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THE THIN FLAT LINE: REDEFINING WHO IS LEGALLY DEAD IN ORGAN DONATION AFTER CARDIAC DEATH

MAXINE M. HARRINGTON†

Well, it just so happens that your friend here is only mostly dead. There's a big difference between mostly dead and all dead . . . . Now, mostly dead is slightly alive.[1]

INTRODUCTION

By the end of 2008, a pilot program to recover organs from those dying on the streets of New York City could be in effect.[2] Under a federally-funded grant, the city is proposing to expand the donor pool by deploying a "rapid organ-recovery ambulance" to procure the organs of people who die of cardiac arrest outside hospitals.[3] According to newspaper reports, a special transplant ambulance would trail an emergency ambulance responding to notification of a victim with cardiac arrest.[4] After regular paramedics cease resuscitation efforts, the transplant ambulance team would wait five minutes and then attempt to maintain the viability of organs by administering drugs and by performing chest compressions to the victim until more extensive preservation efforts could be performed at the hospital and consent for donation from the next of kin could be obtained.[5]

Announcement of the program generated considerable controversy. One commentator referred to the organ-recovery ambulance as a "meat wagon."[6] An academic bioethicist pronounced the initiative "disgusting."[7] Another bioethicist voiced her concern that the victims of cardiac arrest might not be "irreversibly" dead when the organ transplant team took over minutes after resuscitation efforts ceased.[8]

Within a few months after the New York City initiative was announced, the New England Journal of Medicine reported that a team of

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† Professor of Law, Texas Wesleyan University School of Law; J.D., The George Washington University; B.A. University of North Dakota.

1. THE PRINCESS BRIDE (Twentieth Century-Fox Film Corporation 1987).
2. Cara Buckley, *City Plans Ambulance for Donor Collections*, N.Y. TIMES, June 1, 2008, at A35.
3. *Id.*; *see also* Rob Stein, *N.Y. Planning Special Ambulance to Recover Organs*, WASH. POST, May 24, 2008, at A01.
4. Buckley, *supra* note 2.
5. Stein, *supra* note 3, at A08.
6. William Saletan, *Meat Wagons*, SLATE, May 27, 2008, http://www.slate.com/blogs/blogs/humannature/archive/2008/05/27/meat-wagons.aspx.
7. Stein, *supra* note 3 (quoting Michael A. Grodin, director of bioethics at Boston University).
8. *Id.* (quoting Leslie M. Whetsine, a bioethicist at Walsh University).

physicians at Denver Children's Hospital had been able to transplant hearts from three infant donors who were not brain-dead, but who had been removed from mechanical life support.[9] Death was declared in one infant three minutes after cardiac and respiratory efforts ceased; in the other two infants, death was pronounced after seventy-five seconds of absent heart and lung functions.[10] Once death was declared, organ recovery began.[11] Again, some medical bioethicists were alarmed. George Annas, who has been called the "father of patient rights,"[12] warned: "The donors are not dead. I understand they would like us to change the definition of death, but they can't do that by themselves."[13] Robert M. Veatch, professor of medical ethics at Georgetown University, added:

> The whole issue is whether the infants from whom the hearts were taken were dead. It seems very clear to me that they were not . . . . I think it's illegal, and if it's illegal, what we're talking about is the physicians causing the death of the three patients, and that would be homicide. It's immoral. I think it should be stopped.[14]

Should we worry that organs are being removed from people who are just "mostly" dead? Law and medicine are grappling with a fundamental tension between, on the one hand, delaying the pronouncement of death until there is no chance of recovery and, on the other hand, increasing the quantity and quality of organs for transplant by pronouncing death as soon as possible. This article examines whether, in the relentless pursuit of organs, medicine has gone too far in tinkering with the definition of death.

Most cadaveric organs are recovered from donors who meet brain death criteria.[15] There is, however, a growing imbalance between the number of brain-dead donors and the demand for organs. The New York City study and the Denver Children's Hospital protocol are recent exam-

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9. Mark M. Boucek et al., *Pediatric Heart Transplantation After Declaration of Cardiocirculatory Death*, 359 NEW ENG. J. MED. 709, 711, 713 (2008). As an indication of the importance of this debate, The New England Journal of Medicine also featured three perspective reports, an editorial, and a videotaped roundtable discussion among bioethicists, all of which are available on the journal's website at http://content.nejm.org/cgi/content/full/359/7/669/DC1 (last visited Dec. 19, 2008).

10. Boucek et al., *supra* note 9, at 711.

11. *Id.*

12. Boston University School of Public Health, George Annas, Biography, http://sph.bu.edu/index.php?option=com_sphdir&id=239&Itemid=340&INDEX=577 (last visited Dec. 19, 2008).

13. Rob Stein, *Infant Transplant Procedure Ignites Debate; Ethicists Question Strategy in Which Hearts are Removed Minutes After They Stop Beating*, WASH. POST, Aug. 14, 2008, at A01 (quoting George J. Annas).

14. *Id.* (quoting Robert M. Veatch); *see also* James L. Bernat, *The Boundaries of Organ Donation After Circulatory Death*, 359 NEW ENG. J. MED. 669, 671 (2008) (asserting that the protocol's shortened time period for determining death did not comply with prevailing medical standards).

15. *See* Eelco F.M. Wijdicks, *The Diagnosis of Brain Death*, 344 NEW ENG. J. MED. 1215, 1215-18 (2001) (describing the clinical criteria used to determine brain death, and noting that "brain death is the principle requisite for the donation of organs for transplantation").

ples of a movement in the transplant community to increase the supply of organs by using donors whose heart and lung functions have ceased, but who are not yet brain dead. This practice, known as donation after cardiac death (DCD), has proved controversial for a number of reasons.[16] This article addresses the threshold controversy: whether DCD donors are legally dead at the time organ procurement begins.

The Uniform Determination of Death Act (UDDA) and its state counterparts require the "irreversible" cessation of the functions of either (1) the entire brain or (2) the heart and lungs before a person can be considered dead.[17] There is a significant debate among scholars over whether the UDDA recognizes two kinds of death or only two different criteria, cardiac and neurological, under a unitary concept of death.[18] The proponents of DCD have resolved this controversy by recognizing donation after "cardiac death," where organs can be removed minutes after the heart stops, before brain death occurs.[19] Locating a precise moment of death is not an issue in most victims of cardiac arrest. It is a primary issue in DCD, however, because once the heart stops, there is a need to protect transplantable organs from deteriorating due to a lack of blood flow.[20] The quality of organs is less of a concern with patients who are declared dead under brain death criteria because the donor is maintained on artificial support after death to keep the heart and lungs functioning throughout organ procurement.[21] The DCD donor is not declared dead until life support is withdrawn or unsuccessful resuscitation is terminated.[22] The need for viable organs creates a conflict between ensuring that the donor patient is dead and removing organs as soon as possible.[23]

As DCD is generally practiced in the United States, death is declared two to five minutes after the cessation of cardiac and respiratory functions.[24] Once a diagnosis of cardiac death is made, transplant surge-

16. Concerns have also been raised about the pre-mortem administration of drugs and preservation of organs in the dying or newly dead donor; *see* Sarah D. Barber, *The Tell-Tale Heart: Ethical and Legal Implications of In Situ Organ Preservation in the Non-Heart-Beating Cadaver Donor*, 6 HEALTH MATRIX 471, 473, 487-89 (1996); *see also infra* note 111.

17. UNIF. DETERMINATION OF DEATH ACT § 1, 12 U.L.A. 589 (1980); *see also* discussion *infra* Part III.

18. Alexander M. Capron, *Brain Death—Well Settled Yet Still Unresolved*, 344 NEW ENG. J. MED. 1244, 1245 (2001).

19. Robert Steinbrook, *Organ Donation After Cardiac Death*, 357 NEW ENG. J. MED. 209, 209 (2007).

20. INST. OF MED., NON-HEARTING-BEATING ORGAN TRANSPLANTATION: PRACTICE AND PROTOCOLS 22 (2000), *available at* http://www.nap.edu/catalog.php?record_id=9700 [hereinafter 2000 IOM Report].

21. George J. Annas, *Brain Death and Organ Donation: You Can Have One Without the Other*, 18 HASTINGS CTR. REPORT 28, 28 (1988).

22. Robert D. Truog & Franklin Miller, *The Dead Donor Rule and Organ Transplantation*, 359 NEW ENG. J. MED. 674, 674 (2008).

23. 2000 IOM Report, *supra* note 20 (noting that the "need to maintain organ viability creates a strong incentive for an early determination of death").

24. *See* James L. Bernat et al., *Report of a National Conference on Donation After Cardiac Death*, 6 AM. J. TRANSPLANTATION 281, 282 (2006) (stating that most organ procurement organiza-

ons begin the process of organ retrieval. It is unlikely that the DCD donor satisfies the criteria for brain death at the time of organ procurement as it takes longer than five minutes for the entire brain to be irreversibly damaged from lack of oxygen.[25] The speed with which a diagnosis of death is made in the DCD context is done solely to facilitate organ procurement.[26] The closer the donor is to life, the more useful the organs will be to the recipient.

