumptions and inquiries.

To simplify to the extreme: just as for James true belief is that which is useful to the believer, so for Holmes true law is that which is useful to the *polis*. James himself draws the analogy between “the whole notion of *the* truth” as “an abstraction from the facts of truths in the plural” and “a mere useful summarizing phrase like *the* Latin language or *the* Law.”⁶⁷ The substitution of the word “truth” for “law” would situate James and Holmes in similar positions with regard to their favored topics of metaphysics and epistemology. Put differently: just as for James, truth is verifiable if it corresponds with definite functions and good results in the phenomenal world, so for Holmes law is verifiable if it corresponds with demonstrated efficacy and practical, positive consequences within the social sphere. That is probably why Holmes declares in *The Path of the Law* that for “the rational study of the law the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”⁶⁸ Holmes seeks to divorce law from claims to morality. He constructs the “bad man theory of law” not to say that good and bad are fictions or nothings, but to suggest that judges and lawyers ought not to assume special or unmediated access to, or knowledge of, good and bad. “If you want to know the law and nothing else,” he says, “you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”⁶⁹ Holmes is not glorifying the bad man over the good man, or vice versa; he is saying that to know what the law is ontologically, or to prescribe what the law ought to be, one person cannot presume to comprehend the intents and purposes of another person.

One can only speculate about the objectives of another acting agent based on one’s personal experiences concerning a search for the validity or viability of an idea; such validity is assessed by purposefully doing one thing rather than another and then analyzing whether the act corroborates or undermines the impulse motivating the idea. To superimpose one’s suppositions about motivations onto another’s action is merely to guess at (not to test or to verify) the other’s set of preferences. One ought not to restrict by decree the behavior of another if the putative warrant of the restriction depends upon total knowledge of another’s objective. One can create rules that maximize good consequences and that minimize bad consequences, that incentivize actions correlating with positive outcomes and that disincentivize actions correlating with negative outcomes. One cannot conceive of how another’s ideas correspond to the real, or what Wallace Stevens calls “*the res*,” because the desires of another are independent of what one can name and, therefore, are merely inferable, never actual in the sense of being confirmable.⁷⁰ Laws, then, ought not to be designed to compel or coerce an individual if their

⁶⁷ JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING, *supra* note 50.

⁶⁸ Holmes, *supra* note 43.

⁶⁹ *Id.*

⁷⁰ See, e.g., Wallace Stevens, *An Ordinary Evening in New Haven*, in STEVENS: COLLECTED POETRY AND PROSE 397 (Frank Kermode & Joan Richardson eds., 1997).

liability attaches to mental states consisting of purposes that are not and cannot be known except by the acting agent himself, if even he knows such things.

By treating decent people as capable of acting like bad men, the law according to Holmes ensures that biases and presuppositions about morals, character, and personality do not get in the way of judgments about rules and regulations as applied to acting agents. If such biases and presuppositions get in the way of judgments about rules and regulations as applied to acting agents, then law might fail to curtail bad results—it might even *enable* bad results. That would drain law of its utility and diminish the function of law as a social good. For Holmes, the purpose of the law is to facilitate social cooperation and to decrease conflict; the purpose is not to gratify or realize some eschatological, universal, or perfect paradigm.

Law is the expression of a command, and commands are justified on the grounds of philosophy, itself a systematic arrangement of language bearing upon human organization. For a Rortyan, law may represent an apologetic: an attempt “to externalize a certain contemporary language game, social practice, or self-image.”⁷¹ The ontological status of law would therefore be subject to whatever changes are necessary to solve immediate social problems or to satisfy temporary desires. Law would be the language of whatever philosophy has prevailed over other philosophies of the moment, and truth or true law would be “a matter of individual preferences, not of empirical realities.”⁷² Therefore, because truth is “personal and idiosyncratic, it should be cabined from judicial decision-making.”⁷³ In other words, judges should not impose their interpretation of truth onto other people or communities, especially because the judicial function is by design undemocratic and because judges enjoy an exceptional power to control the *polis*.

It is too much to call Holmes a postmodernist or a Rortyan. Nevertheless, Holmes’s aphorisms and dicta anticipate Rorty’s call to “think of the true referents of these terms (the Truth, the Real, Goodness) as conceivably having no connection whatever with the practices of justification which obtain among us.”⁷⁴ What Rorty says of the Platonic philosophers could be said of natural law jurists: their hypostatization creates a dilemma by which “on the one hand, the philosopher must attempt to find criteria for picking out these unique referents [the Truth, the Real, Goodness], whereas, on the other hand, the only hints he has about what these criteria could be are provided by current practice (by, e.g., the best moral and scientific thought of the day).”⁷⁵

Holmes railed against ideas of natural law in *The Natural Law*. One suggestion in that essay is that judges and jurists, like the Platonic philosophers according to Rorty, “condemn themselves to a Sisyphean task” by adhering unconditionally to fixed paradigms, “for no sooner has an account of a transcendental term been perfected than it is labeled a ‘naturalistic fallacy,’ a confusion be-

⁷¹ RORTY, *supra* note 56, at 10.

⁷² Caplan, *supra* note 12, at 795.

⁷³ *Id.* at 795.

⁷⁴ RORTY, *supra* note 56, at 374.

⁷⁵ *Id.* at 374.

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tween essence and accident.”⁷⁶ Those are Rorty’s words, not Holmes’s. But does not Holmes anticipate Rorty in the claim that “[c]ertainty is not the test of certainty. We have been cocksure of many things that were not so.”⁷⁷ This line by Holmes echoes another maxim that Holmes put forth twenty-one years earlier: “Certainty generally is illusion, and repose is not the destiny of man.”⁷⁸

It is not merely an abiding uncertainty that Holmes shares with Rorty. What Holmes shares “with Rorty is their pragmatic belief that philosophy, legal theory, jurisprudence, or whatever else you want to call it, does not and should not affect legal outcomes, which are merely another form of public and political reasoning.”⁷⁹ Critics of legal pragmatism have claimed that the Darwinism that influenced Holmes “led to both the postmodernist neopragmatism of Richard Rorty and the pragmatic moral skepticism of Richard Posner.”⁸⁰ Darwinism notwithstanding, Holmes and Rorty came down on the same side regarding such issues as freedom of speech,⁸¹ even if their pragmatic beliefs did not determine outcomes.

At risk of belaboring the point about Holmes and Rorty, does not the following passage by Holmes mark him as one of the philosophers who Rorty says are “often thought to be questioning the notion that at most one of the incompatible competing theories can be true”⁸²:

Deep-seated preferences cannot be argued about—you cannot argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours.⁸³

Holmes and Rorty seem to agree about the value of skepticism. Given his ideas about the linguistic properties of law and the fluidity of truth, and given his willingness to reject unity and natural law in favor of dissent and, to some extent, logical positivism, Holmes can be read as anticipating postmodernism. That Holmes was not a postmodernist or a Rortyan by most twenty-first century criteria does not preclude us from viewing him as the first American postmodern judge. Holmes’s pragmatism was in a sense postmodern. As Susan Haack remarks, “Though recently it seems to have been Rorty’s style of neo-pragmatism that has been most warmly welcomed by legal commentators, traditionally it is Oliver Wendell Holmes who has been seen as the originator of the pragmatist tradition in legal theory.”⁸⁴ Holmes made American jurisprudence what it is to-

⁷⁶ *Id.*

⁷⁷ Holmes, *supra* note 53, at 40, 41.

⁷⁸ Holmes, *supra* note 43, at 457.

⁷⁹ Steven J. Macias, *Rorty, Pragmatism, and Gaylaw: A Eulogy, a Celebration, and a Triumph*, 77 UMKC L. REV. 18, 88 (2008).

⁸⁰ Nancy Pearcey, *Darwin’s New Bulldogs: Scopes and American Legal Philosophy*, 13 REGENT U. L. REV. 483, 510 (2000/2001).

⁸¹ See Michael Rosenfeld, *Pragmatism, Pluralism, and Legal Interpretation: Posner’s and Rorty’s Justice Without Metaphysics Meets Hate Speech*, 18 CARDOZO L. REV. 97, 134 (1996).

⁸² RORTY, *supra* note 56, at 373.

⁸³ Holmes, *supra* note 53, at 41.

⁸⁴ Susan Haack, *On Legal Pragmatism: Where Does ‘The Path of the Law’ Lead Us?* 50 AM. J. JURIS. 71, 77 (2005).

day. It is impossible to imagine what American law—from the Supreme Court down to the everyday practices of local lawyers—would be if Holmes had never set down his antifoundational foundations.⁸⁵

III. Pragmatism, Aesthetics, and Law

Richard Poirier misses the mark in *Poetry and Pragmatism* when he claims that “[i]t is through [William] James that one can most profitably trace an Emersonian linguistic skepticism that, in my view, significantly shapes those aspects of pragmatism which get expressed in the work of these great twentieth-century figures.”⁸⁶ Instead of being, as is usually the case, spot on, Poirier here overlooks Holmes, perhaps because Holmes is considered above all a judge—not a poet or a member of the literati and hence not a precursor to Robert Frost, Wallace Stevens, Gertrude Stein and the like. Yet Holmes carries out the Emersonian tradition in robust and telling ways, most notably in his poetic prose. Justice Frankfurter calls Holmes’s opinions “great art.”⁸⁷ David H. Burton suggests that Holmes should rank alongside “Jefferson and Harriet Beecher Stowe as an author whose writings helped to change the course of American history.”⁸⁸ More than Frost or Stevens or Stein, Holmes wrote at the intersection of theory and practice because, put simply, law *is* the praxis: the point where theory and practice converge. For this reason, law reveals much about the history of pragmatism, and it “offers one of the liveliest areas of debate about the consequences of pragmatism.”⁸⁹

Law is applied philosophy, and the judicial opinion is a unique literary genre because “judges, alone in American officialdom, explain every action with a distinct and individual writing, which then becomes the measure of their performance.”⁹⁰ Judges are “literary craftsmen in ways that executive leaders and legislators are not,” and the judicial decision, although “heavily prescribed by custom, procedure, and professional expectations,” which “often disguise levels of creativity,”⁹¹ is a textual medium conducive to rhetorical strategy and poetic finesse. Judicial opinions and dissents are like language playgrounds for writers such as Holmes, who is Emersonian in both rhetoric and philosophy. That is why it has

⁸⁵ Jennifer Ratner-Rosenhagen has mapped the connections and continuities between Nietzsche, Emerson, and the pragmatists and has pointed out how Harold Bloom, Richard Rorty, and Stanley Cavell linked the aforementioned to antifoundationalism. These latter three figures “turned to Nietzsche, not to turn away from antifoundational elements in American thought, but to face them in Emerson and his pragmatist children.” JENNIFER RATNER-ROSENHAGEN, *AMERICAN NIETZSCHE: A HISTORY OF AN ICON AND HIS IDEAS* 274 (2012). Holmes more than anyone else ought to be linked to Nietzsche and Emerson in terms of philosophy and as a precursor to Bloom, Rorty, and Cavell.

⁸⁶ RICHARD POIRIER, *POETRY AND PRAGMATISM* 5 (1992).

⁸⁷ Frankfurter, *supra* note 17, at 698.

⁸⁸ DAVID H. BURTON, *OLIVER WENDELL HOLMES, JR.* 69 (1980).

⁸⁹ James T. Kloppenberg, *Pragmatism: An Old Name for Some New Ways of Thinking?* 83 *JOURNAL OF AMERICAN HISTORY* 129 (1996).

⁹⁰ Robert A. Ferguson, *Holmes and the Judicial Figure*, 55 *CHI. L. REV.* 506 (1988).

⁹¹ *Id.*

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been said that “Holmes’s mastery of the judicial opinion as literary genre is unmatched in the twentieth century,” and why “more than any other figure, [Holmes] knowingly shapes the concept of the American judge.”⁹² Max Lerner is even more celebratory: “I venture the belief that the son of Dr. Holmes turned out to be more of a poet than his father, if by poet we mean someone who pierces the appearances and life and expresses his vision in moving symbols.”⁹³ Posner takes this praise still further: “Holmes’s true greatness is not as a lawyer, judge, or legal theorist in a narrowly professional sense of these words, but as a writer and, in a loose sense . . . as a philosopher—in fact as a ‘writer philosopher’; and . . . his distinction as a lawyer, judge, and legal theorist lies precisely in the infusion of literary skill and philosophical insight into his legal work.”⁹⁴

Poirier refers to another Emersonian, John Jay Chapman, as an “Emersonian individualist and dissenter,” and it is suggestive, is it not, that Poirier, by honing in on Chapman, employs the very epithet—“dissenter”—that has come to identify Holmes? Poirier is not wrong about James’s Emersonian qualities. But his depiction of James as the quintessential Emersonian pragmatist is not quite as good as the portrait of Holmes in that role.

The Emersonian believes that the new owes its articulacy to the past; that all texts and paradigms spring from works we inherit; and that, nevertheless, the new requires a definitive, measured break from the past. Nowhere are these ideas realized more palpably than in the common law, which creates, celebrates, borrows from, and extends textual precedent. Judges constantly reinterpret and revise previous opinions (or laws) and so facilitate social and cultural trends. Judicial opinions interact with constitutional and legislative or statutory law, which add layers of complexity to the hermeneutics of judging.

Judges are writers, and writers “are necessarily obliged by the language they use to express the historical moment in which they find themselves.”⁹⁵ Writers, however, “can also use that language to free themselves from any absolute obligation.”⁹⁶ A judge’s obligation is to the law, whatever that might be at any given time and place, because a judge must, in the common law tradition, apply rules handed down to him. Yet judges can use old legal concepts to carve out spaces for rules that fit the current socio-political climate. Law is fluid. Judges are restricted by precedent, but the imaginative ones use language to free themselves from precedent. They use language to adhere to while adapting rules, to unleash creative energies within the confines of previous court decisions. Recognizing that law must be mutable if it is to remain credible or useful to future generations, talented judges, like Emersonian writers, “can so far transfigure historical discourse that they end up speaking to a posterity in no way bound by that discourse.”⁹⁷ If a foolish consistency is the hobgoblin of little minds,⁹⁸ then prudent

⁹² *Id.*

⁹³ LERNER, *supra* note 14, at xlvi.

⁹⁴ POSNER, *supra* note 16, at xvi.

⁹⁵ POIRIER, *supra* note 86, at 75.

⁹⁶ *Id.* at 75.

⁹⁷ POIRIER, *supra* note 86, at 75.

⁹⁸ See RALPH W. EMERSON *Circles in ESSAYS: FIRST SERIES* (Joseph Slater et al. eds., Harvard Univ. Press 1980) (1841).

judges like Holmes are consistently inconsistent, able to make old paradigms suitable for present purposes. To this end, Holmes claimed not only that a “page of history is worth a volume of logic,”⁹⁹ but also that the thing he “always wanted to do is to put as many new ideas into the law as I can, to show how particular solutions involved general theory, *and to do it with style*.”¹⁰⁰

What makes Emerson’s aestheticism pragmatic, or his pragmatism aesthetic? Poirier goes some length toward answering this question by focusing on words, their signification and their use value. Special meaning attaches to the moment of simultaneous creation and demolition, when words both enable and erase meaning. The Emersonian writer, such as he is, capitalizes on this moment, with its double function, by overcoming, or striving to overcome, the limitations of language. This idea is tied to linguistic skepticism: the pragmatic insistence that the signs and syntax we inherit carry particular meanings, but fail to account for pure, unmediated reality. Wallace Stevens captured this idea in one alliterative phrase: “Not Ideas About the Thing But the Thing Itself.”¹⁰¹

Writers strive to represent the immediate, but must settle for the mediate. As Poirier explains, “Attempts to shape reality in language may be, from a literary point of view, dazzlingly successful, but they are always to some degree a betrayal of that reality.”¹⁰² Anxiety about the inability of words to signify their referent leads the Emersonian to speak or write with rhetorical gushes and syntactical acrobatics—that is, to convey meaning and sensation with demonstrative rhetoric to prevent ideas and feelings from suffering from immobility or exhaustion. Put another way, the Emersonian anxiety about the inadequacy of language brings about an exaggeration of style and an amplification of syntax. The inability to state what “is” results in overstatement.

Holmes tended toward overstatement and rhetorical extravagance. “He did not write in the plain style,” explains Thomas Grey, “nor was he given to careful qualification or modest Anglo-Saxon understatement.”¹⁰³ What Holmes “praised in the writers he most admired was not care, clarity, or accuracy, but the qualities of ‘intensity’ and ‘magnificence’ they were able to achieve.”¹⁰⁴ For this reason, Holmes was “particularly drawn to the rhetorical devices of hyperbole and paradox,”¹⁰⁵ and in “the statements for which we best remember” him, he “tended to pronounce in unequivocal and often exaggerated terms.”¹⁰⁶ It is little wonder that scholars have compared Holmes to Nietzsche, who has been compared to Emerson.

⁹⁹ New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921).

¹⁰⁰ OLIVER WENDELL HOLMES JR., *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.* 29 (Richard Posner ed., Chicago, IL: Univ. of Chicago Press, 1992) (emphasis added).

¹⁰¹ Wallace Stevens, *Not Ideas About the Thing But the Thing Itself*, in STEVENS: *COLLECTED POETRY AND PROSE*, *supra* note 70 at 451.

¹⁰² Poirier, *supra* note 86, at 27.

¹⁰³ Grey, *supra* note 23, at 29.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

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Emersonians like Holmes might feel paralyzed by the experience of “the sublime,” an idea first articulated in Roman antiquity and later developed by Anglo-Irish statesman Edmund Burke and recycled by Immanuel Kant, Arthur Schopenhauer, and such postmodernists as Frederic Jameson, Jean-François Lyotard, and Slavoj Žižek. The sublime means different things to different people, but generally it refers to the quality of a thing that is so terrible and awesome that it is ineffable. Alternatively, the sublime can refer to the experience or sensation one feels when encountering a thing that is so terrible and awesome that it is ineffable. In either case, ideas about the sublime are tied to ideas about beauty and representation, which are evident in Emerson and Holmes. Writers trying to depict or describe the sublime might suffer angst when they realize that what they feel cannot be captured in words.

Rhetorical gushes and linguistic acrobatics appear in Emerson’s *Nature*, most notably when the speaker of the essay discusses nature as “not only the material,” but also “the process and the result.”¹⁰⁷ For Emerson, nature is identifiable as a tangible referent in the phenomenal world, but it is constantly changing and, therefore, always the end-result of some prior change or moment of interpretation. The phenomenal world is constituted by shapes and forms, and the “plastic power of the human eye”—perhaps the “transparent eyeball”—allows us to sense that pleasure which comes with beauty.¹⁰⁸ The eye is responsive to and contingent on externalities; it cannot control but only process what is out there. The eye mediates (creates) images and signs and enables our perspective of things. What the eye creates and the intellect internalizes is not reality, but “endless imitations” of reality.¹⁰⁹ Therefore, when Emerson speaks of the western clouds dividing and subdividing themselves “into pink flakes modulated with tints of unspeakable softness,” he questions his ability to articulate the physical qualities of the signified; he doubts the ability of the sign to signify the referent.¹¹⁰ Viewing the clouds is sublime. Because “each moment of the year has its own beauty and in the same field [...] beholds, every hour, a picture which was never seen before,” nature is constantly fleeting and unfolding; accordingly, its description is not applicable across time and cannot be fixed, and the sensations that it simulates cannot adequately be described.¹¹¹

“Was there no meaning in the live repose of the valley behind the mill,” wonders the speaker, “which Homer or Shakespeare could not re-form for me in words?”¹¹² To reformulate the speaker’s suggestion here: there *was* meaning, but words could not represent it. Not even the brilliant and beautiful words of Shakespeare or Homer could do that. Our understanding of a reality becomes an unreality: “The shows of the day, the dewy morning, the rainbow, the mountains, orchards in blossom, stars, moonlight, shadows in still water, and the like, if too

¹⁰⁷ Ralph Waldo Emerson, *Nature, in NATURE: ADDRESSES & LECTURES 13* (Boston & New York: Houghton, Mifflin & Co., 1903).