The debate over whether DCD donors are truly dead is not new but has surfaced mostly in the academic community. Recently, however, DCD has become a focus of media and public attention, as demonstrated by the debate over the New York City and Denver Children's Hospital initiatives. In addition, the Washington Post featured an article in March 2007 about a "new trend in organ donation," airing the concerns of some physicians and bioethicists about the controversial practice of donation after cardiac death.[27] In 2008, widespread publicity was given to the indictment of a transplant surgeon in California in connection with the alleged administration of excessive and inappropriate medications to a potential donor awaiting cardiac death after removal from a ventilator.[28]

These reports in the lay press mirror the expanding use of DCD to boost the supply of organs. Although the number of organs transplanted from cardiac death donors is still relatively small,[29] an increase is expected as hospitals and organ procurement organizations begin to develop DCD policies under mandate from oversight bodies.[30] Currently, most DCD donors are severely ill, hospitalized patients who do not meet the criteria for brain death but who have decided, either personally or through a surrogate, to refuse resuscitation and to withdraw life-sustaining medical care.[31] The controversy over whether patients are

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tions use a five minute interval, while three use an interval of two minutes and one uses four minutes). Pediatric DCD is relatively new, and with two donors, Denver Children's Hospital waited only seventy-five seconds after death to begin organ retrieval. *See* Boucek et al., *supra* note 9, at 711 and accompanying text.

25. *See* Barber, *supra* note 16, at 471-72 (defining brain death); *see also infra* notes 211-12 and accompanying text.

26. Rob Stein, *New Trend in Organ Donation Raises Questions*, WASH. POST, Mar. 18, 2007, at A03.

27. *Id.*

28. *See* Jesse McKinley, *Surgeon Is Accused of Hurrying Death of Patient to Get Organs*, N.Y. TIMES, Feb. 27, 2008, at A1 (reporting that transplant physician ordered excessive doses of morphine and Ativan and administered Betadine, a topical antiseptic, through a nasogastric tube). The physician was acquitted of all charges in December 2008, although the jury issued a note with its verdict stating that the case illustrated a need for clear standards in cardiac death donation. Jesse McKinley, *Surgeon Cleared of Harming Man to Rush Organ Removal*, N.Y. TIMES, Dec. 19, 2008, at A20.

29. In 2006, DCD organs comprised eight percent of the total cadaveric organs transplanted. HEALTH RESOURCES AND SERVS. ADMIN., 2007 ANNUAL REPORT OF THE U.S. ORGAN PROCUREMENT AND TRANSPLANTATION NETWORK AND THE SCIENTIFIC REGISTRY OF TRANSPLANT RECIPIENTS: TRANSPLANT DATA 1997-2006 Table 1.1 (2007), *available at* http://www.optn.org/AR2007/101_dh.pdf [hereinafter 2007 OPTN/SRTR ANNUAL REPORT].

30. *See infra* notes 145-147 and accompanying text.

31. Steinbrook, *supra* note 19, at 209-10.

"dead enough" for organ procurement has focused almost exclusively on this subset of potential donors, and little attention has been given to the distinct medical and legal concerns presented by the expansion of DCD to victims of sudden cardiac arrest outside the hospital. There is an obvious conflict between the right of these individuals to adequate emergency resuscitative efforts and the need to procure organs only minutes after cessation of the heartbeat. Removing organs a mere seventy-five seconds after the heart stops and transplanting hearts from donors who are not brain dead are two other recent developments in DCD that test the legal and ethical boundaries of organ transplantation. These controversial practices raise fundamental questions about the extent to which society is willing to tolerate the removal of vital organs from people we cannot be certain are dead in order to satisfy the escalating demand for organs. This article suggests that there is a need for a wider public debate on the permissible limits of DCD, but that a reasonable accommodation can be reached without compromising legal standards for determining death. There are ethically defensible reasons to allow this form of organ procurement in hospitalized patients voluntarily removed from life support, but absent broad social and political consensus, DCD, as currently practiced, should not be expanded to other potential donors.

Part I of this article begins with a brief background of solid organ transplantation and the statutory framework in which it operates. Part II explains the practice of donation after cardiac death and the history of its use in the United States. Part III examines whether DCD donors are legally dead under the UDDA. In Part IV, the article explores whether it is appropriate, given the speed with which death is determined, to apply DCD as it is currently practiced to those in sudden cardiac arrest or to children. Part V addresses the concern that DCD is causing the death of donors. Part VI suggests several approaches to resolve the controversy over the determination of death in DCD donors. This article concludes with a call for this debate to move beyond scholarly journals into the public arena.

I. A BRIEF HISTORY OF SOLID ORGAN TRANSPLANTATION AND THE LEGAL RESPONSE

The first successful human transplant was performed in 1954 when Dr. Joseph Murray transplanted a kidney from a live donor into his identical twin brother.[32] Eight years later, Dr. Murray performed the first transplant from a cadaveric donor.[33] Early cadaveric transplants, primarily kidneys, were from patients who had suffered traditional circulatory death, where the lungs and heart ceased functioning.[34] Survival

32. Peter I. Abt et al., *Donation After Cardiac Death in the US: History and Use*, 203 J. AM. COLL. SURGEONS 208, 209 (2006).

33. *Id.*

34. *Id.*

rates of recipients were poor, however, primarily due to problems with rejection and poor organ quality caused by warm ischemia time,[35] the period in which the donor's organs begin to die from lack of an oxygenated blood supply.[36]

In the 1960s and early 1970s, the use of neurological criteria to define death, which eventually came to be known as brain death, began to develop.[37] In 1959, French neurophysiologists coined the term, *le coma depasse*, or irreversible coma, to describe patients with irreparable brain damage.[38] By the mid-1960s, medical technology had progressed to the point where it was possible to keep patients with devastating neurological injuries alive.[39] In many of these cases, medical tests, including the electroencephalogram (EEG) demonstrated irreversible cessation of brain activity.[40] Some patients developed what is known as respirator brain, a condition where the heart and lungs can be kept functioning through mechanical ventilation, but where the brain tissue shows extensive signs of cell death.[41]

The burgeoning transplant community understood the implications of being able to recover organs that were still perfusing, or receiving a blood supply, through artificial support while the person was brain dead.[42] Recovering organs from a "heart-beating donor" would avoid the problem of warm ischemia time associated with circulatory death, which diminishes the quality of organs available for transplantation.[43] In other words, the donor's brain would be dead, but the transplantable organs still very much alive.

There was a perceived legal impediment to the removal of organs from those who had suffered brain death, however. State laws were silent or unsettled on the new phenomenon of neurological death.[44] The

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35. Warm ischemia time refers to the time in which the heart and lungs are not functioning adequately to ensure the flow of blood to the organs. Without blood, oxygen cannot be delivered and vital organs will die. 2000 IOM Report, *supra* note 20, at xv.

36. Abt et al., *supra* note 32, at 212.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 213.

41. PRESIDENT'S COMM. FOR THE STUDY OF ETHICAL PROBLEMS IN MED. AND BIOMEDICAL AND BEHAVIORAL RESEARCH, DEFINING DEATH: A REPORT ON THE MEDICAL, LEGAL AND ETHICAL ISSUES IN THE DETERMINATION OF DEATH 23 (1981), *available at* http://www.bioethics.gov/reports/past_commissions/defining_death.pdf [hereinafter DEFINING DEATH].

42. *Id.* (stating that there was a "new urgency" in the transplant community to recognize brain death).

43. *See* N.Y. City Health & Hosp. Corp. v. Sulsona, 367 N.Y.S.2d 686, 689 (Sup. Ct. 1975) (noting agreement of experts that kidneys obtained from donors who died from cardiopulmonary death resulted in an eighty-eight percent incidence of renal failure in the recipient, while kidneys from those who were brain dead were indistinguishable from those obtained from living donors).

44. *See id.* at 689-91 (addressing a petition for declaratory judgment that New York's definition of death included neurological death).

common law defined death as cardiac and respiratory failure.[45] Transplant surgeons who attempted to remove organs from persons who were brain dead but who still had heart and lung function, albeit mechanically, were concerned with possible criminal prosecution or civil suits.[46]

In 1968, the landmark work of the Ad Hoc Committee of the Harvard Medical School was published, which proposed irreversible coma as a new criterion for determining death.[47] The committee stated that its purpose was two-fold: to decrease the burden on families of keeping a person on continued medical support who had irreversible brain damage, and to facilitate the recovery of organs from such people because they were dead, not under traditional circulatory criteria, but under the new definition of brain death.[48] According to the Ad Hoc Committee, "[o]bsolete criteria for the definition of death can lead to controversy in obtaining organs for transplantation."[49] The Ad Hoc Committee's findings were quickly and widely accepted by the medical community. In 1970, Kansas adopted the first statute to formulate a legal definition of death to include brain death, as well as circulatory death.[50] Other states quickly followed suit and, by 1980, twenty-four states had enacted statutory definitions of death that incorporated brain death.[51]

Due to the failure of some states to enact brain death legislation and the lack of uniformity in existing state laws, in 1980 Congress convened an interdisciplinary body under the auspices of the President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research (President's Commission) to explore the advisability of developing a uniform definition of death.[52] In 1981, the President's Commission recommended adoption of the Uniform Determination of Death Act (UDDA).[53] The UDDA provides:

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45. *Id.* at 689; Lovato v. Dist. Court Tenth Judicial Dist., 601 P.2d 1072, 1076 (Colo. 1979).