¹⁰⁸ *Id.* at 10.

¹⁰⁹ *Id.* at 16.

¹¹⁰ *Id.* at 17.

¹¹¹ *Id.* at 18.

¹¹² *Id.* at 17-18.

eagerly hunted, become shows merely, and mock us with their unreality.”¹¹³ And then: “The beauty that shimmers in the yellow afternoons of October, who ever could clutch it? Go forth and find it, and it is gone; tis’ only a mirage as you look from the windows of diligence.”¹¹⁴ Emerson’s fascination here lies with the incapacity of human faculties to realize the referent, even to realize presence itself. Human will makes things intelligible; the universe is made up of properties man gives it; the world is constituted by the human mind. Beauty is not out there; it “becomes an object of the intellect.”¹¹⁵ “The beauty of nature,” far from being obvious or available to all, “re-forms itself in the mind, and not for barren contemplation, but for new creation.”¹¹⁶ The intellect, not words or signs, is reproductive and regenerative; words and signs are, both of them, enablers: tools to be used in the creation of meaning.

These Emersonian ideas about the limitations of words and representation resonate in Holmes’s writing about law. “[L]ike Nietzsche,” explains one scholar, “Holmes approached the question of meaning with doctrines that mixed Emerson—a great early influence on Holmes as well as on Nietzsche—and evolutionism and that stressed the foundational role of affirmation, what Nietzsche would call ‘the will to power.’”¹¹⁷ Holmes remarked to a friend that “[p]robably you will find as I do, that ideas are not difficult, that the trouble is in the words in which they are expressed.”¹¹⁸ He said of his judicial opinions that to “arrange the thoughts so that one springs naturally from that which precedes it and to express them with a singing variety is the devil and all.”¹¹⁹ While singing praises about Justice John Marshall, Holmes announced, “We live by symbols, and what shall be symbolized by any image of the sight depends upon the mind of him who sees it.”¹²⁰ At the very least, these quotations suggest a linguistic skepticism common to both Emerson and Holmes and contextualized by Poirier as part of the American poetic tradition. They also show that Holmes cared a great deal about style, and they might even anticipate the metaphysical skepticism that finds its most quarrelsome voice in Rorty.

What Holmes calls “skin of a living thought” has to do with what Rorty calls the “linguistic turn” as a framework for inquiry.¹²¹ One should not overstate the connections between the schools of thought that influenced Rorty and the jurisprudence that emanated from Holmes, despite what this essay has argued about their compatibility. Holmes’s epistemic and analytic methods are observable only in a limited number of cases, and Holmes was an Emersonian, which Rorty emphatically was not. Unlike Rorty and Rorty’s subjects in *Philosophy and the Mir-*

¹¹³ *Id.* at 19.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 22.

¹¹⁶ *Id.* at 18

¹¹⁷ Luban, *supra* note 25, at 466-67.

¹¹⁸ OLIVER WENDELL HOLMES JR., *1923 Letter to Doctor Wu*, in *THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS, AND JUDICIAL OPINIONS* 421 (1943).

¹¹⁹ HOLMES, *supra* note 42, at 31.

¹²⁰ Holmes, *supra* note 118, at 385.

¹²¹ See, e.g., RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE*, 170-212, 257-11 (1979).

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ror of Nature (including Wilfred Sellars, W.V.O. Quine, and Donald Davidson), Holmes did not write treatises dealing with ontology or epistemology. Rather, Holmes dashed off short, colorful passages constrained by the abbreviated fact patterns of cases already sanitized by numerous lawyers and editors before him. His jurisprudence was expressed mostly through lectures, law review articles, and judicial opinions or dissents: textual mediums directed at non-philosophical audiences though not withdrawn from philosophical themes and questions. Holmes's writings are like dressed down philosophy or philosophy in fragments and sound bites.

It seems apparent that Holmes appreciated the linguistic exercises that his vocation both afforded and required. Using extraordinary language, Holmes troped and modified the judicial rhetoric that came before him. He understood the complicated and dependent relationship he necessarily had with precursor judges and jurists. The relation of his language to past writing and literature was, while troubling to him, illuminating. Writers constantly make the past by making the present—by seeking out and employing words and narratives to describe the present—just as they comprehend the present-past and future-present by engaging with texts. All texts owe their intelligibility to the past; all texts reconstruct previous texts; therefore, all texts are works-in-progress, just as history and human experience are works-in-progress.

The Emersonian takes the language and ideas available to him and makes them his own. He does so, Poirier explains, “by troping or inflecting or giving a new voice to the idea, by reshaping it, to a degree that makes any expression of gratitude to a previous text wholly unnecessary.”¹²² Emersonians participate with the past, giving it new purchase “in terms specifically appropriate to the exigencies of the writer’s own conditions and cultural locality.”¹²³ Each Emersonian writer is repeating, Poirier claims, but each is also original.¹²⁴ As Emerson, referring to the Great Books that preceded him, says in *Self-Reliance*, “They teach us to abide by our spontaneous impression with good-humored inflexibility.”¹²⁵

How, if even the most creative and poetic among us are enmeshed in systems and networks of discourse, does the Emersonian writer break free from the restraints imposed by history, language, and circumstance? The answer, according to Poirier, is superfluity, which has to do, as I have already suggested, “with excess and luxury and exuberance and uselessness and desire,”¹²⁶ concepts that the Emersonian genius pronounces with “an aboriginal power of troping, of turning or changing the apparently given.”¹²⁷ Poirier adds that writing can show us how “instead of trying to revoke or revere or repeat the past we might, to a limited degree, renew it by troping the language, consciously or unconsciously.”¹²⁸ Tropes and inflections are articulations of freedom within syntactical boundaries. Tropes and inflections are therefore elements of superfluity; so are puns and fine-

¹²² Poirier, *supra* note 86, at 19-20.

¹²³ *Id.*, at 19.

¹²⁴ *Id.*

¹²⁵ RALPH W. EMERSON, *THE ESSAY ON SELF RELIANCE* 10 (New York: Roycrofters 1908).

¹²⁶ *Id.* at 37.

¹²⁷ *Id.*, at 39.

¹²⁸ *Id.*

ly developed metaphors; so are rhymes and rhythms; so is repetition. One could argue that judges, like poets, suffer from what Harold Bloom calls “anxiety of influence”: the inspiration and frustration that writers sense when they try to creatively mimic the visions and forms of previous writers.¹²⁹ Such simultaneous inspiration and frustration account for the rhetorical surpluses evident in works by figures like Emerson and Holmes; by the same token, anxiety of influence, to some extent, enables the canonization of writers like Emerson and Holmes.

Tactics and technologies of writing are manifest in great works of the past and reenergized in great works of the present. According to the Emersonian, these tactics and technologies emanate from individuals who are able to tap into their creative will and poetical sense.¹³⁰ “The heritage most worth reclaiming,” says Poirier, “consists of exemplifications of energy and fullness always and forever available *in* yourself; its merely textual embodiments, however admirable, are also superfluous.”¹³¹ In short, style—the effect and demonstration of creative selfhood—is generative; it propels ideas forward, preserving and reanimating their utility and influence. “Style,” Poirier remarks, “represents a movement of mind as against the stasis achieved by former movements that have become textualized or intellectualized.”¹³²

Style prevents the fixity of ideas; it enables fluidity, adaptability, and appeal. It connects old and new corresponding ideas by developing inferential relationships between old and new texts. Perhaps more importantly, it allows one to express, or to try to express, sensations or the subjective registers made possible by language: to express the “law” that Emerson claims is “sacred” because it represents “the integrity of your own mind.”¹³³ The point here is to contemplate and appreciate an awesome quality in language that is beyond all possibility of imitation and measure, but that requires imitation and measure if it is to be understood. This quality—the *aesthetic sublime*—enables, engenders, and produces. It prevents ideational stasis.

Holmes had style. He was an Emersonian. His writing troped, inflected, punned, and re-signified.¹³⁴ His aphorisms are unforgettable and have contributed

¹²⁹ See generally HAROLD BLOOM, *THE ANXIETY OF INFLUENCE: A THEORY OF POETRY* (2d ed. 1997).

¹³⁰ C.f., RALPH W. EMERSON, *Nature in ESSAYS: FIRST SERIES* (Joseph Slater et al. eds., Harvard Univ. Press 1980) (1841).

¹³¹ Poirier, *supra* note 86, at 61.

¹³² *Id.* at 65.

¹³³ EMERSON, *SELF RELIANCE supra* note 130 at 15.

¹³⁴ See, e.g., Allen Mendenhall, *Holmes and Dissent*, 12 J. JURIS. 679, 709 (2011): “Holmes follows his four long opening sentences [in *Lochner*...] with diction that pitches headlong across the page, tripping over commas and at last running into a period: ‘It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract.’ With impeccable timing, he then offers this short, clipped statement: ‘A more modern one is the prohibition of lotteries.’ This syntax variation results in a footstep-like rhythm supplemented by the regulated succession of ‘s’ and ‘th’ sounds: ‘settled,’ ‘various,’ ‘decisions,’ ‘this,’ ‘that,’ ‘constitutions,’ ‘state,’ ‘laws,’ ‘ways,’ ‘as,’ ‘legislators,’ ‘think,’ ‘as,’ ‘injudicious,’ ‘as,’ ‘as this,’ ‘with this,’ ‘with,’ ‘the.’ Add to this alliteration the other alliterative combi-

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to his “quotability.” He became famous for his dissents, which ensured the preservation of legal argument by way of superfluity. Holmes had a “literary motive” for using “hyperbole and paradox to vivify his ideas,” and these “rhetorical tendencies might incline him to display his theoretical points in such a way as to make them seem very distinct, even at the cost of concealing their mutual relations.”¹³⁵ Holmes’s literary flair could turn his dissents into poetry; if dissents represent dead law, then poetry can reanimate the dead and bring old principles back to life. The more pleasurable a dissent, the more memorable it is; the more memorable a dissent, the more likely it will generate or become law.

A dissent records a justice’s disagreement with a majority or plurality opinion. A majority or plurality opinion becomes law. A dissent, however, is not law. It represents rejected or discarded legal argument. But Holmes’s dissents, endowed as they were with Emersonian aesthetic moves and turns of phrase, *did something*. They gave pause, surprised, alarmed; they called attention to themselves. They disclosed, to a degree, what Emerson’s essays disclosed: “that by a conscious effort of linguistic skepticism it is possible to reveal, in the words and phrases we use, linguistic resources that point to something beyond skepticism, to possibilities of personal and cultural renewal.”¹³⁶

Although the majority or plurality opinion supposedly determines what the law is and will be, a dissent that is elegantly or memorably written can invest non-law (the legal argument that did not win out) with unforgettable, extraordinary, impressive possibility. An Emersonian dissent is not, strictly speaking, non-law, because it always remains aesthetically charged and hence functional or viable. An Emersonian dissent is indulgent, extravagant, beautiful; it is rhetorically excessive such that it always seems provisional and liminal, bursting forth with an energy that cannot be ignored, that might even establish itself as law if it impacts and influences future justices. Holmes’s diction and syntax are scored for oration, memorization, and citation. Holmes does not describe; he *enacts*.¹³⁷ His dissents do not enumerate or explain; they demolish and restore. In so doing, they facilitate the ongoing process of judicial transformation and adaptation. They cause symbolic action—language—to become human action, or to obtain to human action. Menand might say that they keep the experiment going. In this respect, Holmes’s aesthetics anticipate and substantiate Dewey’s theories in *Art as*

nations—‘l’ as in ‘laws,’ ‘life,’ ‘legislators,’ ‘like,’ ‘liberty’; ‘t’ as in ‘It,’ ‘court,’ ‘state,’ ‘constitutions,’ ‘state,’ ‘regulate,’ ‘might,’ ‘contract’; ‘r’ as in ‘various,’ ‘court,’ ‘regulate,’ ‘contract’; ‘w’ as in ‘ways,’ ‘which,’ ‘we,’ ‘which,’ ‘with,’ ‘with’—and this sentence begins to seem like poetry. Many rhymes and near rhymes—‘ways’ and ‘laws,’ ‘with’ and ‘this’ and ‘injudicious,’ ‘state’ and ‘regulate,’ ‘tyrannical’ and ‘liberty’—complement this impression.” This article contains other specific examples of Holmes’s use of literary technique. For more on Holmes’s literary and rhetorical precision, see RICHARD POSNER *Judicial Opinions as Literature in LAW AND LITERATURE* 266-282 (1998).

¹³⁵ Grey, *supra* note 23, at 51.

¹³⁶ Poirier, *supra* note 86 at 11.

¹³⁷ Mendenhall, *supra* note 134 at 690 (“Holmes used dissents to refine and exposit legal pragmatism. Unlike most poets, whose writing does not automatically generate social change, Holmes’s ‘poetry’ automatically enacted social change. The medium through which Holmes expressed his ‘poetry’ affected public policy.”)

Experience, a book that treats aesthetics not in the traditional sense as disinterested and detached, but in the pragmatic sense as functional and serviceable: as directly *affecting* and *effecting* things. More scholarship ought to address the aesthetic connection between Holmes and Dewey. After all, Dewey is the one classical pragmatist whom Holmes openly praised.

Judicial dissents instantiate Holmes's poetic pragmatism. Consider the following lines (which I have rendered in poetic form to allow readers to observe how Holmes's writing generates sublimated effects akin to what Emerson calls a "poetical sense") from two of Holmes's dissents:

Black & White Taxi & Transfer Co. v. Brown & Yellow Taxi &
Transfer Co.¹³⁸

A Poem¹³⁹ (1928)

It is very hard to resist the impression
that there is one august corpus
to understand which clearly is the only task
of any Court concerned.

If there were such a transcendental body of law
outside of any particular State
but obligatory within it unless and until changed by statute,
the Courts of the United States might be right in using
their independent judgment
as to what it was.

But there is no such body of law.

The fallacy and illusion that I think exist
consist in supposing that there is this outside thing to be found.
Law is a word used with different meanings,
but law in the sense in which courts speak of it today
does not exist
without some definite authority
behind it.

Notwithstanding Holmes's very non-Emersonian reference to the "transcendental," these lines enact an Emersonian aesthetic. One can almost sense Wallace Stevens, another poetic pragmatist, in this "verse." Holmes, for so long a poet, surely knew what he was doing when he organized this succession of "c" sounds: "corpus-clearly-Court-concerned." These words generate not only alliteration but also iambic feet. Surely Holmes knew the "citability" and "re-citability" of the phrases "It is/resist/impress," "there is/august/corpus," and "exist/consist." Surely

¹³⁸ See *Black & White Taxi & Transfer Co. v. Brown & Yellow Taxi & Transfer Co.*, 276 U.S. 518 (1928) (Holmes, J., dissenting).

¹³⁹ My addition.

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he recognized the iambic rhythm of the phrases “which clearly is the only task / of any court concerned.” That line might have rounded out an Emily Dickenson poem. Other iambic phrases include “might be right in using” (note the “might/right” rhyme here), “as to what it was” (note the “s” and “w” alliteration here), “that I think exist” (note the “th” alliteration here), “used with different meanings” (note the “with-diff-ent” assonance here), and “courts speak of it today” (note the “s” and “t” alliteration here). Either these turns of phrase are deliberate, or they are stunningly coincidental.

Consider another dissent.

Gitlow v. New York¹⁴⁰

A Poem¹⁴¹ (1925)

Every idea
is an incitement.
It offers itself for belief
and if believed
it is acted on
unless some other belief
outweighs it
or some failure of energy
stifles the movement
at its birth.

The only difference
between the expression
of an opinion and an incitement
in the narrower sense
is the speaker’s enthusiasm
for the result.

Eloquence may set fire
to reason.

But whatever may be thought
of the redundant discourse
before us
it had no chance of starting
a present conflagration.

Do not these lines, with their raw idioms and variable feet, smack not only of Stevens but also of William Carlos Williams? Could not these lines represent Holmes’s version of *The Red Wheelbarrow*, a poem published two years before this dissent? One could pore over the rhythm, alliteration, assonance, and other literary techniques at play in these lines, but that would belabor the point. It is

¹⁴⁰ Gitlow v. N.Y., 268 U.S. 652 (1925).

¹⁴¹ My addition.

clear that Holmes seeks to energize language toward some jurisprudential end. It is clear that he is a wordsmith of remarkable depth and subtlety: a poet, in other words.

What Poirier says of canonical American writing holds true for a Holmesian dissent: "It is work that requires a skeptical excitement about the past as it still vibrates all round us in words, and it requires a determination that this inheritance of words will be transformed by our exploitations of the treasures hidden in them, before they are passed on to the generations."¹⁴² This statement is pragmatically true on two levels: the one of diction and syntax, and the one of jurisprudence. Holmes's dissents do not merely play with words; they mold, shape, and form legal arguments. These arguments derive from other, older arguments and are rearticulated in extravagant, affirmative vocabulary and grammar. Holmes's judicial sonorities can be rehearsed, recited, and delivered. None more than Emerson resonates in Holmes's aphorisms and cadences; none more than Emerson is refracted into the rules and principles that Holmes put forth as the antifoundational foundation of American jurisprudence.

IV. Holmes's Pragmatic, Aesthetic Dissents

Pragmatism is about transforming and adapting thought or theory to make it relevant and practical. The common law has a pragmatic element built into it because of its grounding in precedent and experience and its simultaneous potential for revision and variation. How else would ancient laws regulating property come to regulate humans during the era of American slavery, or Internet activity during the present age? In keeping with the needs of his own time and place, Holmes used the dissent to ensure that the common law remained organic, and to improve and possibly extend legal concepts while improving and extending the methodologies and vocabularies of pragmatism. At one time, dissents were "particularly apologetic in tone," but increasingly during the late nineteenth and early twentieth century, dissents grew in number and were stripped of their justificatory appeals.¹⁴³ Because more dissents were handed down, more dissents were redeemed and more legal arguments were preserved. As a poetic pragmatist, much less as a judge, Holmes ensured, by way of aesthetic dissents, that good ideas remained part of the stock of texts that judges rely on. Dissents are *possibility* as it was defined by James: as things "more than nonreal existence, a twilight realm, a hybrid status, a limbo into which and out of which realities," or laws that obtain to the populace, "ever and anon are made to pass."¹⁴⁴

When Supreme Court Justice William J. Brennan Jr. lectured to a California audience about dissents in 1985, he began to answer the question of why judges

¹⁴² Poirier, *supra* note 86 at 33.

¹⁴³ *From Consensus to Collegiality: The Origins of the 'Respectful' Dissent*, *supra* note 1, at 1308-1311.

¹⁴⁴ JAMES, PRAGMATISM, A NEW NAME FOR SOME OLD WAYS OF THINKING *supra* note 50, at 611.

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dissent by citing author Joan Didion.¹⁴⁵ This move not only adds credibility to this essay's claim that the dissent is a medium that lends itself to literary grandstanding, but also suggests that Supreme Court justices are aware of literary figures and fads. Brennan believes that the "dissent is offered as a corrective—in the hope that the Court will mend the error of its ways in a later case."¹⁴⁶ Alluding to Holmes's dissent in *Abrams v. U.S.*, Brennan goes on to say that the function of the dissent "reflects the conviction that the best way to find the truth is to go looking for it in the marketplace of ideas."¹⁴⁷ The very function of the dissent is pragmatist in the way that Holmes's jurisprudence is pragmatist; and its pragmatism has to do with the Darwinian struggle for the melioration of ideas and laws, as well as with the surgical examination of truth described and carried out by William James. Perhaps most telling of all is Brennan's remark about dissents "that soar with passion and ring with rhetoric," because these dissents, like Holmes's, "straddle the worlds of literature and law."¹⁴⁸ The most memorable dissents (and the most memorable opinions) are rhetorically charged; they become part of the legal canon and are studied by lawyers, judges, scholars, and law students, and that is probably why Jack Balkin and Sanford Levinson liken casebooks to literature anthologies.¹⁴⁹

Holmes's dissents have been objects of fascination for some time, and his dissent in *Lochner* was the first dissent to become canonized.¹⁵⁰ Holmes's writing style is a major reason for this fascination and canonization. Consider the following question-and-answer about Holmes's "gift for dissent that has puzzled students of judicial philosophy"¹⁵¹: "How does a judge who rejects many of the philosophical implications of dissent develop such a 'power of constructive negation?' The answer lies in the literary scope of the minority opinion in the hands of a master stylist. If Justice Holmes is most memorable in dissent, it is because his customary ability to see himself clearly is a primary requisite of that genre."¹⁵² What Ferguson says here has to do with Holmes's ability to construct the image of himself as a writer and not just as a judge, although there remains some ambiguity about what Ferguson means regarding Holmes's "customary ability to see himself clearly," to say nothing of why Holmes is a "judge who rejects many of the philosophical implications of dissent." Besides glorifying Holmes's literary style, this question-and-answer establishes dissents as a genre conducive to literary expression. "When Holmes addressed questions of law in his dissenting opinions," explains another scholar, "he had little occasion to predict what the courts would do in fact. His fellow justices had done it already. If law is simply a matter

¹⁴⁵ William J. Brennan Jr., *In Defense of Dissents*, 37 HASTINGS L. J. 427, 428 (1986).

¹⁴⁶ *Id.* at 430.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 431.

¹⁴⁹ Jack M. Balkin & Sanford Levinson, *The Canons of Constitutional Law*, 111 HARV. L. REV. 963, 970-973 (1998).

¹⁵⁰ Anita S. Krishnakumar, *On the Evolution of the Canonical Dissent*, 52 RUTGERS L. REV. 781, 788 (2000).

¹⁵¹ Robert A. Ferguson, *Holmes and the Judicial Figure*, 55 U. CHI. L. REV. 506, 536 (1988).

¹⁵² *Id.*

of what the courts do in fact, dissenting opinions always have the law wrong.”¹⁵³ Dissenting opinions may have the law wrong, but only because they seek to make the law right. The paradoxical character of dissent, about which this essay will say more momentarily, may have attracted Holmes, who once wrote, “There is nothing like a paradox to take the scum off your mind.”¹⁵⁴

Dissents are the state of exception. They are not law, but they influence law. They insist on their importance even though they are outside law. They confirm the validity of the rules that they undermine. They acknowledge that the law is one thing while suggesting that the law ought to be something else. They reify principles that they seek to demolish, and they demolish principles that they seek to reify. Their words do not constitute law; even their references to the holding of the majority or plurality opinion do not constitute law because the references are part of a medium that cannot be law. Nevertheless, dissents retain arguments that can become law. Dissents are liminal media that are not law, but that preserve language and rules that might become law. If a dissent becomes law, it is no longer a dissent. It is language that was once a dissent.

Dissents are subversive by design. They call into question the foundations upon which laws obtain to the *polis*. Dissents suggest that foundations can change or crumble. A foundation that changes or crumbles cannot be a foundation. Therefore, there are no foundations. There are only temporary platforms that allow law to gain its footing. Decisions once decided upon foundations are overruled or reinterpreted based on new sets of foundations. When this happens, foundations are treated as either wrong or misapplied, or as something altogether different from a foundation. What makes dissents compelling is the possibility that they do not have the law wrong, not because they have the law right, but because they show that law is neither right nor wrong: law just is. Perhaps one could argue to the contrary that law is right or wrong only to the degree that it brings about constructive and useful results. In either case, one would have trouble arguing that law is the accumulation of right principles or inevitable results.

Other scholars have written about the discursive function of dissents in relation to law and legal principles. A recent law review article about LGBT adoption and custody cases argues that “the dissent is an important source of judicial narratives,” that “certain dissents are more interesting than the majority opinion in that there seems to be a different set of norms governing their expression of often controversial and ardent opinions,” and that dissents “may even affect majority opinions and the future of law.”¹⁵⁵ This particular article suggests that “dissents can preserve an issue or argument for future consideration,” dissents “may even set the stage for future majority opinions,” and dissents “may actually be functional in [their] capacity to show the unsettled nature and flux of law.”¹⁵⁶ Another article about a very different topic (patents) shares these views but discusses them in

¹⁵³ Alschuler, *supra* note 24, at 365.

¹⁵⁴ Letter from Oliver Wendell Holmes Jr. to Harold J. Laski, in 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI, 1916-1935, at 302 (Mark DeWolfe Howe ed., 1963).

¹⁵⁵ Kimberly D. Richman, *Talking Back: The Discursive Role of the Dissent in LGBT Custody and Adoption Case*, 16 LAW & SEX. 77, 82 (2007).

¹⁵⁶ *Id.* at 82-83.

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light of apparent ambiguities about what the law is in technological fields.¹⁵⁷ Both of these articles indicate that dissents are forward-looking.

Dissents anticipate some future engagement with other texts. Why would a judge dissent if not to preserve his words for the benefit of future judges, legal scholars, lawyers, and litigants? The Honorable Robert S. Smith, an Associate Judge of the New York Court of Appeals, explains why he dissents: “[B]ecause my colleagues make mistakes.”¹⁵⁸ The judge is, one suspects, being witty, but there is something to be said for his response. His more serious answer runs as follows:

[T]here are good reasons not to dissent, even when you disagree with the majority. Nothing you say in dissent, no matter how brilliant, is the law or makes the majority opinion one bit less the law. In that sense, a dissent is a useless exercise. And dissents can do harm. You may annoy your colleagues. [...] And there is a legitimate argument that, when you dissent, you injure the institution of which you are a part by lessening its credibility—the air of infallibility which, even if only shakily founded on fact, helps the courts preserve their role as the final arbiters of hotly-disputed questions.¹⁵⁹

Despite such disadvantages, the judge concludes, “And yet, I keep dissenting. Is it just because my ego makes me do it? Maybe. But I can think of better reasons.”¹⁶⁰ The judge goes on to list a few reasons for dissenting,¹⁶¹ but he never comes to definitive conclusions. His answers are merely speculative. Yet he allows that “I dream, as perhaps every dissenting judge does, that future ages will recognize my wisdom—that my dissents will acquire the status of Justice Holmes’s in *Abrams* and *Gitlow*.”¹⁶² Holmes’s dissents achieved their status because of their philosophical or jurisprudential aphorisms and because of their literary nuance. Their greater impact upon the *polis* is in their vindication: their graduation from non-law into law. Besides *Abrams* and *Gitlow*, Holmes’s dissents in *Lochner v. N.Y.*,¹⁶³ *Toledo Newspaper Co. v. U.S.*,¹⁶⁴ *Hammer v. Dagenhart*,¹⁶⁵ *Bartels v. Iowa*¹⁶⁶ and others have been vindicated by becoming, in small or large part, law.

¹⁵⁷ Jeffrey A. Lefstin, *The Measure of Doubt: Dissent, Indeterminacy, and Interpretation at the Federal Circuit*, 58 HASTINGS L. J. 1025 (2007).

¹⁵⁸ Robert S. Smith, *Dissenting: Why Do It?* 74 ALB. L. REV. 869 (2010/2011).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 870.

¹⁶¹ Three reasons are the possibility that the ideas in the dissent will later gain currency, the possibility that the dissent will force other judges to be more careful and precise in their reasoning, and the possibility that the dissent will make the majority opinion more understandable. Smith concludes by saying that sometimes a judge would simply rather express what he or she thinks than sign his or her name to an opinion representing a competing view.

¹⁶² Smith *supra* note 158.

¹⁶³ *Lochner v. New York*, 198 U.S. 45 (1905).

¹⁶⁴ *Toledo Newspaper Co. v. U.S.*, 247 U.S. 402 (1918).

¹⁶⁵ *Hammer v. Dagenhart*, 247 U.S. 251 (1918).

¹⁶⁶ *Bartels v. Iowa*, 262 U.S. 404 (1923).

The judge's reference to the "air of infallibility" ought to raise eyebrows. It was Holmes's mission to show that "law" was fallible because human knowledge was limited. In a letter to Sir Frederick Pollock, Holmes treated the idea of law's infallibility as an archaic offshoot of natural law theory. Holmes writes that in the Middle Ages "natural law was regarded as the senior branch of divine law and therefore had to be treated as infallible," and he adds, parenthetically, that "there was no infallible way of knowing what [divine law] was."¹⁶⁷ The implication is that divine law might exist, but humans, being fallible, cannot have full knowledge of divine law and so cannot capture divine law in human words. Dissents themselves suggest that law is fallible; their point is to register an error in the law.

Dissents are designed to be interactive with texts that do not yet exist. Poirier, *à la* Emerson, says the following about the interactivity of texts across generations:

As Emerson would have it, every text is a reconstruction of some previous texts of work, work that itself is always, again, work-in-progress. The same work gets repeated throughout history in different texts, each being a revision of past texts to meet present needs, needs which are perceived differently by each new generation. While some of these texts or products may deserve to be called 'classics,' none is definitive, much less indispensable. The proposition that creation consists of repetition with a difference, of repeating in a new text work already being carried on in the texts of the past—this can be further illustrated by noting how the idea is itself repeated, out of the different texts of Emerson, not only, as we have just seen, in Stein, but in James and Dewey.¹⁶⁸

And, I would add, in Holmes.

Poirier's remarks have striking implications for dissents. Holmes's dissents, for instance, reveal how narrowed conceptions of law meet practical purposes and interests; his dissents are aesthetically charged even as they call for evidentiary support as grounds for legal rules, for perspectival consideration of the facts in any given suit, for predictive concerns for potentially different outcomes resulting from the application of one legal rule or another, and for careful incorporation of past principles and events to the cases at hand. All of these concerns point to context and experience as criteria for good judgment. Holmes was not above humor in his celebration of context and experience. As he said in his opinion (not dissent) in *Brown v. U.S.*, "Detached reflection cannot be demanded in the presence of an uplifted knife."¹⁶⁹ His point is that law must not adhere to black letter rules when common sense indicates that black letter rules cannot be followed.

Holmes often advances these pragmatist ideas through the medium of dissent. His dissents enable the mutability of law as they imply and in some cases insist on the mutability of the words or expressions of law. "Courts are apt to err too closely to the words of a law," Holmes says in one dissent, "where those words import a policy that goes beyond them."¹⁷⁰ In another dissent, Holmes says that

¹⁶⁷ HOLMES, *supra* note 37.

¹⁶⁸ Poirier, *supra* note 86, at 18.

¹⁶⁹ *Brown v. United States*, 256 U.S. 335, 343 (1920).

¹⁷⁰ *Olmstead v. United States*, 277 U.S. 438, 469 (1928) (Holmes, J. dissenting).

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the “interpretation of constitutional principles must not be too literal” because we “must remember that the machinery of government would not work if it were not allowed a little play in its joints.”¹⁷¹ Holmes seems to suggest that words are malleable and with a little shove can fit into one package of thought or another, despite the apparent differences between those thoughts.

To the extent that words are malleable, the laws and rules that are made up of words are also malleable. The dissent is a rhetorical medium that ensures the malleability of laws and rules because it records an opposing scheme of laws and rules—that is to say, it registers alternative and sometimes rivaling viewpoints to make sure those viewpoints are not lost to the historical record. The historical record is essential to common law rulemaking, which depends upon the embeddedness of jurisprudence in text. By preserving one side of an argument or an alternative vision of the law within an authoritative text—a text issued by one who has the power to command instructions to others, who, in turn, obey the instructions—a dissenting judge safeguards argument and guarantees that ideas will continue competing for their truth value, or what James might have labeled their “cash value.”

“Free competition is worth more to society than it costs,” Holmes once remarked in his characteristically consequentialist way.¹⁷² That notion carries over into dissents, which prevent the majority opinion from becoming a monopoly on jurisprudence, or a plurality opinion from becoming a cartel. In his dissent in *Abrams v. U.S.*, Holmes remarked that “when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas.”¹⁷³ One may sense here an incipient antifoundationalism, but more definitely one may sense that Holmes conceives of belief as arising from competition among incompatible ideas. He adds in his *Abrams* dissent that “truth is the power of the thought to get itself accepted in the competition of the free market,”¹⁷⁴ and the formal process of dissenting permits certain ideas to continue in the textual record. Holmes’s superfluity virtually ensured that his dissents not only remained in the textual record, but also determined the direction of the textual record for future generations.

Holmes’s dissents are coded in pragmatism; with their brilliant aesthetics, they signal future judges to reconsider certain arguments. Holmes’s dissents show how the ability of aesthetics to stimulate sensation can have sweeping and dramatic social implications. Perhaps that is a fact to be both celebrated and feared.

V. Conclusion

Holmes, whatever else he was, was an Emersonian. He was what Rorty called an “edifying philosopher” whose role “is to help us avoid the self-deception

¹⁷¹ *Bain Peanut Co. v. Pinson*, 282 U.S. 499, 501 (1931) (Holmes, J. dissenting).

¹⁷² *Vegeahn v. Gutner*, 167 Mass. 92, 44 N.E. 1077, 1080 (Sup. Ct. Mass. 1896).

¹⁷³ *Abrams v. United States*, 250 U.S. 616 (1919) (Holmes, J. dissenting).

¹⁷⁴ *Id.*

which comes from believing that we know ourselves,” or that we know true law, “by knowing a set of objective facts.”¹⁷⁵ What sets Holmes apart from other facilitators of pragmatist aesthetics is that his writing, more than Pierce’s or James’s or Dewey’s or even Emerson’s, had a practical bearing: it obtained to the *polis* by nature of its medium as soon as it became public record. To write and interpret law is to impact society; to write and interpret law *well* is to impact society for the better. Judicial opinions are as practical and productive as writing can get. Each of a judge’s words in an opinion or a dissent has a direct effect on the *polis*. Judges’ words influence and simultaneously regulate the *polis*, for better or worse. Those who doubt that literature has a utilitarian import fail to consider the judicial opinion (or dissent) as a literary medium. As I have suggested, judicial writing can be aesthetic. It can employ a wide variety of literary techniques. Judges can be poets.

Holmes was a poet. His Emersonian superfluities suggest a will to realize a poetical sense, and they describe epistemology and metaphysics in a postmodern way while treating laws as linguistic constructs and rhetorical games. His poetical sense, achieved not in nature where Emerson would have his geniuses achieve such self-actualization, but in the law where the use of aesthetics and the representation of data obtain directly to the *polis*, brought about experiments in democracy. Holmes’s dissents were tests just as they inspired and provoked tests. It is not too much to say that Holmes’s writing taps into the aesthetic sublime, at least if what is meant by that term is sensation beyond explanation, the feeling that defies meaningful or constructive signification, the awareness that what one is experiencing—in this case, Holmes’s writing—kindles emotions that are indescribable. Holmes’s writing enabled postmodern jurisprudence. In his writing, the intersection of pragmatism and aesthetics finds its most illuminating expression. In his writing, the treatment of law as language finds support. In his writing, law becomes the art of the possible.

¹⁷⁵ RORTY, *supra* note 56, at 373.

TOWARD A MATURE DOCTRINE OF INFORMED
CONSENT: LESSONS FROM A COMPARATIVE LAW
ANALYSIS

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ABSTRACT

Under the doctrine of informed consent, physicians owe patients a duty to disclose to them all material risks of a contemplated treatment or procedure. While the doctrine is generally well accepted in the United States and several other common law countries, it has had a rockier reception in other places. This inconsistency is on its face surprising, given that the doctrine stems from the principle of patient autonomy – a principle to which most countries supposedly subscribe. Unless the patient is in possession of sufficient information, that autonomy may be compromised. But the inconsistency is less puzzling when one considers the difficulty of applying the doctrine to the actual physician-patient relationship.

This article examines the doctrine in four countries that have had different responses to informed consent: the United States; Great Britain; Canada; and Taiwan. This comparison highlights the compromises that each of these jurisdictions has made to the foundational principles of informed consent, and then proposes a way forward by borrowing heavily from the Canadian model.

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I. INTRODUCTION

Today the doctrine of informed consent is generally well accepted in the United States and other common law countries. Deriving from the principle of patient autonomy, the doctrine places the force of law behind the common-sense notion that every medical patient “of sound mind” has the right to be armed with all of the information that might be relevant to the decision-making process.¹ Thus, the material risks of the proposed treatment (and of non-treatment) and the availability of alternatives are to be disclosed.² When such disclosure is not made, the physician can be liable when the undisclosed risk materializes. In recognizing the doctrine, courts have (at least conceptually) come down on the side of injured patients and the legal system through which they seek redress rather than in favor of the medical profession. In so doing, courts abolished the regime in which doc-

¹ See Frances H. Miller, *Denial of Health Care and Informed Consent in English and American Law*, 18 AM. J. L. & MED. 37, 61 (1992).

² *Id.* at 62. See also Ben A. Rich, *Medical Paternalism v. Respect for Patient Autonomy: The More Things Change the More They Stay the Same*, 10 MICH. ST. U. J. MED. & L. 87, 102 (2006).

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tors had enjoyed the benefits of a rule that allowed their judgment to dictate what was best for the patient.³

From inception, though, the legal rules defining informed consent have reflected a compromise between respect for the patient's right to decide what is to be done with his or her body and the need for judicial management of liability. Thus, even in *Canterbury v. Spence*,⁴ the case most often cited as foundational in the development of the doctrine, the court chipped away at the very autonomy it purported to champion. First, the court stated that only those facts material to a reasonable person – not necessarily to this patient – needed to be disclosed.⁵ Then, the court said that even where material facts were undisclosed, the causal connection needed for liability would only be appropriate where a reasonable person – again, not this patient – would have actually decided against the now-contested procedure.⁶ Lack of fidelity to the core principles of informed consent is also evident in decisional law that declines to apply the doctrine to prescription drugs.⁷

In sum, the results across the U.S. judiciary have been inconsistent and unhelpful for many plaintiffs. Yet the difficult questions raised by informed consent have proved no less vexing for courts in other countries. This article brings a comparative law analysis to bear on the doctrine of informed consent. In doing so, we search for a standard that would be more faithful to the animating principles of the doctrine, while taking seriously concerns about extensive physician liability and the related issue of judicial management of such liability. We draw on the law of the United States, the United Kingdom, Taiwan, and finally Cana-

³ See generally Rich, *supra* note 2, at 94-95. Rich claims that historically it was presupposed that 'the physician actually [knew] what will be good for the patient.' *Id.* at 95. Some scholars have opined that the doctrine of informed consent runs contrary to the traditional paternalism of physicians whereby the physician, and not the patient, was the final arbiter of the treatment plan dialogue. *Id.* See also Allen Buchanan, *Medical Paternalism*, 7 PHIL. & PUB. AFF. 370, 370 (1978).