46. *See Sulsona*, 367 N.Y.S.2d at 688 (noting that one of the reasons the petitioner sought court approval of a new definition of death was the fear of potential criminal or civil liability); *see also* Alexander Morgan Capron & Leon R. Kass, *A Statutory Definition of the Standards for Determining Human Death: An Appraisal and a Proposal*, 121 U. PA. L. REV. 87, 97-100 (1972) (discussing the need for a statutory definition of neurological death to allay professionals' fears of civil and criminal litigation).

47. AD HOC COMMITTEE OF THE HARVARD MEDICAL SCHOOL TO EXAMINE THE DEFINITION OF BRAIN DEATH, A DEFINITION OF IRREVERSIBLE COMA, 205 JAMA 85, 85 (1968) [hereinafter Ad Hoc Committee]. The report uses the terms irreversible coma and brain death coextensively. *Id.* at 88. Later, the medical community would recognize that these diagnoses are not interchangeable. *See* DEFINING DEATH, *supra* note 41, at 25.

48. Ad Hoc Committee, *supra* note 47, at 85.

49. *Id.*

50. Capron & Kass, *supra* note 46, at 108-09.

51. RICHARD M. ZANER, DEATH: BEYOND WHOLE-BRAIN CRITERIA 2 (Richard M. Zaner ed., Kluwer Academic Publishers 1988).

52. DEFINING DEATH, *supra* note 41, at 1, 7-8; *see also supra* at 24-25 (the Commission stated that it was also necessary to clarify the "misleading" term, irreversible coma, used by the Ad Hoc Committee in its 1968 report).

53. DEFINING DEATH, *supra* note 41.

> An individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem, is dead. A determination of death must be made in accordance with accepted medical standards.[54]

The President's Commission was aware of the impact its recommendations would have on the burgeoning field of organ transplantation. If the UDDA were widely adopted, neurologically devastated patients with functioning hearts and lungs could be declared dead in every jurisdiction.[55] The Commission's hopes were soon realized. The UDDA or similar legislation was approved in almost every state, although the statutes are not entirely "uniform" in their definitions of death.[56] Legal recognition of brain death led to the almost universal abandonment of organ procurement from persons suffering a traditional death following cardiac arrest.[57] Because mechanical ventilation sustained the vital functions of the heart and lungs, the quality of organs recovered from brain-dead, heart-beating donors was vastly superior to organs impaired by the warm ischemia time associated with circulatory death.[58]

To promote organ donation, the Uniform Anatomical Gift Act (UAGA) was adopted in 1968, and subsequently revised in 1987 and 2006.[59] This act encourages cadaveric organ transplantation by authorizing the donation of an organ by an adult effective at death and by the next of kin after death.[60] The UAGA also immunizes physicians recovering organs in good faith from civil and criminal prosecution.[61] Every state has adopted one of the versions of the UAGA.[62]

As a mechanism for organizing organ donations and transplantation, the National Organ Transplant Act (NOTA) was passed in 1984.[63] NOTA established the Organ Procurement Transplantation Network (OPTN), which is charged with maintaining a waiting list of individuals

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54. UNIF. DETERMINATION OF DEATH ACT § 1, 12A U.L.A. 781 (2008).

55. DEFINING DEATH, *supra* note 41, at 7-8 (asserting that state variations in the definition of death are not acceptable).

56. *See generally* Jason L. Goldsmith, *Wanted! Dead and/or Alive: Choosing Among the Not-So-Uniform Statutory Definitions of Death*, 61 U. MIAMI L. REV. 871, 889-90 (2007) (noting differences in the language of state law definitions of death).

57. *See* Abt et al., *supra* note 32, at 213-14 (noting that after the recognition of brain death, almost every transplant center stopped retrieving organs from DCD patients); Michael A. DeVita, et al., *Observations of Withdrawal of Life-Sustaining Treatment from Patients Who Became Non-Heart-Beating Organ Donors*, 28 CRITICAL CARE MED. 1709, 1709 (2000) (stating that non-heart-beating donation was largely abandoned when it was found that organs from brain-dead donors had better survival).

58. *See* Abt et al., *supra* note 32, at 214.

59. UNIF. ANATOMICAL GIFT ACT §§ 1-11 (amended 2006), 8A U.L.A. 27, 19 (Supp. 2008).

60. *Id.* §§ 4, 9.

61. *Id.* § 18.

62. Joseph B. Clamon, *Tax Policy as a Lifeline: Encouraging Blood and Organ Donation Through Tax Credits*, 17 ANNALS HEALTH L. 67, 76 (2008) (stating that the UAGA has been adopted in one of its forms by all fifty states).

63. National Organ Transplant Act, 42 U.S.C §§ 273-274g (2008).

who need organs, matching potential recipients with organs, operating a system for procuring and allocating organs, and increasing the supply of organs.[64] In 1986, the United Network for Organ Sharing (UNOS) received the first (and only) federal contract to operate the OPTN and to coordinate the placement of organs and the collection of data on donor and transplant recipients.[65] The OPTN also includes a system of regional Organ Procurement Organizations (OPOs) that are responsible for procuring, testing, and distributing organs within their respective geographic areas.[66]

II. THE RENEWED INTEREST IN DONATION AFTER CARDIAC DEATH

The clinical field of transplantation was spurred not only by the shift in recovery of better quality organs from brain-dead, heart-beating donors, but also by improved techniques for preserving organs after their removal and by the use of immunosuppressants to prevent organ rejection in recipients.[67] In particular, the discovery of cyclosporine in 1978 is thought to have revolutionized the field of transplantation by markedly improving survival rates in organ recipients.[68]

By the end of the twentieth century, solid organ transplantation had become the standard of care for treating organ failure, with recipients living longer with better quality of life than that offered by conventional treatments.[69] For example, numerous studies demonstrate that with end-stage renal failure, patients who receive kidney transplants have significantly higher long-term survival rates compared to those who remain on dialysis.[70]

Yet transplantation is "a victim of its own success."[71] With improvement in the lives of recipients, the demand for transplants has far outstripped the supply. Even if all brain-dead patients were suitable donors, the number of organs recovered could not meet the needs of all the patients on the transplant waiting list.[72] In 1997, there were a total of 9,539 donors; by 2006, that number had increased to 14,756, of which 8,024 were cadaveric donors and 6,732 were living donors.[73] During the

64. *Id.* § 274(b)(2).

65. United Network for Organ Sharing: Organ Donation and Transplantation, History of the UNOS Database, http://www.unos.org/data/about/history.asp (last visited Dec. 18, 2008).

66. 42 U.S.C. §273(b)(3).

67. Abt et al., *supra* note 32, at 214.

68. *Id.* at 208, 214.

69. *Id.* at 214.

70. *See, e.g.*, J.E. Locke et al., *Outcomes of Kidneys from Donors After Cardiac Death: Implications for Allocation and Preservation*, 7 AM. J. TRANSPLANTATION 1797, 1803 (2007) (noting a sixty-eight percent reduction in the long-term mortality of transplanted patients over those on dialysis).

71. Mark D. Fox, *Stewards of a Public Trust: Responsible Transplantation*, 3 AM. J. BIOETHICS v, vi (2003).

72. Ellen Sheehy et al., *Estimating the Number of Potential Organ Donors in the United States*, 349 N. ENG. J. MED. 667, 673 (2003).

73. 2007 OPTN/SRTR ANNUAL REPORT, *supra* note 29, at Table 1.1.

same period, however, the waiting list[74] increased by more than 40,000: from 55,501 in 1997 to 98,263 in 2006.[75]

In response to the growing imbalance between supply and demand, there has been a surge of new initiatives to increase the donor pool. The National Organ Donation Breakthrough Collaborative was established in 2003 to develop best practices for hospitals in order to achieve organ donation rates of seventy-five percent, up from an average of forty-three percent.[76] Medicare conditions of participation require each hospital to notify its OPO of all patient deaths and imminent deaths so that the OPO has the opportunity to determine the suitability of potential organ donors.[77] The deceased donor pool has been expanded through the use of "marginal" organs, so that older donors or those with an underlying disease are being increasingly used to fill the need for cadaveric organs.[78] The use of living donors, primarily for kidneys, increased by seventy percent from 1997 through 2004, but has fallen slightly in the last several years.[79] Despite current law prohibiting the sale of organs,[80] there have been proposals to financially incentivize donors, either through payments to the donor before death or the family after death, although none of these controversial recommendations has been implemented.[81] Xenotransplantation, the transplantation of organs from non-humans to humans, is in the experimental stage but its use is severely limited by unknown health risks and ethical questions.[82]

Finally, pressure to increase the supply of organs caused the transplant community to re-examine organ retrieval from patients who were not brain-dead but whose circulatory functions had stopped.[83] By the end of the twentieth century, the once seemingly insurmountable problems associated with warm ischemia time and the rapid deterioration of

74. 2007 OPTN/SRTR ANNUAL REPORT, *supra* note 29, at Chapter I (noting that some patients may be listed on multiple waiting lists, and the total number of registrations is higher than the number of unique patients); *id.* (stating that thirty percent of those on the waiting list are deemed "inactive" because they are not immediately eligible for an organ if one becomes available); *see also* Rob Stein, *A Third of Patients on Transplant List Are Not Eligible,* WASH. POST. Mar. 22, 2008, at A01 (questioning the reliability of the waiting list numbers).