⁴ *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir 1972).

⁵ *Id.* at 785-86. "We hold that the standard measuring performance of that duty by physicians... is conduct which is reasonable under the circumstances." *Id.* at 785.

⁶ *Id.* at 786. The court here recognized the need to frame the second prong in terms of reasonableness for fear that requiring a doctor to list every potential issue would be "obviously prohibitive and unrealistic." *Id.*

⁷ There are a number of options that courts face when deciding whether or not to extend the doctrine of informed consent to prescription drug cases. At one end of the spectrum, the Texas Supreme Court found that the doctrine does extend to prescription drug cases. See *Barclay v. Campbell*, 804 S.W.2d 8, 10-11 (Tex. 1986) (remanding for a determination of informed consent). At the opposite end of the spectrum, a court may simply rely on the professional standard of care, which only requires disclosure if that is what the reasonable medical professional would do in those circumstances. See *Smith v. Weaver*, 407 N.W.2d 174, 179 (Neb. 1987). There are various other directions a court may go that fall somewhere in between requiring informed consent and the professional standard. Throughout this article, we discuss the difficulties facing courts as they attempt to define the limits of the informed consent doctrine.

da.⁸ We focus on the various standards and tests courts have developed to adjudicate negligence claims stemming from lack of informed consent in those countries. While recognizing that the doctrine of informed consent will be ever-evolving as new developments and insights compel recalibration of the physician-patient relationship, we conclude that the Canadian approach is best. The “modified objective” reasonable person standard, in combination with the expansive view of situations in which the doctrine applies in the first place (i.e., including prescription drug cases), best safeguards patient autonomy without unfairly burdening doctors with legal rules that are too uncertain to offer protection even where deserved.⁹

This article proceeds as follows. Part II begins with a brief background of informed consent, tracing its development in the United States from early cases arising under the tort and theory of battery, to the more sophisticated understanding that consent must be informed in order to be valid (a negligence principle). Drawing largely on the seminal American case *Canterbury v. Spence*, Part II then presents the doctrine of informed consent in its basic form, supplying a foundation against which the alternatives developed throughout the paper can then be assessed. This section then looks at both judicial and legislative developments in informed consent. To understand the shortfalls of the American approach to informed consent, we track the doctrine’s development in the three decades since *Canterbury*. While some courts have had the advantage of legislatively prescribed informed consent standards, others have been left to interpret the doctrine to adapt to changing medical standards.

Yet the presence (or absence) of statutes applying to informed consent has been less significant than might have been expected. Although one might say, generally, that the presence of a broad informed consent statute leads courts to a more expansive view on the situations in which the doctrine applies, in fact results have been hard to predict. While some courts have expressed fidelity to the foundational principles of informed consent, others have limited the application of the doctrine to cases that closely track the facts of *Canterbury v. Spence*, restricting the doctrine to cases involving invasive procedures, such as surgery.

That tendency to narrowly restrict the application of the doctrine has been particularly evident in the prescription drug context. Thus, Part II analyzes the application of informed consent in this increasingly important set of cases. The discussion focuses on the controversial issue of whether a physician’s recom-

⁸ We have chosen these countries for both practical and analytical reasons. We are familiar with the laws in all of these jurisdictions, and noticed that their differences, and their relative strengths and weaknesses, provide a good basis for a broader evaluation of informed consent.

⁹ We focus primarily on causation, because materiality is rarely an issue in many cases that reach this stage in litigation. *But see* *Canterbury v. Spence*, 464 F.2d 772, 788 n 86 (discussing cases in which the plaintiff was unsuccessful on materiality). This is likely because many of the plaintiffs have suffered some unexpected consequence of the procedure. The issue most often litigated is causation – whether the plaintiff would have undergone the procedure after being apprised of the material risk.

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mentation of a particular drug, or course of drug treatment, falls within the scope of the informed consent doctrine.

Part III focuses on the United Kingdom, starting with the British “rule” that formally rejected the doctrine. Despite this historic reluctance, the reality in the lower British courts has been different, as judges have managed to sidestep the rule against informed consent in favor of a case-by-case analysis. Thus, even where a rule seems to prohibit it, the expectation of physician disclosure is by now too much a part of the physician-patient culture for courts to support its wholesale rejection. The natural result of this unusual approach is considerable uncertainty among courts in the United Kingdom. Ultimately, most courts have chosen to use a version of the objective approach that is common in the U.S. This section suggests that the British approach provides little assistance in our search for a doctrine of informed consent that is both patient-friendly and that properly addresses the concerns raised by the U.K. judiciary.

Part IV then describes and analyzes the law of informed consent as it has developed in Taiwan. We praise the law as a significant advance over the previous legal regime, under which physicians were under no legal obligation to arm their patients with information sufficient to enable informed decision-making. However, meaningful as these advances have been, Taiwanese doctors still rely in large part on a signed consent waiver. Yet courts have begun to see that forms, however comprehensive, are no substitute for a truly informed discussion between health care providers and their patients.

Part V moves on to discuss the patient-centric test that has been adopted in Canada. We begin by discussing the historic development of the doctrine there. We then analyze the “modified objective” approach, which takes a traditional objective approach to materiality, but offers a unique and partly subjective approach to causation. We examine the benefits and limitations of this approach, while addressing the traditional concerns of a subjective approach. In the end, the “modified objective” approach may not provide as much protection for plaintiffs *in court* as many would believe; however, it does represent drastic improvements in terms of respect for patient autonomy.

With this panoply of approaches having been considered, Part VI then offers a prescription for a mature doctrine of informed consent. We review the range of options these four nations face as they attempt to redefine their own informed consent doctrine. We observe that courts are torn between their recognition of the importance of informed consent and the reality of modern medical practice, with its time constraints and the difficulties inherent in litigating issues grounded in conversations that are likely to be misremembered, mischaracterized, or simply not understood. We therefore urge that courts (and legislatures, where appropriate) adopt the Canadian approach, which combines sensitivity to the patient’s actual position with a realization that physicians need protection against litigation grounded in an entirely subjective determination “shadowed by the occurrence of the undisclosed risk.”¹⁰ This rule, moreover, should extend to all cases of treatment, including prescription drugs. We further suggest that legislatures and perhaps courts begin to explore the possibility that other health care providers or

¹⁰ *Canterbury v. Spence*, 464 F.2d 772, 791 (D.C. Cir. 1972).

professionally trained workers could become formally involved in the informed consent process. Doing so might relieve overburdened physicians of those parts of the task that could safely be delegated to others, and can be expected to lead to better outcomes.

II. INFORMED CONSENT IN THE UNITED STATES

A. *Evolution of Law and Doctrine*

The idea that physicians need patients' consent before proceeding is of relatively recent origin. An early mention can be found in 1903:

The patient must be the final arbiter as to whether he will take his chances with the operation, or take his chances of living without it. Such is the natural right of the individual, which the law recognizes as a legal right, Consent, therefore, of an individual, must be either expressly or impliedly given before a surgeon may have the right to operate.¹¹

Thus, the idea that the patient's autonomy deserves protection is, from the start, the value underpinning the consent requirement. Bodily integrity and beneficence, two other foundational principles, were identified early on as well.¹² In 1914, influential jurist Benjamin Cardozo wrote, "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault, for which he is liable in damages."¹³ This opinion challenged the discretion of a physician to extend the scope of a surgical procedure beyond that agreed to by the patient.¹⁴ As in other contexts, such as sports, such violations of reasonable expectations are actionable as batteries.¹⁵

But this battery-grounded approach to consent was limited, imposing liability only in cases where the procedure done clearly violated the agreement between physician and patient. Given the state of medical knowledge in the mid-twentieth century, this restriction is not surprising. The human body was poorly understood, and the standard of care required was largely based on the actual physician's work or custom. The standard of care required of a person was only the degree of learning and skill common in his profession or locality. The stand-

¹¹ *Mohr v. Williams*, 104 N.W. 12, 14-15 (quoting EDGAR B. KINKEAD, COMMENTARIES ON THE LAW OF TORTS: A PHILOSOPHIC DISCUSSION OF THE GENERAL PRINCIPLES UNDERLYING CIVIL WRONGS *EX DELICTO* 736 (Vol. 1 1903)).

¹² See Mark J. Cherry, *Non-Consensual Treatment is (Nearly Always) Morally Impermissible*, 38 J.L. MED. & ETHICS 789, 790 (2010).

¹³ *Schloendorff v. Soc'y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914).

¹⁴ *Id.*

¹⁵ See generally Timothy Davis, *Avila v. Citrus Community College District: Shaping the Contours of Immunity and Primary Assumption of the Risk*, 17 MARQ. SPORTS L. REV. 259, 279-80 (2006). There, the court considered whether a batter hit by a pitched ball could recover under the relevant battery statutes. *Id.* See also Brendon D. Miller, *Hoke v. Cullinan: Recklessness as the Standard for Recreational Sports Injuries*, 23 N. KY. L. REV. 409, 410, 412-14 (1996) (examining the various theories of liability for sport-related injuries, including the intentional tort of battery).

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ard of disclosure mirrored this parochial view, and required disclosure only of what a reasonable physician would have done in the same or similar situation.¹⁶ The Supreme Court of Kansas noted that “[t]he duty of the physician to disclose... is limited to those disclosures which a reasonable medical practitioner would make under the same or similar circumstances. How the physician may best discharge his obligation to the patient in this difficult situation involves primarily a question of medical judgment.”¹⁷

But over the past half-century, as medical knowledge and practice evolved, the idea of consent has also moved forward: from concern about non-consensual touching to the more nuanced principle that consent must be *informed*. It was not until 1957 that the phrase ‘informed consent’ was first used. In *Salgo v. Leland Stanford Jr. University Board of Trustees*,¹⁸ a patient became paralyzed after undergoing a translumbar aortography, and argued his injury occurred as a result of the surgery.¹⁹ Plaintiff, his wife and son testified that plaintiff was not informed that anything in the nature of an aortography carried this risk.²⁰ The court stated that “[a] physician violates his duty to his patient and subjects himself to liability if he withholds any facts which are necessary to form the basis of an intelligent consent by the patient to the proposed treatment.”²¹ Thus, courts may examine the disclosures made to a patient as part of the informed consent process to ensure that the consent given was legally valid.²²

Yet *Salgo* left the scope of required disclosure to the medical profession. It was for the physician to consider what the patient needs to know in order to maximize care and minimize patient stress.²³ While this was an improvement over the battery rule, the court’s decision reflected a reluctance to adopt a patient-oriented approach. The court’s struggle between patient autonomy and physician discretion (and paternalism) is evident:

[T]he physician may not minimize the known dangers of a procedure or operation in order to induce his patient’s consent. At the same time, the physician must place the welfare of his patient above all else and this very fact places him in a position in which he sometimes must choose between two alternative courses of action.²⁴

In the early 1970s in the landmark case of *Canterbury v. Spence*,²⁵ the professional disclosure standard was challenged successfully.²⁶ Canterbury’s action sought damages for personal injuries allegedly sustained as a result of one

¹⁶ Miller, *supra* note 1 at 62. The reasonable physician standard is also known as the professional or traditional standard of care.

¹⁷ Natanson v. Kline, 350 P.2d 1093, 1106 (Kan. 1960).

¹⁸ Salgo v. Leland Stanford Jr. Univ. Bd. of Trustees, 317 P.2d 170 (Cal. Dist. Ct. App. 1957).

¹⁹ *Id.* at 174-76.

²⁰ *Id.* at 181.

²¹ *Id.* The court further proclaimed that unless the patient understands the procedure to which he or she is consenting and its inherent risks, consent is without legal effect.

²² See Natanson, 350 P.2d at 1106-07.

²³ See Salgo, 317 P.2d at 181.

²⁴ *Id.*

²⁵ Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972).

or more acts of negligence: an operation negligently performed by appellee Spence; a negligent failure by Dr. Spence to disclose a risk of serious disability inherent in the operation; and negligent post-operative care by Washington Hospital Center.²⁷ After undergoing a laminectomy to relieve back pain, Canterbury fell out of bed during recovery, and was left with paralysis of the bowels and urinary incontinence, despite subsequent surgery.²⁸

The U.S. Court of Appeals for the District of Columbia Circuit challenged the professional standard in a variety of ways. The court was skeptical that any discernible custom actually existed, and further cautioned that if no custom existed to warn of possible complications from the laminectomy, the situation was unlikely to change.²⁹ Next, the court noted the inconsistency in the professional standard that may require customary disclosure while ignoring the circumstances unique to every patient.³⁰ The court's final concern was that the professional standard ignored the prevailing theory of reasonable care in medicine as applied to every patient.³¹

The court shifted the ground from the physician to the patient, establishing the doctrine of informed consent and its goals of ensuring respect for patient autonomy. In the words of Judge Robinson: "The scope of the physician's communications to the patient, then, must be measured by the patient's need, and that need is the information material to the decision... [A]ll risks potentially affecting the decision must be unmasked."³²

But no sooner had the court announced this patient-centered approach than it began a systematic retreat from it. For the nonprofessional standard is based on what a *reasonable* patient in that same situation would want to know in order to make a wise decision.³³ Under this standard, the care provider must disclose risks and alternatives that would be material information to a reasonable lay person.³⁴ Lay witnesses can competently understand the physician's failure

²⁶ *Id.* at 784. The court refused to hold that a cause of action can only be grounded in "nonperformance of a relevant professional tradition" which they described as the "custom of physicians practicing in the community to make the particular disclosure to the patient." *Id.*

²⁷ *Id.* at 776.

²⁸ *Id.* at 776-78.

²⁹ *Id.* at 783-84.

³⁰ *Id.* The court was justifiably concerned that the professional standard would require certain disclosures to avoid liability without the ability to consider the consequences on the patient.

³¹ *Canterbury v. Spence*, 464 F.2d at 784. "Prevailing medical practice... has evidentiary value in determinations as to what the specific criteria measuring challenged professional conduct are... but it does not define the standard." *Id.* at 785.

³² *Id.* at 786-87.

³³ Using this standard that is now referred to in current literature as the "objective" standard, a court decides whether a physician has breached a duty of disclosure based on the critical question: *What would a reasonable person do under these circumstances?* For a discussion of this patient-oriented standard, see JESSICA BERG ET AL., INFORMED CONSENT: LEGAL THEORY AND CLINICAL PRACTICE 48-51 (2002).

³⁴ In contrast, the subjective standard requires a court to ask *what would this plaintiff have done under these circumstances?* *Id.* at 46-47.

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to disclose particular risk or alternatives information.³⁵ Breach of duty to disclose will be established if, according to the testimony of a prudent lay person, a reasonable person in the plaintiff's position would have accorded weight to the omitted information.³⁶

To underscore the crucial advance in doctrine achieved by *Canterbury*: under the prudent patient standard, the risks that must be disclosed are no longer determined by custom and the medical profession. Rather, disclosure is based on a reasonable person standard, independent of medical custom.³⁷ The prudent patient standard imposes upon physicians more substantial obligations and requires consideration of the circumstances unique to every patient.³⁸

In addition to establishing that the physician failed to adequately disclose a material fact to the patient, the plaintiff must also establish causality between the material fact and the injury.³⁹ Causality exists when the disclosure of the material fact would have caused the patient to refuse treatment.⁴⁰ For fear that the bitter plaintiff would always allege that he would have refused the treatment that resulted in injury, the *Canterbury* court refused to implement a subjective test to causation.⁴¹ Instead the court adopted an objective test, defined as "what a prudent person in the patient's position would have decided if suitably informed of all perils bearing significance."⁴² Therefore, the fact finder must conclude that the reasonable person in the plaintiff's position would have declined the treatment if adequately apprised of all of the material facts.

The *Canterbury* formulation of the doctrine of informed consent was soon after adopted in virtually every state within the U.S.⁴³ Although *Canterbury* created a seismic shift in the physician-patient relationship, it necessarily left many questions unanswered. With hindsight, one of those turns out to concern the scope of the doctrine: To which claims should informed consent apply? The answer might seem straightforward: to all instances where the physician and patient discuss (or might be expected to discuss) any contemplated procedure or treatment. Yet the reality has been quite different, as some courts are loath to apply the doctrine to cases beyond those involving invasive (often surgical)

³⁵ *Id.* at 49. The jurors construct a hypothetical reasonably prudent person, and then develop and apply what they believe to be community standards of reasonable conduct. *Id.*

³⁶ *Id.* at 140. However, in a jurisdiction that adheres to the professional standard of disclosure, an expert is typically required to establish the customary disclosures for that course of treatment. *Id.*

³⁷ *See, e.g.,* *Hamilton v. Hardy*, 549 P.2d 1099, 1104 (Colo. App. 1976). "The trend in recent years has been to reject the need for expert testimony on the existence and scope of a doctor's duty to warn of material risks inherent in a surgical technique or prescription drug." *Id.*

³⁸ BERG, *supra* note 33, at 49.

³⁹ *Canterbury v. Spence*, 464 F.2d 772, 790 (D.C. Cir. 1972). Of course, as the text implies, the undisclosed risk must actually have materialized

⁴⁰ *Id.*

⁴¹ *Id.* at 790-91.

⁴² *Id.* at 791.

⁴³ *See* Michael Wallach & Steven J. Berry, *Informed Consent in Texas: A Proposal for Reasonableness and Predictability*, 18 ST. MARY'S L.J. 835, 845 n.49 (1987) (noting that the *Canterbury* formulation of causation had almost universal acceptance).

procedures. This approach is puzzling, as it appears to focus more on the factual situation in which the *Canterbury* decision arose than on the defining feature of the doctrine: that patients have the right to shape the course of their own medical care, and that this right can only be realized where they are given a full measure of materially relevant information.

B. Limits to Informed Consent: The Curious Case of Prescription Drugs

This section explores this issue of the boundary of informed consent by focusing on an issue that has generated an especially high level of disagreement among courts: whether a claim based on the lack of informed consent will lie where the physician fails to inform the patient of the risks of drugs being prescribed. It appears that courts are likelier to extend the doctrine to such cases where the state has enacted legislation recognizing informed consent, even though these laws generally do not speak directly to the issue.⁴⁴ One might hazard that legislative recognition of the doctrine leads courts to conclude that it should be applied in any case of doctor-patient interaction, however removed the facts of a particular case might be from the surgical context of *Canterbury*.

Yet no such conclusion can be reached with confidence. Although general informed consent statutes might (but do not reliably) bear on a court's analysis, some courts have permitted informed consent claims in prescription drug cases, some have not, and others have vacillated to the detriment of litigants seeking predictability in the law. Where the statute itself does not compel a conclusion on this issue, courts are guided by their philosophy of how broadly informed consent should extend. Thus, throughout this discussion, the statutes – where they exist – are discussed in the context of judicial treatment of the issue whether the prescribing of drugs fits is covered by informed consent. A mature theory of informed consent requires its application in all situations involving decisions concerning a patient's course of treatment – and the prescription of drugs is certainly one such situation, particularly today when advances in pharmaceuticals have transformed the medical profession into something that would have been unrecognizable back in 1972, when *Canterbury* was decided.

In the aftermath of *Canterbury*, some state legislatures enacted statutes attempting to define the cause of action more clearly. A typical example is the New York law, which created a cause of action for lack of informed consent in a way that retains some of the older deference to physician custom, but also recognizes the need for patients to be reasonably informed of material risks.⁴⁵

⁴⁴ As discussed *infra*, note 76 associated text., however, Pennsylvania is a notable exception to this rule, because the relevant statute there specifically lists the procedures to which informed consent will apply, and the prescribing of drugs (except “experimental” ones) is not included in that list. 40 P.S. § 1303.504 (2011).

⁴⁵ “Lack of informed consent means the failure of the person providing the professional treatment or diagnosis to disclose to the patient such alternatives thereto and the reasonably foreseeable risks and benefits involved as a reasonable medical, dental or podiatric practitioner under similar circumstances would have disclosed, in a manner permitting the patient to make a knowledgeable evaluation.” N.Y. PUBLIC HEALTH LAW § 2805-d (McKinney 1975).

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The law also follows the objective standard for causation, tying liability to the decisions of the “reasonable person,” not necessarily to those the actual patient.⁴⁶ Most in need of interpretation would seem to be another section of the law, which limits the application of the doctrine to cases “involving either (a) non-emergency treatment, procedure or surgery, or (b) a diagnostic procedure which involved invasion or disruption of the integrity of the body.”⁴⁷ That section *might* be read to exclude prescription drugs, depending on the interpretation of the word “treatment.”

Yet that section has proven no barrier to the New York courts’ view that prescription drugs are indeed within the reach of the statute. In fact, the section defining the class of cases covered by the law is not even mentioned in many of the cases, with the courts apparently assuming that drugs are a “treatment.”⁴⁸ Recently, in *Kuperstein v. Hoffman-Laroche, Inc.*,⁴⁹ the district court applied the New York law in a claim against the manufacturer of the prescription drug *Lariam* and the doctors who prescribed it.⁵⁰ The infant plaintiff and his parents, residents of New York, sought damages under state law in state court for the injuries caused by the drug.⁵¹ The court stated that, “as a threshold matter, a cause of action will lie where the treatment provided by the defendant was the prescription of medication.”⁵² The court did not even pause to consider whether the act of prescribing drugs fell within the ambit of a “treatment” or “procedure” as required by the law (and indeed did not even bother to set forth that provision). Without deciding the case on the merits, the district court found that the plaintiff satisfied the liberally construed informed consent doctrine and made out a *prima facie* case of medical malpractice to survive a motion to dismiss.⁵³

A similar result has been reached in Vermont. There, the governing statute applies by terms to “professional treatment or diagnosis[.]”⁵⁴ and the courts have read those words to cover the prescription drug cases. A leading case is *Perkins v. Windsor Hosp. Corp.*,⁵⁵ where the Vermont Supreme Court allowed a patient who suffered adverse reaction to the prescription drug Flagyl to bring a claim under Vermont’s informed consent statute.⁵⁶ In *Perkins*, the plaintiff brought suit against the defendant physician alleging he was negligent in having prescribed

⁴⁶ “For a cause of action therefore it must also be established that a reasonably prudent person in the patient’s position would not have undergone the treatment or diagnosis if he had been fully informed and that the lack of informed consent is a proximate cause of the injury or condition for which recovery is sought.” *Id.*

⁴⁷ *Id.*

⁴⁸ See, e.g., *Marchione v. State*, 194 A.D.2d 851 (3d Dep’t 1993); See also *Dooley v. Skodnek*, 529 N.Y.S.2d 569 (App. Div. 1988).

⁴⁹ *Kuperstein v. Hoffman-Laroche, Inc.*, 457 F.Supp.2d 467 (S.D.N.Y. 2006).

⁵⁰ *Id.* at 473.

⁵¹ *Id.* at 469.

⁵² *Id.* at 472.

⁵³ *Id.* at 473-74.

⁵⁴ V.T. STAT. ANN. tit. 12, § 1909 (West 2011).

⁵⁵ *Perkins v. Windsor Hosp. Corp.*, 455 A.2d 810 (Vt. 1982).

⁵⁶ *Id.* at 812-14.

Flagyl, and that he had failed to obtain plaintiff's informed consent to the treatment.⁵⁷ The Vermont Supreme Court noted that the legislature had specifically amended the informed consent statute in 1976 to ensure that a physician was required to disclose all reasonably foreseeable risks to allow the patient to make an informed decision.⁵⁸ Here, the plaintiff's expert testified that even if the physician had given his customary warnings, they were insufficient to address this particular patient's needs.⁵⁹ This alone made out a *prima facie* case that the consent given by Perkins was not informed.

Although operating with a much more limited statute, the Ohio courts have also established that the physician has an obligation to adequately inform patients of the risks associated with prescription drugs.⁶⁰ The court in *Bader v. McGregor*⁶¹ found that a physician assumed a duty to obtain the patient's informed consent just by issuing the prescription.⁶² The *Bader* court based its finding on the Ohio Supreme Court's proposition that such a duty can be inferred from the physician-patient relationship, and that when the physician prescribes a medication, a physician "knowingly consents to act for the patient's medical benefit, thus giving rise to a duty of care."⁶³

The federal judiciary has also interpreted federal law to find the doctrine of informed consent written into the existing statutes. In *Whittle v. United States*,⁶⁴ an action was brought under Federal Tort Claims Act, charging medical malpractice on the part of physicians at an Army medical center. The District Court found that psychiatric physician's prescription of a dangerous combination of antidepressant and barbiturates, without the patient's informed consent, was inconsistent with accepted medical practice.⁶⁵ The physician had a duty to disclose to his patient all the material risks and available alternatives, especially in this case where the combination of drugs was known to be highly volatile.⁶⁶ Further, the physician waited a prolonged period of time before having the patient sign the perfunctory consent form, an approach the court characterized as 'cavalier.'⁶⁷

⁵⁷ *Id.*

⁵⁸ *Id.* at 813.

⁵⁹ Apparently Perkins was taking the medication with alcohol. It appears that the doctor knew Perkins to be a drinker; this knowledge helped the court determine that the warnings given were potentially inadequate given her condition. *Id.* The court's consideration of the plaintiff's particular circumstances is akin to the Canadian courts' approach, which takes into account some of the objective facts about the patient. *See* Part IV., *infra*.

⁶⁰ The relevant statute deals only with written consent forms, and expressly declines a role in the development of the common law relating to the doctrine. O.R.C. Ann. § 2317.54 (2011).

⁶¹ *Bader v. McGregor*, 2004 WL 1729656 (Ohio Ct. App. 2004).

⁶² *Id.* at 1.

⁶³ *Id.* at 4 (citing *Lownsbury v. VanBuren*, 762 N.E.2d 354 (Ohio 2002)).

⁶⁴ *Whittle v. U. S.*, 669 F.Supp. 501 (D.C. Cir. 1987).

⁶⁵ *Id.* at 503. The physician simply had the decedent sign a form consenting to the combination of dangerous drugs without fully explaining the dangers associated with the treatment. *Id.* The court went on to further find that the treatment was the proximate cause of death. *Id.* at 506.

⁶⁶ *Id.* at 505.

⁶⁷ *Id.* at 505-06.

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Whittle is especially instructive for at least two reasons. First, it underlines the point that the specific language of statutes is less important than judicial commitment to the principles of informed consent. The Federal Tort Claims Act contains no mention of informed consent, so the court was building from principles of negligence as applied in the medical malpractice context. Second, *Whittle* illustrates the close connection between the claims for medical malpractice and lack of informed consent. The physician prescribed dosages of the drugs in excess of what was recommended (which might or might not be sufficient to establish medical malpractice, since some physicians did prescribe similarly high doses) and did so in a potentially dangerous combination. This latter action looks like malpractice, but might also be construed to ground a claim based on a failure to provide informed consent (assuming that, in some cases, this danger of combined drugs might be justified).

While informed consent legislation at least creates a scaffold on which courts can construct doctrine, matters are even muddier in the absence of such legislation. Consider the situation in Connecticut as one example. In *Santos v. Brier*,⁶⁸ the court expressed the state judiciary's inconsistency as follows: "It is unclear whether prescribing a medication is a medical procedure for the purposes of the informed consent cause of action. Language used in some cases to describe the cause of action appears to militate *against* its application to the prescription of medication."⁶⁹ After citing state case law supporting that proposition, the court also noted that "[I]anguage from other cases appears to militate *toward* including the prescription of medication within the informed consent cause of action."⁷⁰ The Superior Court did not have to decide the case on the merits, and no definitive ruling on the matter has come from the Connecticut Supreme Court; therefore, the doctrine of informed consent is still murky in Connecticut. Legislative guidance might help, if only because the examples of New York, Vermont, and even under the Federal Torts Claims act suggest that even general statutory language is read unrestrictively.

At the other end of the spectrum lies Pennsylvania, which long followed the rule that informed consent must only be given when the physician's treatment amounts to a physically invasive procedure. As far back as the early eighties,⁷¹

⁶⁸ *Santos v. Brier*, 2007 WL 662727 (Conn. Super. Ct. 2007). Plaintiff suffered adverse allergic reaction as a result of being prescribed a medication by the defendant physician. *Id.* at 1. Plaintiff sought the care for Marfan syndrome. *Id.* She was later diagnosed with lichen planus, a painful and disfiguring skin condition, caused by an adverse reaction to the medication prescribed by defendant. *Id.* Plaintiff claimed that the injury was a result of defendant's failure to obtain her informed consent. *Id.*

⁶⁹ *Id.* at 1 (emphasis added). See n. 4 (summarizing Connecticut case law that militates against the inclusion of prescription drugs). The case was not adjudicated on the merits and was dismissed on procedural grounds. *Id.* at 3.

⁷⁰ *Id.* at 1, n.4 (emphasis added) (summarizing Connecticut case law that militates toward the inclusion of prescription drugs).

⁷¹ Even when a doctor treats a patient with a drug known to have potentially dangerous side effects, there is no duty "to secure the patient's informed consent to the treatment by disclosing to the patient all the facts, risks and alternatives that a reasonable person, in the situation which doctor knows or should know is that of the patient, would deem

Pennsylvania courts had not only been reluctant to extend the doctrine to medications, but they had unequivocally limited the doctrine to surgical procedures. At times, this staunch defending of the “surgery only” ramparts led to results that are just puzzling. For example, in *Morgan v. MacPhail*,⁷² the Pennsylvania Supreme Court found the doctrine inapplicable to two consolidated cases involving highly invasive procedures: the injection of a steroid into the heel of one patient; and a procedure involving the injection of an anesthetic into the area around the ribs of another patient. The court simply found that these were not surgical procedures, and therefore held the informed consent doctrine not to apply.

The rationale for this approach is best articulated from an excerpt of the Pennsylvania Superior Court decision *Boyer v. Smith*:

To now expand the doctrine's current applicability to cases involving the administration of therapeutic drugs would be to radically depart from, and indeed obliterate, the foundation upon which the [battery theory of informed consent] stands. [We are] unpersuaded that such expansion is unnecessary.

[W]e are also of the particular opinion that, in the light of the day-to-day realities of providing professional medical care, traditional medical malpractice actions, sounding in negligence, are an adequate legal medium for compensating patients for the injurious consequences of therapeutic drug treatment.⁷³

These statements seriously misunderstand the doctrine of informed consent, a misunderstanding that continues even today in that state.⁷⁴ First, as stated in Part I.A., *informed* consent, unlike consent, is grounded in negligence theory – *not* battery. Moreover, as noted in the discussion of *Whittle*, informed consent is an aspect of medical malpractice created for a specific purpose: to encourage the physician to engage the patient in a dialogue about the risks, benefits, and purposes of a given treatment – and a drug regimen is surely a “treatment,” as the courts in New York and Vermont have found, without even the need for discussion. In the drug context, a doctor who prescribed too high a dose of a given medication – or the wrong drug entirely – would be a proper defendant to a medical

significant in making a decision to undergo recommended treatment.” *Malloy v. Shanahan*, 421 A.2d 803, 804 (Pa. Super. Ct. 1980). *See also Boyer v. Smith*, 497 A.2d 646 (Pa. Super. Ct. 1985) (holding that the trial court properly refused to charge the jury regarding doctrine of informed consent in an action against the physician who prescribed drug causing severe reaction in plaintiff, thereby limiting the doctrine to surgical or operative medical procedures).

⁷² *Morgan v. MacPhail*, 704 A.2d 617 (Pa. 1997). *See also Stalsitz v. Allentown Hosp.*, 814 A.2d 766 (Pa. Super. Ct. 2002). There, a patient and his spouse asserted a medical malpractice claim against a hospital, medical company, vascular surgeon, surgeon's assistant, and interventional radiologist for negligent treatment of patient's blood clots. *Id.* at 770. The patient claimed that the defendants were required by Food and Drug Administration (FDA) regulations to obtain informed consent for recombinant tissue plasminogen activator (TPA) therapy when used to treat blood clots. *Id.* at 771. The court disagreed with the patient, holding that TPA therapy, which involved the injection of a drug, was not surgical or operative, and that “the general rule is that informed consent only applies to surgical procedures.” *Id.* at 775.

⁷³ *Boyer*, 487 A.2d at 649.

⁷⁴ *See Fitzpatrick v. Natter*, 961 A.2d 1229, 1241 n.13 (Pa. 2008).

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malpractice case, while another physician who prescribed the correct dose but failed to warn of serious consequences might be on the receiving end of a suit alleging a failure of informed consent.

In the mid-1990s, the Pennsylvania legislature did enact a measure designed to broaden the applicability of informed consent, thereby registering disapproval of the narrow, surgery-only approach.⁷⁵ Yet it left most prescription drugs out by limiting the duty to disclose to cases involving experimental drugs (or other drugs used in an experimental way). By defining the class of procedures covered in a laundry-list way, the law-makers – perhaps inadvertently – made it even more difficult for the decisional law to evolve as to cover many prescription drug cases.

The Pennsylvania approach is also the judicial view in Colorado, which does not have a statute covering informed consent. In a Colorado Supreme Court case, a patient who had been prescribed a sulfa antibiotic drug to treat prostatitis, and who suffered a seizure after taking the drug, brought an action against his physician in which he asserted an informed consent claim.⁷⁶ The Colorado court affirmed the trial court's decision in favor of the defendant physician on the informed consent claim. The Court further held:

Indeed, the doctrine of informed consent was developed in connection with a patient's consent to specific surgical procedures so as to avoid a physician's liability for battery, making the doctrine ill-suited to a claim based on the administration of medication over a course of time, which is better suited to a claim based upon a negligence theory of liability.⁷⁷

This view is increasingly an isolated one, however.

Tennessee serves as a good example of the change to a more expansive view. There, courts that once followed the Pennsylvania approach have more recently begun to develop doctrine that more closely follows the emerging trend when adjudicating lack of informed consent in the context of prescription drugs, or in other non-surgical procedures.⁷⁸

Until the last decade, the rule of law in Tennessee, as announced in *Cary v. Arrowsmith*,⁷⁹ was that the doctrine of informed consent did not apply to thera-

⁷⁵ 40 P.S. § 1303.504 (2011). Section (a) provides:

(a) Duty of physicians.--Except in emergencies, a physician owes a duty to a patient to obtain the informed consent of the patient or the patient's authorized representative prior to conducting the following procedures:

- (1) Performing surgery, including the related administration of anesthesia.
- (2) Administering radiation or chemotherapy.
- (3) Administering a blood transfusion.
- (4) Inserting a surgical device or appliance.
- (5) Administering an experimental medication, using an experimental device or using an approved medication or device in an experimental manner.

⁷⁶ *Gorab v. Zook*, 943 P.2d 423, 425-26 (Colo. 1997).

⁷⁷ *Id.* at 430.

⁷⁸ Tennessee has only a very general informed consent law that establishes the existence of the cause of action but does not specify the situations to which it might apply. TENN. CODE ANN. § 29-26-118 (2011).

⁷⁹ *Cary v. Arrowsmith*, 777 S.W.2d 8 (Tenn. Ct. App. 1989).

peutic treatment, such as the prescribing of drugs.⁸⁰ The rationale of the *Cary* court's decision was based on its adoption of the rationale of the Pennsylvania Superior Court in *Boyer v. Smith*.⁸¹

The application of the doctrine of informed consent was at issue in the more recent *Mitchell v. Ensor*,⁸² in which a female patient brought a medical malpractice action against a physician and medical group, alleging that the physician failed to obtain her informed consent prior to administration of a testosterone injection.⁸³ Although the *Ensor* court held in favor of the defendant physician due to the rarity of the side effect,⁸⁴ it acknowledged that several courts in Tennessee, after *Cary*, had used language in their decisions suggesting that the doctrine of informed consent applied to both operative procedures and the administration of medication.⁸⁵ The court in *Cary* referenced various cases as illustrative of the potentially emerging shift in Tennessee law to better incorporate the doctrine of informed consent into other medical fields.⁸⁶

In short, the "surgery-only" rationale, which is still followed in a few jurisdictions, appears grounded in the facts of the seminal case of *Canterbury v. Spence* rather than in its central holding that every *medical* patient has a right to determine what shall be done with his body through an informed exercise of choice, entailing the opportunity to evaluate knowledgeably the options available and risks attendant upon each.⁸⁷ In the twenty-first century, the movement is towards consideration of the purpose of the doctrine of informed consent and away from the rigid application of the doctrine via a more functional approach. The ability to make an informed decision about what happens with or to one's body is equally important, whether the choice involves going under the surgeon's scalpel or using a chemical compound to alter a patient's body.

This theory is making inroads in states like Tennessee, where lower court opinions are starting to question their own archaic formulation of the informed consent doctrine. As the doctrine continues to evolve, states like Pennsylvania that continue to endorse a narrow approach may find themselves in an unwanted spotlight for sacrificing patient autonomy, with potentially severe consequences. As we continue to move from traditional medicine further into the dangerous

⁸⁰ *Id.* at 21.

⁸¹ *Id.* at 21 (the court here quotes *Boyer* and agrees with the rationale).

⁸² *Mitchell v. Ensor*, 2002 WL 31730908, at 1 (Tenn. Ct. App. 2002).

⁸³ *Id.* at 1.

⁸⁴ The proof established that an enlarged clitoris has never been reported as a side effect in medical literature as a result of one injection of any strength of testosterone. *Id.* at 4.

⁸⁵ "While none of these cases specifically deal with therapeutic drug treatment or... medication, we can infer that the carefully chosen language of these courts evinces an intent that the doctrine of informed consent can be applied to cases involving the administration of medication as well as surgical procedures." *Id.* at 9.

⁸⁶ See *Shadrick v. Coker*, 963 S.W.2d 726, 732 (Tenn.1998). ("a health care provider, such as a physician or surgeon... has a duty to provide the patient with enough information... to enable the patient to make an intelligent decision and thereby given an informed consent..."). See also *Housh v. Morris*, 818 S.W.2d 39, 41 (Tenn. App. 1991); *Bryant v. McCord*, No. 01A01-9801-CV-00046, 1999 WL 10085, at *7 (Tenn. App. 1999).

⁸⁷ *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972) (emphasis added).

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world of complex and often incompletely understood drugs, it becomes ever more vital that patients be armed with the knowledge needed to make informed decisions, and to fully understand the consequences of competing alternatives.