75. 2007 OPTN/SRTR ANNUAL REPORT, *supra* note 29, at Table 1.3.

76. *See* U.S. DEP'T OF HEALTH AND HUMAN SERVS. HEALTH RESOURCES & SERVS. ADMIN. OFFICE OF SPECIAL PROGRAMS, DIV. OF TRANSPLANTATION No. 240-94-0037, THE ORGAN DONATION BREAKTHROUGH COLLABORATIVE: BEST PRACTICES FINAL REPORT (2003), *available at* http://www.njha.com/onit/pdf/930200530512PM71.pdf.

77. 42 C.F.R. § 482.45(a)(1) (2003).

78. Craig R. Smith & Jeffrey A. Lowell, *Ethical Considerations in Organ Donation and Transplantation*, 15 J. INTENSIVE CARE MED. 231, 235 (2000).

79. 2007 OPTN/SRTR Annual Report, *supra* note 29, at Table 1.1.

80. National Organ Transplant Act, 42 U.S.C § 274e (2008).

81. *See generally* Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America's Organ Shortage*, 13 GEO. MASON L. REV. 69, 108-118 (2004) (summarizing financial initiatives to increase organ donation).

82. *See generally* Margaret A. Clark, *This Little Piggy Went to Market: The Xenotransplantation and Xenozoonose Debate*, 27 J.L. MED. & ETHICS 137, 138-145 (1999) (discussing the medical, ethical, and legal issues raised by xenotrasplantation).

83. Abt et al., *supra* note 32, at 214.

organs after cardiac arrest were being alleviated with improved donor preparation and organ preservation methods.[84] These donors were originally referred to as non-heart-beating donors (NHBDs), in contrast to the heart-beating donors who suffered brain death.[85] Donation from a non-heart-beating donor is now termed donation after cardiac death (DCD) and that term is used throughout this article to provide a consistent terminology.[86]

Legal developments in end-of-life care also spurred renewed interest in DCD. In 1968, at the time of the Ad Hoc Committee's recognition of brain death, physicians were urged not to remove respirators before a declaration of death was made as this could subject them to legal jeopardy.[87] Beginning with the *Quinlan* case in 1976,[88] through *Cruzan* in 1990,[89] the "right to die" debate had evolved from a nascent movement to widespread acceptance of a patient's right to withdraw life-sustaining technology. Patients who were terminally ill but not brain-dead and who requested or had their surrogates request removal of extraordinary care were now a potential source of organs.[90]

Organ donors who die from cardiac death rather than brain death are categorized as either controlled or uncontrolled donors.[91] In the controlled group are those who are neurologically damaged or severely ill, usually on a ventilator, and who have a planned withdrawal from life-sustaining treatment because of the futility of further care.[92] The uncon-

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84. *Id.*

85. *Id.*

86. One critic has alleged that the terminology was changed from NHBD to DCD as a marketing ploy in the face of uncertainty in determining death. Mohammed Y. Rady et al., *Non-Heart Beating, or Cardiac Death, Organ Donation: Why We Should Care*, 2 J. HOSP. MED. 324, 328 (2007). The Institute of Medicine has suggested that the terminology be further refined to donation after circulatory determination of death (DCDD). COMMITTEE ON INCREASING RATES OF ORGAN DONATION, ORGAN DONATION: OPPORTUNITIES FOR ACTION 128 (James F. Childress & Catharyn T. Liverman, eds., 2006), *available at* http://www.iom.edu/CMS/3740/24738/34249.aspx [hereinafter 2006 IOM REPORT].

87. Ad Hoc Committee, *supra* note 47, at 339.

88. *In re Quinlan*, 355 A.2d 647, 663 (N.J. 1976), *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976) (holding that a patient has a constitutional right of privacy to terminate life-sustaining treatment).

89. Cruzan v. Dir. Mo. Dep't of Health, 497 U.S. 261, 279 (1990) (assuming that a competent person has a constitutionally protected liberty interest in refusing life-sustaining medical treatment).

90. ROGER HERDMAN & JOHN T. POTTS, DIVISION OF HEALTH CARE SERVICES, INSTITUTE OF MEDICINE, NON-HEART-BEATING ORGAN TRANSPLANTATION MEDICAL AND ETHICAL ISSUES IN PROCUREMENT 24 (1997), *available at* http://www.nap.edu/catalog.php?record_id=6036 [hereinafter 1997 IOM REPORT].

91. *Id.* at 1. These categories are derived from the classification of non-heart-beating donors developed at the University Hospital Maastricht in the Netherlands. *Id.* at 25. The Maastricht categories include: 1. Dead on arrival; 2. Unsuccessful resuscitation; 3. Awaiting cardiac arrest; and 4. Cardiac arrest while brain dead. G. Koostra et al., *Categories of Non-Heart-Beating Donors*, 27 TRANSPLANTATION PROC. 2883, 2883 (1995). Category three is controlled; the other categories are uncontrolled. *Id.* at 2893-94. A fifth uncontrolled donor category, unexpected cardiac arrest in a critically ill patient, was recently added. Dale Gardiner et al., Editorial, *Non-Heart-Beating Donation—Solution or a Step Too Far?*, 62 ANESTHESIA 431, 431 (2007).

92. 1997 IOM REPORT, *supra* note 90, at 1.

trolled donor includes those who experience an out-of-hospital cardiac arrest or who are hospitalized and suffer an unexpected cardiac arrest and are not successfully resuscitated.[93]

Most DCD donors are in the controlled group, where the timing of cardiac arrest and the retrieval of organs are carefully planned events and provide transplant surgeons with the shortest time for the retrieval of viable organs.[94] To approach the success rates of transplantation with organs from brain-dead, heart-beating donors requires a short interval to death and a prompt declaration of death followed by rapid organ retrieval and cold preservation of the organs.[95] With the consent of the patient or patient's family, physicians remove the ventilator and other life support in or near an operating room, waiting for the pulse and respirations to cease.[96] Once that occurs, death is declared quickly, usually within two to five minutes, and the organ procurement process immediately begins.[97] Occasionally, circulation does not promptly cease after life support has been withdrawn.[98] If cardiopulmonary arrest does not occur within a short period of time after removal of the ventilator, organ quality diminishes.[99] Most DCD protocols provide that if death does not occur within one hour, organ recovery will not be carried out.[100] In that event, the patient is returned to a patient care unit to await death.[101]

In the United States, the University of Pittsburgh Medical Center was one of the first to revisit the non-heart-beating donor as a possible source of organs. In 1992, the transplant center produced a protocol for recovering organs from persons who were not brain dead but who were expected to die from cardiac arrest following the voluntary withdrawal of life support.[102] A central piece of this policy (commonly known as the "Pittsburgh protocol") was that procurement of organs could not begin until the donor suffered irreversible cessation of cardiopulmonary function, which required an observation time of two minutes following cardiac arrest before the declaration of death could be made and the retrieval process begun.[103]

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93. *Id.*
94. *Id.* at 24.
95. *Id.* at 26.
96. DeVita et al., *supra* note 57, at 1710 (describing the process of organ procurement at the University of Pittsburg Medical Center).
97. *Id.*
98. 2000 IOM REPORT, *supra* note 20, at 21.
99. *Id.*
100. *Id.*
101. *Id.*
102. University of Pittsburgh Medical Center Policy and Procedure Manual, Subject: Management of Terminally Ill Patients Who May become Organ Donors After Death, *reprinted in* PROCURING ORGANS FOR TRANSPLANT, THE DEBATE OVER NON-HEART BEATING CADAVER PROTOCOLS, app. at 235 (Robert M. Arnold et al., eds., 1995) [hereinafter PROCURING ORGANS FOR TRANSPLANT].
103. *Id.* at 240. Clinical tests to confirm death included pulselessness, apnea, and electrocardiographic criteria. *Id.*

Concerns in the medical community about the two-minute length of time between cessation of circulatory functions and the declaration of death were promptly raised. An entire issue of the Kennedy Institute of Ethics Journal was devoted to the controversies surrounding the Pittsburg protocol.[104] Renée Fox, who was a member of the President's Commission, called the plan macabre and an "ignoble form of cannibalism."[105] The primary concern, which persists to this day, is that the period of time between the cessation of circulation and the declaration of death is too short to be certain the patient is irreversibly dead before organs are harvested.

Following the lead of the Pittsburgh Medical Center, the Cleveland Clinic developed a similar proposal for recovering organs from DCD donors.[106] However, a professor of bioethics at Cleveland State University went to the local county prosecutor, alleging that under the draft protocol, the Clinic intended to hasten patients' deaths in order to procure their organs for transplant.[107] In March 1997, *Sixty Minutes*, a national television show, aired a segment in which it claimed that patients at the Cleveland Clinic were being killed for their organs.[108] Calling it a "matter of grave concern," the assistant district attorney commenced an investigation into the organ procurement policy.[109] The protocol was not implemented.[110]

In response to concerns about DCD, the Institute of Medicine (IOM) was asked by the U.S. Department of Health and Human Services in 1997 to review the medical and ethical issues associated with non-heart-beating donation.[111] In its report, the IOM acknowledged the "relentlessly increasing need for organs for patients with life-threatening organ failures . . . ."[112] The number of DCD donors was a very small component of the cadaveric donors: in 1996 there were only sixty-five DCD donors out of 5,416 dead donors.[113] The majority of OPOs recov-

104. 3 KENNEDY INST. ETHICS J. 103 (1993). The articles in this issue were later published in PROCURING ORGANS FOR TRANSPLANT, *supra* note 102.