Moreover, the notion that a medical malpractice claim suffices to deal comprehensively with pharmaceutical cases is misguided. A typical medical malpractice claim in the prescription drug realm would deal with the administration of the wrong medicine, the incorrect dosage, or some other similar error. Negligence under informed consent, by contrast, is based on the theory that the patient was not apprised of all material risks, and was therefore unable to properly consent to the administration of drugs – surely a medical “treatment” or “procedure” under any properly patient-centered model.

Thus, well over forty years since *Canterbury* ushered in the era of informed consent, important unfinished business remains. In some states, the theory has been suffocated by limitation to particular classes of cases. Even where no such restrictions apply, though, the continued use of objective standards makes realization of the promise of patient autonomy difficult in many cases. But the U.S. is not alone in continuing to struggle with this challenging doctrine.

III. UNITED KINGDOM: THE GULF BETWEEN DOCTRINE AND PRACTICE

While cultural norms relating to the physician- patient relationship vary among nations and populations, a broad movement in the direction of greater patient autonomy is discernible, even where formal legal doctrine lags. This is particularly true in the United Kingdom, as evidenced by modern court opinions rejecting what might be supposed to be a clear rule. The British common law does not recognize informed consent as a doctrine,⁸⁸ as held by the House of Lords in *Sidaway v. Bethlem Royal Hospital Governors*, informed consent appeared “contrary to English Law.”⁸⁹ This is because, in medical negligence cases, British courts have used the *Bolam* test, derived from the case in which it arose, *Bolam v. Friern Hospital Management Committee*. Yet more recent cases, encouraged and supported by statutory changes and a shift in the attitude of the medical profession itself, have effected a slow but discernible movement toward a more patient-centered approach.

The foundation for *Bolam* was laid in *Hunter v. Hanley*.⁹⁰ In *Hunter*, the plaintiff was injured after a hypodermic needle being used for penicillin injections broke off and remained lodged in her body.⁹¹ The court decidedly held that negligence was determined by the ordinary person standard, which must also

⁸⁸ Murray Earle, *The Future of Informed Consent in British Common Law*, 6 EUR. J. OF HEALTH L. 235, 235 (1999).

⁸⁹ *Sidaway v. Bethlem Royal Hosp. Governors*, [1985] A.C. 871 (H.L.) [894] (appeal taken from Eng.).

⁹⁰ *Bolam v. Friern Hosp. Mgmt. Comm.*, [1957] 1 W.L.R. 582, [586-89] (appeal taken from Eng.); *Hunter v. Hanley*, [1955] S.C. 200, [202-06] (appeal taken from Scot.).

⁹¹ *Hunter v. Hanley*, [1955] S.C. 200, [200] (appeal taken from Scot.).

govern in medical cases.⁹² As such, the standard of care is determined by the medical profession and a physician acts negligently only when the challenged conduct falls outside of that established standard

While *Hunter* established the professional standard of care for medical practitioners, the standard of care governing malpractice through informed consent was left open until *Bolam*. Bolam was given electro-convulsive therapy (E.C.T.) treatment, which sent electric currents through his brain. Bolam experienced unwarned-of and rare convulsive spasms that resulted in a bone fracture.⁹³ The court extended the *Hunter* holding and found that Bolam could only recover if he proved that 1) the physician did not act in accord with the accepted medical standards and 2) that he would have refused the treatment if properly apprised of the risk.⁹⁴ Thus, the first part of the *Bolam* test is based on the rule that “a doctor is not negligent if he acts as in accordance with a practice adopted at the time as proper by a responsible body of respectable medical opinion.”⁹⁵ The jury was accordingly instructed that they should not find the defendant liable for malpractice if accepted medical practice did not require a warning before undergoing the E.C.T. treatment.⁹⁶ Unsurprisingly, the jury then found for the defendants.

The rule in *Bolam* stands in contrast to the doctrine of informed consent as defined in *Canterbury v. Spence*.⁹⁷ In *Canterbury*, the court held that “true consent to what happens to one’s self is the informed exercise of a choice, and that entails the opportunity to evaluate knowledgeably the options available and the risks attendant upon each.”⁹⁸

There are two major differences between the *Bolam* and American views of the doctrine of informed consent. First, *Canterbury*, unlike *Bolam*, created a patient’s right to be informed of material risks pertaining to a medical procedure and the availability of alternative modes of treatment. As a result, it appears that breach of duty in *Canterbury* rests on what constitutes a material risk. This is a major bone of contention amongst British jurists who have been reluctant to adopt the doctrine because, as has been argued, it will require the incorporation of a “new” test of materiality into the British common law – one that looks beyond physician practice – as it currently exists.⁹⁹ Hence, some academicians have concluded that while the principles of informed consent may someday be built into British common law, the “importation of the wholesale doctrine *per se* will continue to be resisted.”¹⁰⁰

Secondly, the *Canterbury* rule tests negligence relative to a reasonable patient’s point of view on what he or she would want to know, whereas the *Bolam*

⁹² *Id.* at 202-03.

⁹³ *Bolam v. Friern Hosp. Mgmt. Comm.*, [1957] 1 W.L.R. 582, [582] (appeal taken from Eng.). An expert testified that he had only seen one fracture in over 50,000 treatments. *Id.* at 585.

⁹⁴ *Id.* at 586-88.

⁹⁵ *Id.* at 586-87.

⁹⁶ *Id.* at 587.

⁹⁷ *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972).

⁹⁸ *Id.* at 780.

⁹⁹ Earle, *supra* note 88, at 236.

¹⁰⁰ *Id.*

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test weighs the physician's actions against the accepted industry standard. This difference is illustrated by the key question to be decided when using one or the other approach. A *Canterbury* jurisdiction would ask, "what would the reasonable patient expect to be told?" The *Canterbury* view mixes subjective and objective elements, as it seeks to understand what a reasonable patient (objective) in the plaintiff's shoes (subjective) would deem material. The *Canterbury* court was wary of an injured plaintiff complaining that all undisclosed risks are material if they result in injury, and therefore adopted a test that considers factors relevant to the reasonable person in this plaintiff's position.¹⁰¹ In contrast, a *Bolam* court would decide a medical negligence claim by asking: "what can a reasonable doctor be expected to have disclosed to this patient?"¹⁰²

In recent years, however, there has been movement in the United Kingdom away from *Bolam*.¹⁰³ The seeds of discontent were sown in *Sidaway v. Bethlehem Royal Hospital Governors*. Although the House of Lords held that the *Bolam* test was the appropriate test when determining the standard of information given to a patient,¹⁰⁴ Lord Scarman dissented. He argued that a doctor's duty of disclosure on risks and alternatives originated from the patient's rights.¹⁰⁵ Over the course of time, the dissenting opinion by Lord Scarman has gained positive recognition from academicians and the British Medical Association (BMA) that has adopted it as its standard of practice. From the *Sidaway* dissent, the BMA derived the ideal prudent patient standard, which requires the physician to disclose enough information that "allows the patient to make a rational decision."¹⁰⁶

Moreover, lower courts in the United Kingdom have made the standard more plaintiff-friendly while ostensibly following the *Bolam* test. Specifically, these courts have determined whether the patient would have declined the operation had he or she known the risk involved. Of note is the fact that none of the cases discussed hereinafter were appealed to the House of Lords. In addition, these cases – like many other informed consent cases – showcase the complex interplay between the issues of materiality (relevant to the breach of duty) and causation.

For example, in *Smith v. Tunbridge Wells H.A.*,¹⁰⁷ the plaintiff sued for the negligent failure to warn of the possibility of impotence and incontinence following a procedure to treat rectal prolapse.¹⁰⁸ Using the *Bolam* language, the *Tunbridge* court held that a responsible body of medical practitioners would have

¹⁰¹ *Canterbury v. Spence*, 464 F.2d 772, 790-91 (D.C. Cir. 1972).

¹⁰² *Id.* at 239.

¹⁰³ The following discussion omits consideration of *Bolitho v. City and Hackney Health Auth'y* (1997) 39 B.M.L.R. 1, [1997] 4 All ER 771, which inserts the qualification that only rational practices of physicians are considered reasonable by courts.

¹⁰⁴ *Sidaway v. Bethlehem Royal Hosp. Governors*, [1985] A.C. 871 (H.L.) [893-94] (appeal taken from Eng.).

¹⁰⁵ *Id.* at 888.

¹⁰⁶ Earle, *supra* note 88, at 239 & n.21 (quoting BRITISH MEDICAL ASSOCIATION, MEDICAL ETHICS TODAY: ITS PRACTICE AND PHILOSOPHY: THE BMA'S HANDBOOK OF ETHICS & LAW, 1999, at 10-11.)

¹⁰⁷ *Smith v. Tunbridge Wells H.A.*, [1994] 5 Med. L.R. 334.

¹⁰⁸ *Id.*

disclosed the risk, and that the plaintiff would have refused the operation.¹⁰⁹ More importantly, the court looked beyond accepted medical practices and looked to the individual plaintiff's circumstances in assessing materiality. The court took into consideration the fact that the patient was a twenty-eight year-old married male who had lived with the condition for eight years.¹¹⁰

Likewise, in *McAllister v. Lewisham*,¹¹¹ the approach used in *Tunbridge* was used to find liability.¹¹² The court held the plaintiff would have declined the lengthy brain surgery to correct a neurological deficit in her leg.¹¹³ This court's conclusion was based on the fact that, although the risk of some further sensory deficit stood at 100%, if the condition went untreated, had the plaintiff been properly warned of the risks, she would have postponed the procedure.¹¹⁴ Though the physician did warn Ms. McAllister that her leg condition would also worsen with surgery, he did not warn her of the risks associated with brain surgery, including the possibility of hemiplegia, where half of one's body is paralyzed (which was the unfortunate result of this procedure).¹¹⁵ Although Rougier J. decided that Ms. McAllister would have declined the procedure and therefore allowed her to recover, he did raise the issue of the difficulty inherent in the subjective approach to determining legal causation in that it is dependent on hypothesis and hindsight.¹¹⁶

In *Lybert v. Warrington Health Authority*,¹¹⁷ the Court of Appeal's decision illustrated that a court would use a subjective test on causation where it finds the plaintiff's testimony convincing. In a suit stemming from a failed sterilization procedure, the court found that the couple had been given inadequate warning of the possibility of failure, and that had the warning been sufficient, the couple would have opted for an alternative form of contraception instead of tubal ligation.¹¹⁸ The court considered the previous history of the couple: the wife had three cesarean sections and had requested a hysterectomy at the time of her last cesarean section. Thus, the *Lybert* ruling showed a court more willing to use a more subjective test in a situation when the credibility of the plaintiff's testimony as in this case was not in doubt. Note, too, that the case avoids the physician's standard practice entirely.¹¹⁹

When a British court is unconvinced that the subjective approach is appropriate, it tends to inquire about legal causation through a more objective assessment of the evidence. For example, *Newell v. Goldenberg*¹²⁰ involved a failure to disclose the risk of recanalization (post-vasectomy) which led to plaintiff's preg-

¹⁰⁹ *Id.* at 341.

¹¹⁰ *Id.*

¹¹¹ *McAllister v. Lewisham*, [1994] 5 Med. L.R. 343.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 352-53.

¹¹⁷ *Lybert v. Warrington H.A.* [1996] 7 Med. L.R. 71.

¹¹⁸ *Id.* at 74.

¹¹⁹ *See id.*

¹²⁰ *Newell v. Goldenberg*, [1995] 6 Med. L.R. 371.

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nancy.¹²¹ The doctor admitted that he typically warned the patients of this risk, but that he failed to warn in this case. The court therefore had little trouble finding that the omission was material to the patient.¹²² However, the plaintiff could not show that, had he been apprised of all of the risks, he would not have undergone the sterilization procedure. The court held that the husband's contrary claim was made in hindsight.¹²³ As a result, the court looked at more objective factors such as medical literature to determine legal causation, and it found from experts on both sides that a sterilization procedure was medically contraindicated in the husband.¹²⁴ But because the court was unconvinced that he would have rejected the procedure after being apprised of all of the risks, causality was missing; the plaintiff therefore failed on his informed consent theory.¹²⁵

Thus, by the mid-1990s, the lower courts, unconvinced that the *Bolam* test was sufficient to compensate injured plaintiffs, had gradually retreated from the professional standard. That movement gathered strength in 1999, with the Court of Appeal's decision in *Pearce v United Bristol Healthcare NHS Trust*.¹²⁶ *Pearce* marked a shift in shifting to the patient's perspective in determining what constitutes a material risk. Lord Woolf moved from the *Sidaway* ruling that held it was for the court to determine a material risk, and instead endorsed Lord Scarman's dissent in that case: materiality was for (reasonable) patients to decide:

*If there was a significant risk which would affect the judgment of a reasonable patient then, in the ordinary event, it is the responsibility of the doctor to inform the patient of that significant risk.... In the Sidaway case Lord Bridge recognises that position. He refers to a significant risk as being something in the region of ten per cent. When one refers to a 'significant risk' it is not possible to talk in precise percentages..."*¹²⁷

Although the claimant in *Pearce* lost, the case established that a material risk, for the purpose of informed consent, should be disclosed to a patient if a reasonable patient would want to be told of it.¹²⁸ Then, in *Wyatt v. Curtis* (2003), Lord Justice Sedley used Lord Woolf's statement in *Pearce* to strengthen the judicial view that materiality determinations are rooted in patient autonomy.¹²⁹

Something of a watershed seemed to have been reached in *Chester v. Afshar* (2004), in which the House of Lords adopted quite a patient-centric view as to both causation and the responsibility of physicians to disclose material risks.¹³⁰ Grounding the basis of informed consent in the principle of patient autonomy, Lord Steyn quoted Ronald Dworkin as follows:

¹²¹ *Id.*

¹²² *Id.* at 374.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Pearce v United Bristol Healthcare NHS Trust* [1999] P.I.Q.R. 53, C.A.

¹²⁷ *Id.* at 59.

¹²⁸ Sara Fovargue & Jose Miola *How Much Information Is 'Enough'?* 5 CLIN. ETHICS, 513-5 (2010).

¹²⁹ *Wyatt v. Curtis* [2003] EWCA (Civ) 1779.

¹³⁰ *Chester v. Afshar* [2004] 3 WLR 927.

The most plausible [account] emphasizes the integrity rather than the welfare of the choosing agent; the value of *autonomy*, on this view, derives from the capacity it protects: the capacity to express one's own character - values, commitments, convictions, and critical as well as experiential interests - in the life one leads. Recognizing an *individual right of autonomy* makes self-creation possible.¹³¹

While *Chester* was an important case, its impact on subsequent case law has been unclear.¹³² Thus, deference must still be paid to *Bolam*, which has created uncertainty across the judiciary. While there has been an undeniable shift toward finding materiality in undisclosed risks, the causality issue remains murky at best. On the issue of causality, some courts have used purely objective standards, while others have examined the facts more subjectively. It is difficult to predict the future of the doctrine in the United Kingdom, but as long as *Bolam* remains authoritative law in the United Kingdom, the shift toward a patient-oriented standard will continue to be gradual, uncertain, and unreliable.

The British rule, as it turns out, is not the only example of an approach that compromises patient autonomy. But the Taiwanese approach at least recognizes that patients' interests will not reliably be served by a rule tying the requirement of physician disclosure to customary practice.

IV. INFORMED CONSENT LAW IN TAIWAN: FROM FORMS TO REALITY

A. History and Rise of the Forms

The concept of informed consent is relatively new to Taiwan. Before 2003, patients in Taiwan generally lacked sufficient information about the nature, risks and alternatives of contemplated procedure, let alone their rights. While there was typically a requirement for consent to the procedure itself – thereby precluding a claim based on battery – such consent was not required to be informed.¹³³ This problem became more serious as the number of needless surgeries performed in Taiwan continued to increase.¹³⁴ Generally speaking, these increases were caused by insurance payments and for cultural reasons.¹³⁵

¹³¹ *Id.* at 929.

¹³² See Lara Khoury, *Chester v. Afshar: Stepping Further Away from Causation?*, 2005 SING. J. L. STUD. 246 (2005) (discussing various subsequent cases that rejected the analysis used in *Chester*, but arguing that it should be considered good law moving forward for various policy reasons).

¹³³ See Hsiu-I Yang, *Rethinking Informed Consent*, THE TAIWAN LAW REVIEW, No 162, 5-16 (2008) (available only in Chinese).

¹³⁴ See Bureau of National Health Insurance in Taiwan, *Statistics of National Health Insurance*, 2001. The reimbursement deduction rate of total medical expenses was increasing, from 2.79% in 1998 to 4.28% in 2001. The increase in the deduction rate was one of the major contributing factors to an increased rate of questionable or unnecessary surgery. See also Chen-Hsen Lee and Yue-Chune Lee, *Surgery in Taiwan*, 138 ARCH

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From the insurance perspective, the reimbursement system of National Health Insurance (NHI) plays a factor in therapeutic decision-making. Sometimes, it encourages surgeons to perform surgeries, because generally the insurance will pay more reimbursements (benefits) than the alternate conservative managements.¹³⁶ Further exacerbating the problem are the medical cultural norms at play in Taiwan.¹³⁷ Historically, the physician-patient relationship has been very one-sided, with very few patients questioning the decision-making of the physician. Therefore, the default model has been that the patient generally accepts the risks of the suggested surgeries while the surgeon enjoys the benefits of enhanced reimbursements.

There are several cases that addressed the issue of lack of informed consent.¹³⁸ As the cases increased dramatically, the government felt compelled to solve the underlying problems giving rise to them. In August 2003, the Department of Health (DOH), which governs medical care in Taiwan, introduced a medical consent form. This new medical consent form requires a detailed explanation of the nature of the disease, the surgical site and how the operation will be carried out, the success rate of the operation, the possibility of transfusion, the possible risks and their managements, the possible outcomes of refusing the treatment or procedure, the alternatives, and the possible temporal and permanent complications. At the end, there are declarations from both the patient and physician to ensure that the physician has fully described the operation, and that the patient was fully aware of the nature of the operation and agreed to undergo the surgery.

In 2004, the commitment to informed consent represented by this form was strengthened by the issuance of a document by the DOH entitled *Guiding Principles for Medical Care Institutions in Informing Patients and Obtaining Surgery and Anesthesia Informed Consent from Patient when Performing Surgery* (Guiding Principles).¹³⁹ These principles begin with procedures: The consent forms are both to be filled out in duplicate. The physician/ anesthesiologist shall explain all information relevant to the operation to be performed. After the informing process is completed, the physician/ anesthesiologist in charge of the operation/ an-

SURG. 927 (2003). Preliminary results showed that, as expected, clinics provided 16% more preventive care, 5% more surgical procedures, 14% more visits for chronic patients.

¹³⁵ See Han-His Liu, *Use and Disclosure of Health Information and Protection of Patient Privacy in Taiwan*, 29 MED. & L. 87, 93-94 (2010).

¹³⁶ For example, endometriosis can be treated with surgery or other conservative alternatives, such as pain medications. Physicians are only reimbursed the fees of the medication, typically no more than thirty U.S. dollars. Conversely, the NHI will reimburse the physician somewhere between \$345-669 for the surgical procedure (hysterectomy).

¹³⁷ See Liu, *supra* note 135, at 93-94 (asserting that patients seeking to obtain their own medical records are considered to be 'troublemakers').

¹³⁸ See *Ding v. Kaohsiung Hosp.*, 2007, (Kaohsiung Dist. Ct.) (finding a physician liable for surgery performed beyond what was agreed upon without patient authorization). See also *Lin v. Kaohsiung Med. Univ. Hosp.*, 2004, (Taiwan Sup. Ct., Kaohsiung Branch); *Kuo v. Yang*, 2005, (Taiwan Sup. Ct.).