105. Renée Fox, *"An Ignoble Form of Cannibalism": Reflections on the Pittsburgh Protocol for Procuring Organs from Non-Heart-Beating Cadavers, in* PROCURING ORGANS FOR TRANSPLANT, *supra* note 102, at 155, 162.

106. George J. Agich, *From Pittsburgh to Cleveland: NHBD Controversies and Bioethics,* 8 CAMBRIDGE Q. HEALTHCARE ETHICS 269, 269 (1999).

107. *Id.*; *see also* Gina Kolata, *Controversy Erupts over Organ Removals*, N.Y. TIMES, Apr. 13, 1997, at A28.

108. Agich, *supra* note 106, at 269.

109. Kolata, *supra* note 107.

110. James M. DuBois & Michael DeVita, *Donation After Cardiac Death in the United States: How to Move Forward*, 34 CRITICAL CARE MED. 3045, 3045 (2006) (stating that the Cleveland Clinic DCD protocol was never implemented).

111. 1997 IOM REPORT, *supra* note 90, App. A. In addition to the criteria for determining death, the IOM discussed ethical issues involving DCD policies and oversight, pre-and post-mortem medical interventions, conflicts of interest, and interaction with families. *Id.* at 47-57, 61-63.

112. *Id.* at 8.

113. *Id.* at 10, 27, Table 4.1A.

ered no organs from DCD donors.[114] Citing the more than 50,000 people on the waiting list, the IOM concluded it was unlikely that in the future, brain-dead donors or living donors would be able to satisfy the increasing demand.[115] Returning to DCD donors as a source of organs was one way the transplant community could address the shortage of organs. A study cited by the IOM predicted that use of controlled donors could increase cadaver donors by at least twenty-five percent.[116]

In 1997, there were twenty-nine OPOs (out of sixty-three) that had a written DCD protocol.[117] The standards for determining the irreversibility of cardiopulmonary death varied considerably: several protocols required very specific criteria such as confirmation of a zero pulse, apnea,[118] unresponsiveness to verbal stimuli, and absence of electrical activity for two minutes on the electrocardiogram (ECG).[119] Others were vague as to the criteria for determining death.[120] Although prominent European programs required a ten minute cessation of cardiopulmonary function before organ procurement,[121] U.S. guidelines were either silent or varied significantly with respect to the period of time organ retrieval could begin after heart stoppage. Some allowed organ retrieval immediately after cardiac arrest, while others mandated a waiting period ranging from sixty seconds to five minutes.[122]

While voicing its support for increasing the supply of organs from this patient population, the IOM suggested that DCD policies as to the timing and criteria for determining death be uniform among OPOs and hospitals.[123] The IOM noted the difficulties surrounding the timing of events and the requirement of "irreversible" cardiac death.[124] A lack of adequate safeguards in declaring death could leave transplant programs open to charges of orchestrating a premature death and retrieval of organs.[125] The IOM recommended a waiting period of at least five minutes after the cessation of heart and lung activity as demonstrated by ECG

114. *Id.* at 31.

115. *Id.* at 14. At the end of 1996, there were 50,047 people on the transplantation waiting list. *Id.* at 11. During the same year, there were 8,940 donors, of which 5,416 were dead donors and 3,524 were living donors. *Id.* at 10.

116. *Id.* at 30.

117. *Id.* at 34-35.

118. Apnea is the absence of breathing. STEDMAN'S MED. DICTIONARY 118 (28th ed. 2006).

119. 1997 IOM Report, *supra* note 90, at 40.

120. *Id.*

121. *Id.* at 58; *see* R. Schlumpf, et al., *Transplantation of Kidneys from Non-Heart-Beating Donors: Protocol, Cardiac Death Diagnosis, and Results*, 28 TRANSPLANTATION PROC. 107, 107 (1996) (stating that protocol of University of Zurich Hospital is to wait ten minutes after the diagnosis of cardiac death before further organ retrieval procedures are implemented); G. Koostra, *Statement on Non-Heart-Beating Donor Programs*, 27 TRANSPLANTATION PROC. 2965, 2965 (1995) (reporting that the first international workshop on non-heart-beating protocols reached consensus on a ten-minute interval after cardiac arrest to ensure the dead donor rule).

122. 1997 IOM Report, *supra* note 90, at 40-41.

123. *Id.* at 48.

124. *Id.* at 57.

125. *Id.*

changes consistent with absent heart function and zero pulse activity as monitored by an arterial catheter before a declaration of death is made and organ retrieval commences.[126] A two-minute or shorter interval from cardiopulmonary cessation to declaration of death was deemed by the IOM as too short to ensure irreversibility.[127] The IOM's recommendation for a five-minute interval applied solely to controlled donors who decline resuscitation after the withdrawal of life support; no suggestions were made as to the appropriate waiting period for uncontrolled donors, who, as the IOM noted, present a different set of ethical and legal challenges.[128]

Despite the IOM's imprimatur and the growing demand for organs, over the next few years the process of harvesting organs from non-heart-beating donors failed to gain wide acceptance.[129] In an effort to promote DCD and to overcome obstacles to its implementation, the IOM issued a follow-up report in 2000, encouraging the development of DCD protocols.[130] No new ground was broken by this report. The IOM reiterated its original proposal for consistency among DCD protocols in the determination of death,[131] although it appeared to retreat from its 1997 report recommending a five minute interval from cardiopulmonary function until a declaration of death. In its 2000 report, the IOM recognized that "well considered" opinions may differ on the proper interval and that a two-minute wait was acceptable.[132]

Progress on DCD continued slowly. By 2003, out of sixty-nine OPOs, twenty-five performed no DCD retrieval, and only eight OPOs recovered organs from ten or more donors, which accounted for sixty-eight percent of all DCD donations in the United States.[133] In 2005, a national conference of experts ("consensus conference") was convened to assess the medical and ethical issues surrounding DCD.[134] The participants concluded that DCD was ethically acceptable and encouraged greater use of such protocols to increase the number of organs available for transplantation.[135] The consensus conference also found a short waiting period acceptable: a period of at least two minutes but not longer than five minutes should lapse between asystole,[136]or the lack of a heart-

126. *Id.* at 59, 61.

127. *Id.* at 59.

128. *Id.* at 5, 50; *see also infra* discussion Part IV.A.

129. 2000 IOM Report, *supra* note 20, at 9 (stating that less than three percent of donors were NHBDs and that there were only about a dozen active NHBD programs); *see also* DeVita, et al., *supra* note 57, at 1711 (noting the lack of support for non-heart-beating donation).

130. 2000 IOM Report, *supra* note 20, at 2.

131. *Id.* at 39.

132. *Id.*

133. Richard J, Howard, *A 10-Year Analysis of Organ Donation After Cardiac Death in the United States*, 80 TRANSPLANTATION 564, 565 (2005).

134. Bernat et al., *supra* note 24, at 281

135. *Id.* at 287.

136. Asystole is defined as the absence of heart contractions. STEDMAN'S MED. DICTIONARY, *supra* note 118, at 172.

beat, and recovery of organs.[137] Interestingly, rejecting the IOM's recommendation, the conference decided that it was not necessary to confirm loss of circulatory functions by electronic monitoring.[138] Thus, a person could be declared dead while still demonstrating cardiac electrical activity on an ECG.

In spite of its efforts, the IOM recognized that in 2006, there was still "general inertia" in implementing DCD.[139] Noting that DCD remained controversial, the IOM stated: "this committee believes that it is worth examining why three IOM committees and at least two international consensus conferences have all concluded that both controlled and uncontrolled [DCD] can proceed in an ethical manner yet so little has changed in clinical practice."[140]

One of the reasons for the lagging interest in DCD has been clinical resistance.[141] A survey published in 2006 revealed that bedside caregivers had numerous concerns about DCD.[142] Among the reservations listed by healthcare providers at all professional levels was a perceived similarity between DCD and "euthanasia."[143]

The lack of support for DCD may soon change. Following the efforts of the IOM and transplant community to encourage greater use of DCD, the Joint Commission, which accredits ninety-one percent of the nation's hospitals,[144] implemented a new standard, effective January 2007, requiring hospitals to develop policies addressing the recovery of organs from asystolic donors.[145] The Joint Commission does not require hospitals to provide DCD, but if the hospital and its medical staff do not wish to implement a DCD protocol, the hospital must justify its reasons in writing.[146] Finally, UNOS developed model elements for a DCD poli-

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137. Bernat et al., *supra* note 24, at 282.

138. *Id.*

139. 2006 IOM Report, *supra* note 86, at 136.

140. *Id.* at 144.

141. *See* M. Susan Mandell et al., *National Evaluation of Healthcare Provider Attitudes Toward Organ Donation After Cardiac Death*, 34 CRITICAL CARE MED. 2952, 2952 (2006).

142. *Id.* at 2955.

143. *Id.* The term euthanasia was not defined, and could mean either active or passive euthanasia.

144. JOINT COMM'N, JOINT COMMISSION FACT SHEETS, FACTS ABOUT JOINT COMMISSION ACCREDITATION AND CERTIFICATION, http://www.jointcommission.org/AboutUs/Fact_Sheets/facts_jc_acrr_cert.htm (last visited Dec. 19, 2008).