¹³⁹ The guiding principles were provided by Department of Health, Taiwan, in 2004. No 093021814.

esthesia shall answer the patient's questions and discuss the procedure, and then sign the appropriate consent forms and record the time and date of notification.

The Guiding Principles next discuss the notification guidelines. Before information is provided to the patient, the patient's level of receptivity should be assessed. In principle, information shall be given directly to the patient. In the event that the patient is unable to give informed consent, the physician must receive informed consent from the patient's guardian or agent. Physicians should respect patients' decision-making power, present information in simple, easy-to-understand language and a calm manner, and avoid exaggerated or threatening words. Similar to the first section of the Guiding Principles, this section further imposes stringent requirements on the physician to fully inform the patients. Finally, the section strongly encourages all members of the medical team to participate in these discussions with the patients, and instructs them to direct all necessary questions to higher authorities. This is a particularly important provision, because as we will discuss, the imposition of more demanding informed consent standards should naturally include more members of the medical profession. This allows patients to receive more information without overburdening the physicians.

The third section refers to signing the surgery consent form. The surgery consent form must be signed personally by the patient, except under the following circumstances: if the patient is a minor, or for any reason is unable to express consent, the form may be signed by a person specified under the Medical Care Act (legal agent, spouse, relative or related party). After a consent form is signed and verified, the medical care institution must file one copy with the patient's medical records, and provide the other copy to the patient.

The legislators also created new articles relating to surgery consent (article 63) and invasive examination consent¹⁴⁰ (article 64) in Act of Medical Care in 2004. According to article 63:

Before a surgical intervention, a patient or his/her legal representative, spouse, relative or interested person should be informed, by the medical care organization, of the reasons, success rate or possible complications and risks of an operation which may be incurred. Unless in an emergency, no surgery can be performed without the written consents on anesthesia and surgery, which should be signed by the patient or his/her legal representative, spouse, relatives or interested persons. In case the patient is a minor or unable to sign the written consents by himself/herself, it could be signed by his/her legal representative, spouse, relatives or interested persons.¹⁴¹

Analogous language appears in article 64.¹⁴² The goal, of course, is to help the patient to determine whether to consent to or to reject an invasive examination.

¹⁴⁰ Invasive examination means the invention via some kind of tool that is inserted into the body, such as a diagnostic puncture, endoscopy examination, coronary intravascular ultrasound, endotracheal intubation, or cardiac catheterization. There is no separate consent form for invasive examinations.

¹⁴¹ Act of Medical Care in Taiwan, 2004.

¹⁴² *Id.* Article 64.

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B. Cases Claiming Failure to Provide Informed Consent

In Taiwan, patients seeking redress under a medical malpractice claim can resort to either civil or criminal procedures¹⁴³. In a civil lawsuit, plaintiffs need to demonstrate the fault, injury, and proximate causation of fault and injury for torts compensation. But in a situation that will surely perplex the American audience, most patients (79%) choose to proceed through criminal law channels by filing the case with prosecutors.¹⁴⁴ In the criminal procedures, plaintiffs do not have to pay fees for litigation and can get medical history or any related records by prosecutors. The court is required to investigate, and the sentence can include monetary recovery to the patient or imprisonment of the medical practitioners.¹⁴⁵

In addition to the consent forms, the doctrine of informed consent in Taiwan can also be understood through criminal and civil case law that has developed. In *Kuo v. Yang*,¹⁴⁶ the Supreme Court held that, if the physician asked the patient to sign the consent form (before a cardiac catheterization) but did not explain the essence of this procedure to the patient, it would be difficult to know whether the patient understood what he or she was consenting to. The Court held that the doctor had not properly obtained informed consent from the patient. Theoretically, the physician could not know the patient's apprehensions about surgery if there was no discussion.

On this vital question of what the patient understood, another important case is *Hong v. Huang*¹⁴⁷ where a gynecologist injured a young female during an examination. The patient chose to seek redress via criminal procedures under an informed consent theory, alleging that the doctor did not inform her about the nature, modality, and the risk of this invasive examination. The court agreed that there was a lack of communication and that injuries had occurred, despite the fact that a witness nurse proved the doctor did inform the patient about the examination briefly and the additional difficulty that proximate causation between the

¹⁴³ Taiwan might be the only country that punishes physicians for medical malpractice or lack of informed consent by using a criminal trial, while most countries settle almost all medical disputes with civil actions. However, it is not appropriate to apply criminal law unconditionally to the medical profession. We believe Taiwan is the only democratic country still utilizing criminal charges to "discipline" physicians' practice nowadays. Such practices are unjust from the perspective of human rights protection, unless the physician is grossly negligent. (See Jiin Ger, *Why Can Taiwan Utilize Criminal Law To Discipline Physicians?* LEGAL MEDICINE 11: S135-S137 (2009)).

¹⁴⁴ SHEN G.L., *The Principle of Offense and Defense Balance in Medical Disputes*, in THE CIVIL PROCEDURE ACT AND PRINCIPLE OF OFFENSE AND DEFENSE BALANCE, 92-125 (Taipei: Angle Publishing (2007)).

¹⁴⁵ See *Tsai v. Leu*, 2005, (Taiwan Sup. Ct. Kaohsiung Branch) (sentencing a surgeon to three months' imprisonment for professional negligence and a lack of informed consent for failure to warn the patient of the risk of death (the ultimate result) in a total knee transplant).

¹⁴⁶ *Kuo v. Yang*, 2005 (Taiwan Sup. Ct.).

¹⁴⁷ *Hong v. Huang*, 2003, (Taipei Dist. Ct.).

fault and the injuries were hard to define.¹⁴⁸ These cases suggest that the judiciary is leading the effort in Taiwan to encourage physicians to disclose all material risks in going beyond the standard consent form.

C. Is The Law Working in Taiwan?

Six months after the implementation of the consent forms, a survey was conducted for evaluation of the effectiveness of the forms and the new articles in the Act of Medical Care.¹⁴⁹ Out of a total of 500 issued questionnaires, 444 were returned and collected, a returns-ratio of 88.8%.¹⁵⁰ Disappointingly, the results showed that only 65.09% of patients agreed that doctors had mentioned the possible complications of the surgery, 89.77% knew the reasons for surgery, 86.57% realized the success rate and risks of the surgery, and 88.04% understood the prognosis of this scheduled management.¹⁵¹ While 87.39% of the patients were satisfied with the new consent form, only 61.0% of them received it before they were admitted.¹⁵²

These results and the cases discussed suggest that the law is not working as effectively as was hoped/intended. It was argued that most physicians still lacked awareness about the concept of patient's autonomy and the intent of informed consent. Most of the doctors only focused on practicing medicine; they paid little attention on the paperwork, and simply lacked sufficient time to explain and discuss the full extent of the operation and other alternatives with the patients. In order to improve the unfavorable situation, the DOH announced that the proper implementation of informed consent would be an item in the regular review of hospitals, and that the NHI would not reimburse the costs of operation to hospitals without completed informed consent procedures.¹⁵³

¹⁴⁸ In *Hong v. Huang*, the court held that defendant's act was a substantial factor in causing the plaintiff's injury, but also found that she had failed to prove she would have refused to accept the examination had she known of the possible adverse effects..

¹⁴⁹ DEPARTMENT OF HEALTH IN TAIWAN, ANNUAL REPORT, (2004), http://www.doh.gov.tw/cht2006/dm/search_result.aspx (available only in Chinese).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ See Bureau of National Health Insurance in Taiwan, *Announcement of the Bureau of National Health Insurance*, (Jan. 1, 2006),

http://www.nhi.gov.tw/webdata/AttachFiles/Attach_13297_2_990101西醫--壽審查依據及一般通則.pdf.

Based on Article 1. Examination Basis and General Principle 2, General Principles (12) and (16) of the NHI Directives for Examining Medical Expenses of Medical Care Institutions and NHI Directives for Examining Basic Medical Expenses of Western Medicine: "when applying for surgical expenses, a surgery consent form and an anesthesia consent form shall be submitted. The contents of such forms shall be stipulated by the central competent authority. An institution that fails to submit such forms shall not be entitled to any payment for such expenses." This rule provides that "complete" medical records shall include a surgery consent form and an anesthesia consent form when applying for reimbursement of such surgical expenses.

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Requirements are in place to encourage hospitals to help doctors conduct the consent procedures with patients.¹⁵⁴ In addition to the efforts of government, Taiwan Healthcare Reform Foundation (THRF)¹⁵⁵ also suggests that patients should try to ask important questions before accepting the operation: *Should I undergo this operation? What kind of operation it is? Is there any alternative to the operation? What might happen after the operation?* These questions will help the patients understand the reason, method and possible achievement of this operation, and at the same time prevent them from falling victim to the questionable procedures set up for additional reimbursements.¹⁵⁶ While ultimate responsibility for informing patient consent must remain with health care professionals – because lay patients will not be able to formulate all the questions that must be asked in order to inform themselves – the THRF’s list of questions is nonetheless an important acknowledgment that communication is a back-and-forth process, and that patients might be more attuned to physician disclosures where they actively participate in the discussion.

The problem with using consent forms has been raised in other jurisdictions,¹⁵⁷ and the deficiencies with this approach are apparent. The primary problem, as discussed above, is the tendency of over-extended health care providers to rely on forms without properly apprising the patients of the risks associated with surgery. They believe that the form includes most of the relevant information, the patient will sign it, and consent will be deemed informed. As a Canadian court recently stated, reliance on a form is “absurd and contrary to the guiding principles of the informed consent process.”¹⁵⁸ This approach completely ignores the successes of informed consent – subjective patient autonomy.¹⁵⁹ As we argue in Part IV, the Canadian approach is desirable because it requires subjective factors to be taken into consideration in every case. The Taiwanese form is a standard document that fills in certain blanks related to the procedure. While it is personalized with the name, treatment, and risks, this approach is not a substitute for the meaningful discussion required to give the patient the opportunity to make an informed decision.

Conversely, consent forms can be beneficial to both the patient and the physician if utilized appropriately. While they have too often been used as ends in themselves, rather than a means towards the goal of truly informed consent, they

¹⁵⁴ Act of Medical Care in Taiwan, 2004, Article 81. When treating the patient, the medical care institution should inform the patient or his/her legal agent, spouse, kin, or interested party of his/her condition, course of treatment, medication, prognosis, and possible adverse effects.

¹⁵⁵ The Taiwan Healthcare Reform Foundation (THRF) is an independent, non-governmental organization that aims to improve the healthcare quality and patient’s rights in Taiwan. Their job is to address various healthcare concerns in Taiwan through advocacies, public education, and publications. Taiwan Healthcare Reform Foundation, *History and Mission*, <http://www.thrf.org.tw/EN/index.asl> (last visited March 16, 2011).

¹⁵⁶ *Id.*

¹⁵⁷ See, e.g., *Malinowski v. Schneider*, 2010 ABQB 734 (Can.) (generally discussing the problems with consent forms).

¹⁵⁸ *Id.*

¹⁵⁹ See *infra* section IV.

can also be used as a starting point to a more informed discussion. If the subsequent discussion does not in fact take place, the problem might be cultural boundaries that sometimes prevent the patient from comfortably asking questions of the physician's decisions.¹⁶⁰ Therefore, if the form provides answers to the patient's questions, that result will in some cases be an improvement over the situation that existed before the forms were created.

Likewise, the consent form may assist the physician in avoiding criminal punishment in informed consent cases. The form may therefore have been an appropriate step for Taiwan to have taken in 2003. The country was working to move past the problem of excessive patient deference to physicians that had existed for too long. The form has likely helped patients understand more information while shielding the physicians from excess civil and criminal liability¹⁶¹. Further, the DOH has provided directives seeking to impose even greater responsibilities on physicians.¹⁶²

The question then is whether this would be an effective system to implement in the United States, in the on-going struggle to expand the boundaries of informed consent law to cover medical procedures beyond surgical care. Experience with consent forms in the U.S. suggests otherwise.¹⁶³ Too often, such forms are filled in by rote, and summon little if any discussion between patient and health care provider. Thus, the forms sometimes have the unintended consequence of compromising the very principles of informed consent they are supposed to be furthering.

Further, the doctrine of informed consent evolved in drastically different ways in the United States and Taiwan, and for very different reasons. In Taiwan, the change was statutorily driven to escape the cultural norms that had dominated

¹⁶⁰ Traditionally, "doctor-patient relationship" in Taiwan is somewhat similar to "parent-child relationship". Owing to the "parental privilege" of the doctor, the patient seldom has the chance to doubt the decision-making of physician's clinical practice.

¹⁶¹ In the other countries discussed throughout this article, patients claiming a lack of informed consent resort to civil procedures. In Taiwan, however, patients claiming a lack of informed consent can resort to either civil or criminal procedures. In Taiwan, the judges, using criminal law in 79% of the medical disputes, punish physicians in addition to awarding money damages to the plaintiff. See Pyng Jing Lin, *Criminal Judgments to Medical Malpractice in Taiwan*. *Legal Medicine* 11: S376-S378 (2009).

¹⁶² *Id. supra* note 141. "The physician in charge of surgery shall fill out the Type of Surgery to Be Performed section of the form in Chinese, explain all information relevant to the operation to be performed in accordance with the contents of the Physician's Statement-1, and then check all relevant boxes on the form. Physicians should do their utmost to fulfill patients' need for information about their medical condition and the surgical procedure and anesthesia they will undergo. Physicians should respect patients' decision-making power, present information in simple, easy-to-understand language and a calm manner, and avoid exaggerated or threatening words."

¹⁶³ For example, a Task Force of the American Psychiatric Association concluded that the written forms provided to potential recipients of electroconvulsive therapy were inadequate. APA TASK FORCE ON ELECTROCONVULSIVE THERAPY, THE PRACTICE OF ELECTROCONVULSIVE THERAPY: RECOMMENDATIONS FOR TREATMENT, TRAINING, AND PRIVILEGING, APP. B, at <http://www.ect.org/resources/apatask.html> (last visited Aug. 14, 2012).

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the culture. In the United States, the change was judicially driven because of an emerging view of autonomy over one's body. Fidelity to that principle can be achieved only by legal rules that encourage the physician to speak with the patient and disclose all of the material risks *to that patient*. If the stock form is used, it typically will not be tailored to the particular patient nor, as stated above, will it usually encourage the patient to ask more questions.

Yet the American approach is itself flawed, too often sacrificing patient autonomy to the perceived need for an objective standard that will further both judicial management of the cases and, overall, more just outcomes. A better accommodation of these competing values can, and must, be achieved. It happens that a successful model already exists – just to our north. It turns out that the Canadian approach – referred to by the shorthand description of the “modified objective” test -- safeguards patient autonomy without creating unmanageable physician liability. To a discussion of this approach this Article now turns.

V. TOWARD A PATIENT-CENTERED, YET WORKABLE, MODEL OF INFORMED CONSENT: THE CANADIAN APPROACH

Very much like their counterparts in the United States and the United Kingdom, Canadian courts once seemed to rely on some variation of the professional standard of disclosure in their informed consent doctrine.¹⁶⁴ It was not until after *Canterbury* was decided in 1972 that many jurisdictions around the world began to show greater respect to the patient's right to make an informed decision. This paradigm shift took hold in Canada through two cases, both decided in 1980: *Hopp v. Lepp*¹⁶⁵ and *Reibl v. Hughes*.¹⁶⁶

The plaintiff in *Hopp* had a blockage within his spinal column, causing him considerable pain. He specifically asked the physician about the seriousness of the operation, to which the physician responded that he would be home in six to ten days and fully mobile.¹⁶⁷ The plaintiff was left permanently disabled as a result of the operation. While the court did not wholly incorporate the doctrine from *Canterbury*, they did draw on its underlying theory of patient autonomy in deciding that physicians had an obligation of full disclosure.¹⁶⁸

In the same year, the court decided *Reibl v. Hughes*,¹⁶⁹ where the patient suffered from headaches that were serious, but not considered life-threatening.¹⁷⁰ He underwent surgery to relieve the headaches, and was left partially paralyzed

¹⁶⁴ See *Kenny v. Lockwood* [1932] O.R. 141 (Can.) (finding that the doctor had fulfilled his duty to the patient by honestly describing the nature of the procedure and recovery, even though the plaintiff suffered from an undisclosed risk of surgery). The court essentially only imposed a duty of honesty on the physician in disclosures. *Id.* at 157.

¹⁶⁵ *Hopp v. Lepp* [1980] 2 S.C.R. 192 (Can.).

¹⁶⁶ *Reibl v. Hughes* [1980] 2 R.C.S. 880 (Can.).

¹⁶⁷ *Hopp*, 2 S.C.R. 192 at 194-95 (Can.).

¹⁶⁸ *Id.* at para. 30.

¹⁶⁹ [1980] 2 R.C.S. 880 (Can.).

¹⁷⁰ *Id.* at para. 42 & 48.

as a result of the undisclosed risk.¹⁷¹ Again drawing largely on *Canterbury*, the court weighed the benefits and concerns of objective and purely subjective approaches.¹⁷² The court decided on a “modified objective” approach, that took into consideration subjective factors of the patient viewed objectively. The pertinent inquiry therefore is, “[what would] the reasonable person in the patient’s particular position... agree to or not agree to, if all material and special risks of going ahead with the surgery or foregoing it were made known to him.”¹⁷³ The court decided that because he was only forty-four and close to securing certain benefits from his employer, he would have rejected the surgery had he been apprised of all of the material risks.¹⁷⁴

Together, *Hopp* and *Reibl* shifted the Canadian doctrine of informed consent away from the physician-oriented standard.¹⁷⁵ The standard adopted was similar to that in the United States – using subjective factors relevant to a particular patient, but viewing them objectively. More recent case law has moved the dial even further toward a patient-centered approach. It is this recent movement that has captured our attention, and that we urge as the basis of a more truly patient-centered doctrine of informed consent.

*Malinowski v. Schneider*¹⁷⁶ illustrates how the doctrine of informed consent has developed since the 1980s into a predominantly subjective standard, at least on causation. This is particularly relevant, as many of the plaintiffs in the United States prove materiality, but ultimately lose on causality.¹⁷⁷ Malinowski moved to Canada when he was 16, and had to learn the English language upon his arrival.¹⁷⁸ He was injured while pulling heavy electrical cable, and he subsequently saw a chiropractor for back pain. Because of the chiropractic treatments, he developed cauda equina syndrome (CES), a risk that had not been disclosed to him.¹⁷⁹ The CES caused numbness in his saddle area and down his legs.¹⁸⁰ As the symptoms became worse, he had to undergo emergency surgery to correct it, though he was still left with various disabilities, rendering him unable to work.¹⁸¹

The dispute revolved around the adequacy of the chiropractor’s disclosure of the risks from chiropractic treatment and of non-chiropractic alternatives. The court discussed the “patient-centric” approach to informed consent, including five key components (discussed below). The court also discussed usefulness of informed consent forms, the evaluation of materiality, and finally, the subjective approach to causation. It is this approach to causation that marks the most signifi-

¹⁷¹ *Id.* at para. 1.

¹⁷² *Id.* at para. 19-27.

¹⁷³ *Id.* at para. 25.

¹⁷⁴ *Id.* at para. 48..