145. *See* JOINT COMM'N. OF ACCREDITATION OF HEALTHCARE ORGS., THE JOINT COMMISSION. HOSPITAL ACCREDITATION PROGRAM: HOSPITAL TRANSPLANT SAFETY, STANDARD TS.01.01.01, 2 (2008), *available at* http://www.jointcommission.org/NR/rdonlyres/E9943504-BFF5-42B1-9467-79FEC1D9BD66/0/HAP_TS.pdf. The provision was previously designated as a part of Standard LD 3.110. *See* Joint Comm'n. on Accreditation of Healthcare Orgs., *Approved: Revisions to Standard LD.3.110*, 26 JOINT COMM'N PERSPS. 7 (2006), *available at* www.sharenj.org/hospital%20professionals/pdf/JCAHO%20Standard%20LD%203%20110.pdf.

146. JOINT COMMISSION HOSPITAL ACCREDITATION PROGRAM: HOSPITAL TRANSPLANT SAFETY, *supra* note 145, at 2. The Joint Commission requirement for a hospital to justify a decision to forego a DCD policy became effective January 1, 2008. *See* Joint Commission, *Approved: Revi-*

cy for all OPOs and transplant centers, which became effective July 1, 2007.[147] The mainstream medical community has seemingly put its seal of approval on DCD.[148]

III. DEFINING DEATH UNDER THE UDDA

Despite the apparent consensus in the transplant community on the acceptability of DCD, a growing number of physicians and ethicists have raised concerns about this approach to recovering organs.[149] With a few notable exceptions, little attention has been given to this issue in the legal community.[150] In addressing the current practice of DCD, it makes sense to ask the question: does it matter whether we remove organs from those who may not be quite dead?

The "dead donor rule" has become entrenched in the transplant community: vital organs cannot be removed from a patient who is not dead and organ retrieval cannot be the cause of death.[151] A number of states codify the dead donor rule. For example, Maryland's version of the UDDA states: "A pronouncement of death under this section shall be made before any vital organ is removed for transplantation."[152] The UAGA also implicitly recognizes that donors must be dead before organ retrieval by providing that the gift of a vital organ is not effective until the death of the donor.[153] The UAGA does not define death and to de-

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sions to Standard LD.3.110, Element of Performance 12, for Critical Access Hospitals and Hospitals, 27 JOINT COMM'N PERSPS. 6, 14 (2007).

147. UNITED NETWORK FOR ORGAN SHARING, MODEL ELEMENTS FOR CONTROLLED DCD RECOVERY PROTOCOLS, UNOS Bylaws, app. B, attachment III (2007), *available at* http://www.unos.org/policiesandBylaws2/bylaws/UNOSByLaws/pdfs/bylaw_145.pdf.

148. In 2006, a national initiative in Canada also recommended the adoption of DCD programs, using a five minute observation period before death could be declared. *See* Sam D. Shemie et al., *National Recommendations for Donation After Cardiocirculatory Death in Canada*, 175 CAN. MED. ASS'N J. S1, S6 (Supp. 2006).

149. Jerry Menikoff, *Less Bull, Better Bioethics*, 9 DEPAUL J. HEALTH CARE L. 1133, 1146-47 (2005) (reviewing ALBERT R. JONSEN, BIOETHICS BEYOND THE HEADLINES: WHO LIVES? WHO DIES? WHO DECIDES? (2005)).

150. *See, e.g.*, Jerry Menikoff, *The Importance Of Being Dead: Non-Heart-Beating Organ Donation*, 18 ISSUES L. & MED. 3 (2002); James M. DuBois, *Is Organ Procurement Causing the Death of Patients?*, 18 ISSUES L. & MED. 21 (2002); Jerry Menikoff, *Doubts About Death: The Silence of the Institute of Medicine*, 26 J. L. MED & ETHICS 157 (1998).

151. Robert M. Arnold & Stuart J. Youngner, *The Dead Donor Rule: Should We Stretch It, Bend It, or Abandon It?*, *in* PROCURING ORGANS FOR TRANSPLANT, *supra* note 102, at 220-21. Although John Robertson is credited with coining the term, it is not altogether clear when the dead donor rule originated. *Id.* at 220. The idea that a donor has to been dead before vital organs are removed dates at least as far back as the late 1960s. *Id.*

152. MD. CODE ANN., HEALTH-GEN. § 5-202(b)(2) (West 2005); *see also* ALA. CODE § 22-31-3(a) (LexisNexis 2006) ("When a part of a donor is proposed to be used for transplantation . . . there shall be an independent confirmation of the death by another medical doctor licensed in Alabama."); HAW. REV. STAT. ANN. § 327C-1(b) (LexisNexis 2008) ("Death shall be pronounced before . . . any vital organ is removed for purposes of transplantation."); LA. REV. STAT. ANN. § 9:111(A) (2008) ("In any case when organs are to be used in a transplant, then an additional physician, . . . not a member of the transplant team, must make the pronouncement of death."); N.M. STAT. ANN. § 12-2-4(C) (LexisNexis 2008) ("Death is to be pronounced . . . before any vital organ is removed for purposes of transplantation . . . .").

153. UNIF. ANATOMICAL GIFT ACT, *supra* note 59, § 2(3).

termine who is dead from the absence of either brain or cardiac activity requires looking at the state law defining death.[154]

A. *The Meaning of "Irreversible"*

In accordance with the UDDA, most states define cardiopulmonary death as the "irreversible cessation of circulatory and respiratory functions" as determined by accepted medical standards.[155] Under the UDDA, death is not merely the lack of circulation and respiration; for death to occur, those functions must have irreversibly ceased. In recommending adoption of the UDDA, the President's Commission noted that a clinical assessment of irreversibility will change with new medical technology and capabilities. According to the Commission, "Many patients declared dead fifty years ago because of heart failure would have not experienced an 'irreversible cessation of circulatory and respiratory functions' in the hands of a modern hospital."[156]

Neither the UDDA nor its state counterparts define the term irreversible. The President's Commission was concerned primarily with expanding the concept of brain death, and failed to address what is meant by irreversibility of cardiopulmonary functions.[157] Further, although death is to be determined under the UDDA according to accepted medical standards, no uniform standard for irreversibility exists in the DCD context.[158] In most areas of medicine, determining the precise moment of death is not critical.[159] In DCD, however, minutes can mean the difference between a viable and nonviable organ.[160] For practical reasons, therefore, the point at which death becomes irreversible must be a very short interval after heart stoppage; ergo, the basis for a two to five minute waiting period.

The meaning of irreversible in the determination of death has been the subject of much debate among physicians and medical ethicists.[161]

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154. Comments to the 1968 version of the UAGA state:

> Subsection (b) leaves the determination of the time of death to the attending or certifying physician. No attempt is made to define the uncertain point in time when life terminates. The point is not subject to clear cut definition and medical authorities are currently working toward a consensus on the matter . . . . The real question is when have irreversible changes taken place that preclude return to normal brain activity and self sustaining bodily functions.

UNIF. ANATOMICAL GIFT ACT (1968) § 7, 8A U.L.A. 147 (2003).

155. *See* Goldsmith, *supra* note 56, at 903.

156. DEFINING DEATH, *supra* note 41, at 76.

157. *Id.* at 76-77 (discussing the degree of brain damage necessary to meet irreversible cessation of functions).

158. 1997 IOM Report, *supra* note 90, at 61; *see also* Stuart J. Youngner et al., *When is "Dead"?*, 29 HASTINGS CTR. REPORT 14, 16 (1999) (noting that controversy about the meaning of irreversibility has made it difficult to achieve consensus about the timing of death in DCD).

159. 1997 IOM Report, *supra* note 90, at 57.

160. *Id.*

161. *See, e.g.*, Youngner et al., *supra* note 158, at 16 (stating that although the term irreversible is used in both the law and clinical practice, its exact meaning is unclear); E.T. Bartlett, *Differences Between Death and Dying*, 21 J. MED. ETHICS 270, 274 (1995) (contending that the meaning of

The term irreversible implies that more than a mere cessation of heartbeat is necessary for one to be dead. Otherwise, people who suffer cardiac arrest and are resuscitated are being literally brought back from the dead. On the other hand, it is often difficult to determine the precise moment of physiological death.[162] Physicians recognize that dying is a process that culminates in a diagnosis of clinical death, yet the law requires a demarcation between life and death—the irreversible loss of function of the organism.[163] James L. Bernat, lead author of the 2005 consensus conference report, argues that death is an event, not a process.[164] He believes that "[b]ecause all organisms must be either alive or dead, death is an inherently discontinuous and instantaneous event."[165]

In both its 1997 and 2000 Reports, the IOM noted the difficulties associated with the term irreversibility in DCD. "[E]xisting empirical data cannot confirm or disprove a specific interval at which the cessation of cardiopulmonary function becomes irreversible."[166] The IOM reasoned that a five minute waiting period of time is an acceptable indication of irreversibility because a patient will not autoresuscitate after that period of time, i.e. the patient will not resume circulation on his own without medical assistance.[167] Although James M. DuBois asserts that "[t]he medical community has arrived at a moral certainty that circulatory and respiratory functions do not spontaneously resume . . . after they have been lost more than a couple of minutes,"[168] there is little scientific data to support this assumption.[169] The five studies on which the IOM relied were not direct studies of autoresuscitation and were conducted in the early to mid-twentieth century, with the last one performed in 1970.[170] In 1997, the IOM recommended further research to validate the

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irreversibility is unambiguous and means "not capable of being reversed or reversing."); Tom Tomlinson, *The Irreversibility of Death: Reply to Cole*, 3 KENNEDY INST. OF ETHICS J., 157, 161 (1993) (asserting that irreversibility is tied to the setting in which it is used); David J. Cole, *The Reversibility of Death*, 18 J. MED. ETHICS 26, 29 (1992) (arguing that the concept of irreversibility should be abandoned because it departs from conventional notions of death).

162. DEFINING DEATH, *supra* note 41, at 77 (recognizing that determining the time of death can be "troublesome").

163. *Id.* (noting that "death should be 'viewed not as process but as the event that separates the process of dying from the process of disintegration'").

164. James L. Bernat, *A Defense of the Whole-Brain Concept of Death*, 28 HASTINGS CTR. REPORT 14, 15 (1998).

165. *Id.* at 16.

166. 2000 IOM Report *supra*, note 20, at 22; *see also* 1997 IOM Report, *supra* note 90, at 58 (citing a lack of scientific certainty in defining the interval for irreversibility).

167. 2000 IOM Report, *supra* note 20, at 22-23.

168. DuBois, *supra* note 150, at 32.

169. *See* DeVita, *supra* note 57, at 1710 ("The empirical data are sparse but suggest that 2 mins, rather than 5 mins, may be sufficient to ensure irreversible cessation of cardiopulmonary function."); Youngner et al., *supra* note 158, at 15 (concluding that the data cited by the IOM on autoresuscitation are "seriously flawed" and "provided the weakest possible evidence for a recommendation"); Rady et al., *supra* note 86, at 325 (suggesting the true incidence of autoresuscitation is unknown because of underreporting).

170. 2000 IOM Report, *supra* note 20, at 22-23.

appropriate interval necessary to exclude the possibility of autoresuscitation.[171] Those studies have not been undertaken.[172]

Some critics of DCD do not dispute that the possibility of spontaneous recovery of circulation in controlled donors withdrawn from life support is exceedingly unlikely.[173] They do question, however, whether a body's inability to reverse circulation on its own carries the same meaning as irreversible cessation of function under the UDDA.[174] Irreversible cessation of cardiopulmonary function can be interpreted in different ways: (1) the patient's circulation will not spontaneously resume absent outside intervention (autoresuscitation); (2) the patient's circulation will not be reversed because the patient or family has chosen to withdraw life support and to refuse further resuscitative efforts; or (3) the patient's circulation can not be reversed, even with cardiopulmonary resuscitation (CPR) or other technical means.[175] The IOM and the transplant community have chosen a combination of the first and second constructs of irreversibility: after two to five minutes, the patient is unlikely to resume heart and lung functions on his own and circulation will not be artificially started at the request of the patient or family.[176] The reason the transplant community rejects the third meaning of irreversibility is obvious: the patient can not be irreversibly dead when organs are procured after just two to five minutes of asystole because many patients *can be* successfully resuscitated after this short an interval.[177]

Although the UDDA does not define "irreversible" or address organ donation, a few states favor a strict construction of irreversible in their death statutes. For example, Oklahoma law provides: "A determination of death must be made in accordance with accepted medical standards; provided however all reasonable attempts to restore spontaneous circulatory or respiratory functions shall first be made, prior to such declaration."[178] The Virginia statute also mandates that before a person is de-

171. 1997 IOM Report, *supra* note 90, at 59 (stating there was a need to collect data to conduct the appropriate interval).

172. 2000 IOM Report, *supra* note 20, at 24 (noting that the studies it recommended had not been undertaken); *see also* Bernat et al., *supra* note 24, at 282 (stating in 2005 consensus conference report that studies on the minimum period of observation necessary to rule out resuscitation had not been conducted).

173. The possibility of spontaneous circulation is an issue with uncontrolled donors in whom resuscitation has been attempted, however. *See infra* note 264 and accompanying text.

174. *See* Joanne Lynn, *Are the Patients Who Become Organ Donors Under the Pittsburgh Protocol for "Non-Heart-Beating Donors" Really Dead?*, *in* PROCURING ORGANS FOR TRANSPLANT, *supra* note 102, at 98-99 (stating that the two-minute waiting period in the Pittsburg protocol may not be wrong, but it is a departure from conventional notions of irreversibility).

175. 2000 IOM Report, *supra* note 20, at 24.

176. *Id.*

177. *See infra* notes 212, 213 and accompanying text.

178. OKLA. STAT. ANN. tit. 63, § 3122(2) (West 2004).

clared dead, a physician must confirm that all further attempts at resuscitation would be unsuccessful.[179]

There is a paucity of case law on the meaning of irreversible cessation of circulatory functions under the UDDA, but the little that exists appears to support a definition of irreversible that is at odds with current DCD practice. In a 1995 Michigan case, the district attorney charged the defendant with negligent vehicular homicide of an infant born after an emergency caesarean section.[180] The baby had no discernible heartbeat or respiratory effort for at least ten minutes after delivery.[181] Medical personnel were able to detect a heart rate fifteen minutes after birth and gasping respirations ten minutes later.[182] Under Michigan law, negligent homicide has to cause the death of a person, which excludes viable fetuses not born alive.[183] The defendant contended he could not be charged with homicide because the infant was not alive at birth.[184] The court struggled with how to define "alive" and looked to Michigan's version of the UDDA to determine if the child was born "dead."[185] The court concluded that because heart and respiratory functions were restored, albeit many minutes after delivery, the child did not have irreversible cessation of circulatory and respiratory functions at birth.[186] The fact that the child required medical intervention to restore circulation did not preclude a finding that the child was born alive. "Otherwise," the court reasoned, "the use of the word 'irreversible' becomes meaningless."[187]

A few other cases have reached a similar conclusion. In *Jefferson County v. Eastern Idaho Regional Medical Center (In re Johnson)*,[188] a hospital appealed from a finding by county commissioners that it was not entitled to payment for emergency resuscitation rendered to an indigent patient.[189] The commissioners found that due to an asthma attack, the patient had suffered cardiac arrest at 5:19 p.m. and had no pulse, blood

179. A person shall be medically and legally dead if . . . there is the absence of spontaneous respiratory and spontaneous cardiac functions and, because of the disease or condition which directly or indirectly caused these functions to cease, or because of the passage of time since these functions ceased, attempts at resuscitation would not, in the opinion of such physician, be successful in restoring spontaneous life-sustaining functions, and, in such event, death shall be deemed to have occurred at the time these functions ceased. VA. CODE ANN. § 54.1-2972(A)(1) (West 2005).

180. People v. Selwa, 543 N.W.2d 321, 322-23 (Mich. Ct. App. 1995).

181. *Id.* at 323 (citing expert testimony that the baby's Apgar scores at one, five and ten minutes following birth were zero, which meant that the heart rate and respiratory effort were virtually nonexistent).

182. *Id.* The infant was removed from the respirator after a few hours and declared brain dead. *Id.*

183. *Id.* at 324. The intentional or willful killing of an "unborn quick child" is, however, punishable as manslaughter. MICH. COMP. LAWS ANN. § 750.322 (West 2004).

184. *Selwa*, 543 N.W.2d at 323.

185. *Id.* at 325.

186. *See id.* at 328.

187. *Id.* at 328.

188. 883 P.2d 1084 (Idaho Ct. App. 1994).

189. *Id.* at 1085-86.

pressure, and respirations at 5:45 p.m.[190] The patient remained unresponsive during transport and arrived at the hospital cyanotic[191] and incontinent of urine and stool.[192] Despite the patient's status, the emergency room physician began resuscitation efforts that did not cease until 6:28 p.m.[193] The commissioners decided that because the patient was dead on arrival at the hospital, the treatment rendered was neither reasonable nor necessary.[194] Reversing the commissioner's denial of payment, the court stated:

> The only evidence which contrasted with the doctor's medical opinion was testimony from Johnson's husband who believed that his wife had died on their lawn while being attended by the paramedics. This lay testimony, however, was insufficient to supplant the expert opinion of the doctor as to whether there was a reasonable prospect that the cessation of Johnson's life functions *could be reversed* when she arrived at the hospital.[195]

A recent (and rather peculiar) case nicely illustrates the ordinary understanding of irreversibility. Prior to his wife's filing of an action for divorce, Joseph Finnegan had suffered three heart attacks, but had been successfully resuscitated each time.[196] He moved to dismiss the action on the ground the court had no jurisdiction to dissolve the marriage because he had died on three occasions and the parties' marriage ended upon his death.[197] The court rebuffed defendant's claims, noting that he still existed and that his "alleged deaths were neither permanent nor irreversible."[198]

The rapid declaration of death in DCD donors serves the broader goal of increasing the supply of organs. Yet, the price of this achievement is an acknowledgment among DCD proponents that death is contextual and irreversibility is defined by the intent of the patient.[199] To satisfy the dead donor rule, DCD proponents have to disregard the conventional understanding of irreversibility, i.e. whether it is possible to reverse a cardiac arrest. According to DCD supporters, because controlled donors choose to be withdrawn from life support and it would be unethical, if not legally wrong, to resuscitate these individuals, it is acceptable to construe irreversibility to mean that we *will not* reverse, not

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190. *Id.* at 1086.