¹⁷⁵ Ironically, though, the “physician-centered standard” was not necessarily understood well among physicians themselves. See Gerald. B. Robertson, *Informed Consent Ten Years Later: The Impact of Reibl v. Hughes*, 70 CAN. BAR REV. 423, 439 (1991).

¹⁷⁶ *Malinowski v. Schneider* (2010) AQBQ 734 (Can.).

¹⁷⁷ See *id.* para. 2-3 & *supra* note 8

¹⁷⁸ Polish was his first language. *Malinowski*, (2010) AQBQ 734 at para. 1.

¹⁷⁹ *Id.* at para. 4 & 9.

¹⁸⁰ *Id.* at para 4.

¹⁸¹ *Id.* at para 5.

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cant advance from prevailing law in the U.S. Yet the Canadian approach marks an advance in other ways, too. Analyzing the details of tests the *Malinowski* court laid out makes clear that a wide range of medical treatments will fall squarely within the ambit of the informed consent doctrine. Yet empirical evidence shows that the subjective approach has not allowed more plaintiffs to recover under this doctrine, primarily because of the nature of disclosures being made.

The court specifically describes the Canadian approach as being “patient-centered” and identified five key components to informed consent.¹⁸² Informed consent in Canada revolves around:

1. the medical practitioner’s diagnosis of the patient’s condition;
2. the prognosis of that condition with and without medical treatment;
3. the nature of the proposed medical treatment;
4. the risks associated with the proposed medical treatment; and
5. the alternatives to the proposed medical treatment, and the advantages and the disadvantages and risks of those alternatives.¹⁸³

Malinowski contended that he was not properly apprised of the risks associated with chiropractic care. In evaluating the risks of the proposed treatment, Canadian courts are essentially looking at the material disclosures made to the patient. The court takes the *Canterbury* approach to materiality, asserting that a material fact is one that “a reasonable person in the patient’s position would want to know.”¹⁸⁴ However, the court expands on the generalities articulated in *Canterbury*, and effectively establishes clearer (and arguably stricter) standards of disclosure by requiring disclosure of risks that the patient would not know of, where a given risk is either:

- (a) a likely consequence, and the injury that would result is at least a slight injury or
- (b) a serious consequence, such as paralysis or death, even where that risk is uncommon but not unknown.¹⁸⁵

Essentially, then, the physician is required to disclose any risk that is likely or unlikely but severe.¹⁸⁶

The court then looks to the usefulness of the disclosures as made *to the particular patient*. The duty is on the medical practitioner to ensure that the risks are disclosed and understood. Therefore, if the patient struggles with the English language or is of limited education, the court will impose a greater duty to disclose in a meaningful way.

¹⁸² *Id.* at para. 31 (citing *Dickerson v. Pinder*, (2010) ABQB 269 (Can.))

¹⁸³ *Malinowski v. Schneider* (2010) AQBQ 734, 31 (Can.). The dispute here was over items four and five.

¹⁸⁴ *Id.* at para. 34.

¹⁸⁵ *Id.* at para. 35.

¹⁸⁶ Although the court was less explicit, this also appears to have been the view in *Canterbury v. Spence* 464 F.2d 772, 788 (“[a] very small chance of death or serious disablement may well be significant; a potential disability which dramatically outweighs the potential benefit of the therapy or the detriments of the existing malady may summons [sic] discussion with the patient.”) *Id.* at 788, note 3 (citing examples of cases making the point).

Moving onto the fifth component of the above test, the Canadian courts require the physician to disclose all *reasonable* alternatives, including non-treatment as a viable option if it exists. A decision is not really informed if the patient is not given “some yardstick against which he can assess the options available to him.”¹⁸⁷ Evaluating components four and five in terms of materiality, it is clear that the Canadian courts use the “modified-objective” approach in a very patient-friendly manner. While the court discusses the objectivity involved in the overall decision-making, it is clear that the judges were concerned about how the particular patient was able to arrive at a reasoned conclusion. Intuitively, this makes sense. The doctrine of informed consent, when broken down into its component parts requires not only consent, but that it is informed. The previous models discussed *call* the doctrine “informed consent,” but they never fully come to grips with the requirement that consent *actually be informed*. They discuss materiality in the abstract without breaking it down into component parts. Here, the Canadian courts explicitly detail what is a material risk, how it must be disclosed to the individual patient, and the requirement that alternative treatments *must* be disclosed to ensure the patient has a yardstick with which to measure the options.

The court then went on to apply these legal rules to the facts before it. It first explained the adequacy of the warnings given to Malinowski at each decision point relating to the treatment. They solicited testimony from the patient, the physician, and each party’s expert on informed consent disclosures.¹⁸⁸ Most relevant to our discussion is the court’s position on informed consent forms. The court indicated that it had historically disfavored the forms as being able to give informed consent in any capacity.¹⁸⁹ Much of the concern relates to the absence of subjectively relevant information to the patient. Chiropractic forms are typically uniform in nature. While they do address some of the issues that can arise during treatment, they neglect to typically include alternative treatments. Canadian courts impose a duty on the physician to disclose *all reasonable alternatives*. To give patients a standard form to read regarding possible risks is not at all sufficient, especially given the seriousness of various risks. Further, the court here was troubled because of Malinowski’s language and educational barriers. As previously discussed, the Canadian courts take extra precautions when the patient requires extra assistance in some capacity. Here, the patient might have struggled with the form and its contents. Therefore, the form is even more detrimental to the physician’s claim that consent was informed. The duty imposed on physicians in Canada is substantial, and works in the patient’s favor.

The court then looked to the consultation to see if the doctor properly disclosed the risks of the chiropractic treatment. The doctor’s testimony revealed that he had not properly disclosed the special or unusual risks associated with

¹⁸⁷ *Id.* at para. 38 (quoting *Zimmer v. Ringrose*, 1981, 124 D.L.R. (3d) 215).

¹⁸⁸ *Id.* at para. 42-89.

¹⁸⁹ *Id.* at para. 60-70. Prior decisions found that documents signed prior to physician discloses would not be any indication that consent was informed. In fact, “[t]hat approach makes a mockery of the jurisprudence flowing from the doctrine of informed consent since *Hopp*.” *Id.* at para. 62 (quoting *Dickson v. Pinder*, 2010 ABQB 269).

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CES.¹⁹⁰ The court also looked at the disclosure of alternative treatments. While the physician disclosed alternatives, such as surgery and pharmaceuticals, he did so in a way that made them seem unnecessarily dangerous.¹⁹¹ Unhappy with the manner in which these alternatives were disclosed, the court remarked that “[a] medical professional should not be a salesman of a service.”¹⁹² Looking at the signed consent, the lack of full disclosure, and the poor disclosures regarding the alternatives, the court concluded that informed consent was not given.¹⁹³ The material disclosures were not made to the patient in this instance; thus, the physician had breached his professional duty to his patient.

But it is in the area of causation that the *Malinowski* court most dramatically parted company with *Canterbury*. The court began unexceptionably by noting that, even given non-disclosure of a material fact, recovery is not possible unless the patient can also show that the “patient would not have agreed to the treatment if properly informed.”¹⁹⁴ But then it veered sharply and decisively in a different direction.

In deciding whether the patient would have consented to the treatment, the court looked at the circumstances unique to the patient, but then viewed the result objectively in terms of reasonableness.¹⁹⁵ The court began its discussion of the evidence by explicitly stating, “Mr. Malinowski’s characteristics and testimony are very relevant.”¹⁹⁶ The judges then considered his testimony at trial, his lack of chiropractic history (to show he did not particularly care for them or know much about them), and his desire to continue working. After concluding that Malinowski likely would have refused the treatment if he had been apprised of all of the risks associated with the treatment, they were then able to conclude that he would reasonably have rejected this treatment.¹⁹⁷ Further, the court independently concluded that viable alternatives existed that should have been disclosed.¹⁹⁸

Malinowski represents a very patient-centered approach to the doctrine of informed consent; one that places power within the court to make independent judgments for the plaintiff’s benefit. Though the court describes its view as a subjective-objective hybrid, in reality the emphasis is on subjective factors. The only objectivity that comes into discussion is in asking not what the reasonable patient would do, but in asking whether this patient’s word is reasonable given the (objective) factual circumstances of his life.

Throughout the informed consent discussion, the court was keen to emphasize the physical and educational barriers facing Malinowski. These obstacles in turn imposed a higher duty on the doctor to act, in accord with this more patient-centered doctrine of informed consent. The court takes this doctrine very seriously in protecting patient autonomy. However, this heavily subjective test often

¹⁹⁰ *Malinowski v. Schneider* (2010) AQBQ 734, 71-73 (Can.).

¹⁹¹ *Id.* at para. 74-77.

¹⁹² *Id.* at para. 75.

¹⁹³ *Id.* at para. 79.

¹⁹⁴ *Id.* at para. 80.

¹⁹⁵ *Id.* at para. 81.

¹⁹⁶ *Malinowski v. Schneider* (2010) AQBQ 734, 82 (Can.).

¹⁹⁷ *Id.* at para. 86.

¹⁹⁸ *Id.* at para. 87.

comes under fire as potentially driving more litigation, thereby harming physicians and their practices. This claim has essentially been debunked, for two important reasons.

Gerald B. Robertson has used two studies in identifying the impact of the “modified-objective approach” in Canada since *Reibl*.¹⁹⁹ His first study was concluded ten years after *Reibl*, and Robertson concluded that patients continued to lose, primarily because they still could not prove causation.²⁰⁰ Ten years after that, Robertson again analyzed the impact of the *Reibl* decision, and once again concluded that causation was problematic for plaintiffs.²⁰¹ Interestingly, Robertson notes that in the twenty years since *Reibl*, the courts have continued to shift causation to a much more subjective approach -- but without any benefit to the plaintiffs.²⁰² Robertson theorizes, and we agree, that the subjective approach to causation significantly benefits patients, though not in the courtroom. The problem that Robertson identifies during trial concerns the court’s assessment of the plaintiff’s credibility.²⁰³ When a court determines that the plaintiff is untruthful in testifying that she would not have undergone the treatment had she known of the undisclosed risk, that plaintiff will lose on causation – even if objective facts about her life circumstances would seem to impel a different result. While Robertson’s conclusion is not based on an empirical study (but rather on examples he cites), it is not unreasonable. Indeed, we have seen a similar phenomenon in the U.K.²⁰⁴

While plaintiffs still struggle to win negligence suits alleging informed consent, Robertson more importantly theorizes that it is because physicians disclose many more risks since the *Reibl* decision. Robertson notes that in 2001, physicians were found to have disclosed the appropriate amount of information in forty-five percent of cases brought before the court. If accurate, this is a very important statistic and really brings the fundamental importance of the “modified-objective” approach to informed consent to light. While the authors advocate a more plaintiff-friendly approach to the doctrine, it should not be forgotten that the underlying premise to the doctrine is sufficient disclosure to the patients so that they remain autonomous over their own body. This article – and, one hopes, most

¹⁹⁹ See Gerald B. Robertson, *Informed Consent Ten Years Later: The Impact of Reibl v. Hughes*, 70 CAN. B. REV. 423, 439 (1991) [hereinafter *10 Years Later*]; Gerald B. Robertson, *Informed Consent: Twenty Years Later*, HEALTH L.J. 154 (2003) [hereinafter *20 Years Later*].

²⁰⁰ Robertson, *10 Years Later*, *supra* note 199, at 434; Robertson, *20 Years Later*, *supra* note 199, at 154 (noting that plaintiffs were still losing eighty-two percent of cases ten years after *Reibl*).

²⁰¹ Robertson, *20 Years Later*, *supra* note 199 at 154 (noting that plaintiffs lost eighty percent of the time in 2002 and eighty-six percent of the time in 2001).

²⁰² *Id.* at 155-57.

²⁰³ *Id.* at 157.

²⁰⁴ See Part II *supra* for a discussion about lower courts in the United Kingdom that have chosen to reject the plaintiff’s testimony entirely because of a credibility concern. While Robertson’s theory is plausible, he is unable to identify any reduction in the rate of successful lawsuits derived from this apparent shift in philosophy. See *id.* at 154 (identifying a similar success rate for plaintiffs ten and twenty years after *Reibl*).

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lawsuits – simply would not exist if all patients were adequately apprised of the risks of all treatments.

There are indications that health care providers have been adapting to this legal reality, providing informed consent both because patients are entitled to it and because the medical profession has an interest in avoiding the liability that non-disclosure can create. Consider, for example, an article published by attorney Eleanore A. Cronk in 2001 at the request of the Royal College of Dental Surgeons of Ontario.²⁰⁵ The committee reached out to Ms. Cronk to better “understand the current complex legal and ethical considerations” surrounding the doctrine of informed consent in dentistry.²⁰⁶ Among many other key points, the article implores the dentists not to rely on form letters, to keep full and complete medical records of every discussion, to ensure every risk that must be disclosed actually is discussed (and she lists all the various risks that are important), to disclose all available alternatives, and to give the patient time to consider the alternatives.²⁰⁷ Ms. Cronk then summarized the legal standards and impressed upon the dentists the importance of following the criteria to avoid liability.²⁰⁸

This example by Ms. Cronk is not unique to the dentistry profession, nor is it likely to be unique to Canadian healthcare providers generally. It suggests that healthcare providers are concerned enough to request that lawyers speak personally to them, and provides them with a ‘how-to’ brochure on avoiding malpractice liability deriving from a lack of informed consent. The natural result of these encounters is that physicians will be less likely to fail to reveal material risks. Physicians are in a significantly better position to understand the risks associated with any course of treatment, be it surgery or prescribing drugs to patients. Even if the physician does not fully understand the risks associated with a particular drug, they are likely in the best place to become more familiar with the risks associated with those drugs. The physicians could also work with their staff to educate them on the risks associated with each drug, and the physician could thereafter discuss the particular risks with the individual patients. These developments seem to be occurring under the Canadian approach. The subjective test has given physicians enough concern that they now reveal many more risks to patients. While the result has apparently been more losses in court for plaintiffs, the societal gain from these disclosures has apparently been significantly positive.

VI. FROM POSITIVE LAW TO POLICY

We have now considered a variety of approaches to the doctrine of informed consent. As has become apparent, the doctrine is still evolving, and results in the countries considered have been inconsistent and unclear. Most significantly, it

²⁰⁵ Eleanore A. Cronk, *Informed Consent in 2001: “Don’t Leave Home Without It”*, DISPATCH, June 2001, at 1.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 2-4.

²⁰⁸ *Id.* at 4-8.

has often failed patients. Even within the United States, courts are faced with an array of possibilities, including using a traditional “modified-objective” approach, that compromises the autonomy it ostensibly champions. In the United Kingdom, the professional standard still reigns supreme, though it has been eroded over time. The professional standard essentially allows physicians to create their own standard of care, which compromises the very idea of informed consent. In Taiwan, the doctrine has evolved to better protect patients, as the courts have begun to question unblinking reliance on the informed consent forms, which were themselves a marked advance over the “physician knows best” attitude that had so long held sway. As seen in *Malinowski*, the forms simply do not take into account the particular patient’s issues. Ignoring the particular plaintiff’s position is contrary to the theory that the patient should be apprised of all material risks in order to make an informed decision. Therefore, the Canadian approach is best suited to address informed consent claims stemming from injuries associated with unwarned risks from procedures ranging from surgery to prescription drugs.

The theory of informed consent in the United States must further evolve to properly protect the patients. The first major step for the doctrine was in 1972 in *Canterbury*, when the judiciary moved away from the restrictive professional standard and adopted a more plaintiff-friendly approach. Like any new doctrine, though, informed consent had a great distance to cover before it could validate its promise of safeguarding patient autonomy. *Canterbury* itself created some of the problem by steadfast reliance on objective standards for both materiality and causation. These compromises were understandable in light of the bold course the court was charting, yet compromises they surely were. Another issue that later became evident was that even the animating philosophy of *Canterbury* – “[true] consent...is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgeably the options available and the risks attendant upon each” – could too easily be occluded by courts that emphasized too heavily the factual situation in that case.²⁰⁹ As we have seen, state legislatures began to address the issue, but no statutes explicitly included all medical treatments in the doctrine. In many cases, then, patients were reliant on the courts to expand the doctrine beyond the surgical context. As we have demonstrated, some states have continued to resist this expansion. We hope to have made the case that these restrictions, notably in the area of prescription drugs, are unjustified.

It is now past time for another major change in informed consent doctrine, making it more patient-friendly by adopting the approach that has taken hold in Canada. The effect of this shift in Canada was rapid: the “modified-objective” approach was adopted in the 1980s, and since that time there have been dramatic shifts in favor of the patient. In the U.S., by contrast, although the framework of informed consent has been in place even longer, we have not seen similarly progressive changes to the doctrine.

The only way patients will be properly protected in the United States, the United Kingdom, Taiwan and beyond is by adopting the Canadian approach to informed consent. While it is often referred to as a “modified-objective” approach (much like it is in the United States), in the past twenty years it has become sig-

²⁰⁹ *Canterbury v. Spence*, 464 F.2d 772, 780.

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nificantly more subjective, especially when it comes to causation. The importance should not be understated. Very few cases alleging a failure to warn fail at the materiality stage, which is likely because of the simple fact that the plaintiff has been seriously injured – thus, there was some risk of substantial injury, as demanded by the materiality rule. But plaintiffs continue to struggle to prove that they would have rejected the treatment had they been apprised of these risks. As we have noted, causation is still an issue under the progressive Canadian approach, but it is because *more* patients are being adequately apprised of risks. The approach in Canada might better be labeled *patient* friendly instead of *plaintiff* friendly. To the extent this assumption could be further empirically validated, it would signal a great success: more information (benefiting patients) and fewer lawsuits (benefiting health care providers, and, ultimately, patients as well).

The authors urge that this model be adopted in the United States and, to the extent feasible, in the other nations considered in this Article, and that the model be applied to all cases involving information exchanges between doctors and patients – including prescription drugs.

In adopting the factors used in Canada, the physician would have to spend more time with each patient to discuss the prognosis, the proposed treatment (including all risks that are likely and/or extremely dangerous) and fully apprise the patient of all reasonable alternatives. The primary issue here is requiring all physicians to fully communicate the risks and benefits of contemplated treatments. Given the ever-decreasing amount of time physicians have to spend with their patients, however, it is probably unrealistic to expect much more in the way of conversations (except perhaps for the very most serious situations). One way to speed up this process is to empower physicians' assistants, nurse practitioners, and possibly experienced nurses to discuss the general risks associated with the procedures or treatments being considered. The physician should then review the patient's medical chart and further apprise them of any risks personal to the patient. The physician is in the best place to understand the nature of these risks, and many patients surely do not understand the true risks associated with a recommended course of treatment, perhaps especially when complex drug interactions are involved.

The natural result of this extended duty is significant – more patients would understand the dangers associated with the range of options presented. This improved communication should lead to the results displayed in Canada – fewer successful cases, but better protections for the patients. The states and federal judiciary would be wise to recognize the successes of the Canadian model. Both countries used the same model in the 1970s and 1980s, but the American reluctance to grant patients more rights led to a stagnant doctrine that has not been materially improved by statutes. If the goal is fully to protect patients while reducing judicial caseloads, altering our understanding of the doctrine of informed consent is a good place to start. The shift towards subjectivity is easy given the framework of *Canterbury* and the ready, successful example from Canada. It may take time to fully embrace the subjective approach to causation given our inherent concerns about more litigation. However, once positive results are reported here in the U.S., we may see other nations quickly following suit.

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