191. Cyanosis is a dark bluish color of the skin due to a lack of oxygen. STEDMAN'S MED. DICTIONARY, *supra* note 118, at 475.

192. *In re Johnson*, 883 P.2d at 1086.

193. *Id.*

194. *Id.*

195. *Id.* at 1087 (emphasis supplied).

196. Finnegan v. Finnegan, No. FA074031514, 2008 WL 642627, at *1 (Conn. Super. Ct. Feb. 19, 2008) (unpublished).

197. *Id.*

198. *Id.* at *2.

199. *See* DuBois, *supra* note 150, at 32-33 (recommending that irreversibility be determined contextually).

that we *cannot* reverse, circulatory functions.[200] The irreversibility of heart function is thus a moral, not a physiological, reality that promotes the social objectives of organ transplantation.[201]

Further evidence that irreversibility may have a different meaning in the DCD context is the frequent substitution of the word "permanent" for "irreversible" cessation of respiration and circulation.[202] In accepting the weak construal of irreversibility to mean that resuscitation will not be attempted, the report of the 2005 Consensus Conference notes: "This meaning of 'irreversibility' also has been called the 'permanent' cessation of respiration and circulation. If data show that autoresuscitation . . . cannot occur and if there is no attempt at artificial resuscitation, it can be concluded that respiration and circulation have ceased permanently."[203]

Jerry Menikoff is highly critical of this pragmatic definition of irreversible circulatory death.[204] He suggests that the intent of the patient plays no role in the determination of death under the UDDA and that cardiopulmonary function is not irreversibly lost as long as it could conceivably be restored by resuscitation efforts.[205] Others agree. E.T. Bartlett is critical of the Pittsburgh protocol because it confuses being dead with dying.

> Surely, no one would seriously argue that the condition of a patient, two minutes post-arrest, who is unable on his own to return to a normal rhythm is, *ipso facto*, dead. If that were true then we should now refuse CPR on similar patients because they are dead![206]

Alexander Morgan Capron, executive director of the President's Commission, also argues that the weak construal of irreversibility is inconsistent with the UDDA because there are not two kinds of death—circulatory and neurological—but only one phenomenon based on different criteria.[207] "Thus," he concludes, "replacing 'irreversible cessation of

200. *See* John Robertson, *The Dead Donor Rule*, HASTINGS CTR. REPORT, Nov.-Dec. 1999, at 6, 12 ("[I]t is difficult to see why one should adopt a construal of irreversibility that ignores whether the patient could in fact legally or morally be resuscitated."); *see also* Tomlinson, *supra* note 161, at 162 (concluding that, in a patient who has refused life-sustaining care, "medical means for reversing cardiopulmonary arrest are no longer ethically significant possibilities").

201. *See* Tomlinson, *supra* note 161, at 162-63 (distinguishing between the physiological and functional criteria for death).

202. *See* 2006 IOM Report, *supra* note 86, at 146 (concluding that the term "permanent" loss of function is a reasonable interpretation of irreversibility under the UDDA).

203. Bernat et al., *supra* note 24, at 282.

204. *See* Jerry Menikoff, *Doubts About Death: The Silence of the Institute of Medicine*, 26 J.L. MED & ETHICS 157, 158-61 (1999).

205. *Id.* at 158.

206. Bartlett, *supra* note 161, at 274.

207. Alexander Morgan Capron, *The Bifurcated Legal Standard for Determining Death*, *in* THE DEFINITION OF DEATH CONTEMPORARY CONTROVERSIES 117, 133 (Stuart J. Youngner et al. eds., Johns Hopkins Univ. Press 1999).

circulatory of respiratory functions' with 'we choose not to reverse' flies in the face of the UDDA's underlying premise."[208]

In addition, lungs are increasingly being recovered from DCD donors with promising results,[209] and, with the Denver Children's Hospital program, we know there have been at least three DCD heart transplantations.[210] Whatever definition of irreversibility is chosen, it seems inconsistent to say that a person's heart and lungs irreversibly ceased when they are later transplanted and revived in recipients. Simply put, "[I]f a heart is restarted, the person from whom it was taken cannot have been dead according to cardiac criteria."[211]

B. Are There Two Kinds of Death Under the UDDA?

Adding to the controversy is the fact that the brain may still be functioning in DCD donors at the time of organ procurement. Irreversible brain damage usually does not occur within two to five minutes of asystole.[212] Many patients will survive and have normal neurological function if resuscitated at this point.[213] Even supporters of DCD admit that it may take ten to fifteen minutes of no circulation for the brain to suffer irreparable damage.[214] New resuscitative therapies demonstrate the possibilities that a patient may survive neurologically intact even after prolonged cardiac arrest[215] and that the poor survival rates and neurological outcomes associated with cardiac arrest may be due, at least in part, to outmoded clinical practices.[216]

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208. *Id.*

209. *See, e.g.*, David Gómez de Antonio et al., *Results of Clinical Lung Transplant from Uncontrolled Non-Heart-Beating Donors*, 26 J. HEART & LUNG TRANSPLANTATION 529, 533 (2007).

210. *See* Boucek et al., *supra* note 9, at 710. It is more accurate to say Denver Children's Hospital performed three modern DCD heart transplants. The first heart transplants performed by Christian Barnard in the late 1960s took place before the concept of brain death arose and it is not clear whether the patients satisfied brain death criteria. *See* MARGARET LOCK, TWICE DEAD: ORGAN TRANSPLANTS AND THE REINVENTION OF DEATH 80, 87 (Univ. Cal. Press 2002).

211. Robert M. Veatch, *Donating Hearts After Cardiac Death—Reversing the Irreversible*, 359 NEW ENG. J. MED. 672, 673 (2008).

212. *See* DEFINING DEATH, *supra* note 41, at 17 (recognizing that a four to six minute loss of blood flow does not irreversibly damage the brainstem). *See also* Lynn, *supra* note 174, at 99 (stating that "no one" would argue that the brain would cease functioning after only two minutes without oxygen).

213. *See* Lynn, *supra* note 174, at 99 (noting there would be a "legion" of examples of people surviving with intact brain function after cessation of the heartbeat for two minutes). In fact, one bioethicist has suggested that patients may not even be unconscious after only two minutes of asystole. Robert M. Veatch, *Consent for Perfusion and Other Dilemmas with Organ Procurement from Non-Heart Beating Donors*, *in* PROCURING ORGANS FOR TRANSPLANT, *supra* note 102, at 198.

214. *See* DuBois, *supra* note 150, at 34 (noting that it would probably take ten to fifteen minutes after arrest for the brain to die); *see also* DEFINING DEATH, *supra* note 41, at 16-17 ("If deprived of blood flow for at least 10-15 minutes, the brain, including the brainstem, will completely cease functioning.").

215. *See* Rady et al., *supra* note 86, at 327-28 (stating that patients resuscitated with extracorporeal perfusion are able to recover after much longer periods than two to five minutes of cardiorespiratory arrest); *see also infra* notes 278-85 and accompanying text.

216. *See* Myron K, Weisfeldt & Lance B. Becker, *Resuscitation After Cardiac Arrest, A 3-Phase Time-Sensitive Mode*, 288 J. AM. MED. ASS'N 3035, 3036 (2002) (stating that although sur-

In response to concerns that the brain is not irreversibly damaged after two to five minutes, proponents of a short waiting period point to the UDDA, under which, they assert, death can be determined by either the cessation of brain or cardiopulmonary functions.[217] Thus, loss of circulation is an independent determination of death, unrelated to whether there is irreversible loss of brain function.[218] Nonsense, says Menikoff. Accusing the IOM of "shading the truth,"[219] Menikoff contends the history of the UDDA conclusively dispels the notion there are two different kinds of death.[220] Death occurs when the organism ceases to function as a whole, and not when death comes to particular parts.[221] Citing an influential 1981 article by Capron and Leon R. Kass,[222] Menikoff states that "cardiopulmonary criteria were being retained [in the proposed statute] precisely because they gave clear results in the *easy* cases, where it was *quite evident* that brain function had ceased . . . ."[223] The President's Commission also looked upon death as a unitary phenomenon.[224] Consideration was given by the Commission to a statute that would contain only a definition of brain death but circulatory death was included as alternative criteria because "the loss of spontaneous breathing and heartbeat are surrogates for the loss of brain functions."[225]

Bernat, who today is an ardent supporter of DCD, previously criticized the Pittsburgh protocol because it was not clear the donors were brain dead after only two minutes.[226] He stated:

> Tests measuring circulation for the patient not receiving cardiopulmonary support assess the prolonged absence of heartbeat (asystole or ventricular fibrillation) and the prolonged absence of breathing (apnea). These are adequate tests for death in this context because they lead directly to the destruction of the brain and all other organs. The cessation of heartbeat and breathing must be prolonged because their absence must be of sufficient duration for the brain to become

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vival rates are poor after ten minutes of cardiac arrest, it is unknown whether this is due to irreversible injury or the failure of current therapeutic approaches).

217. *See* 2000 IOM Report, *supra* note 20, at 24 (asserting that there is no basis for a requirement that death by cardiopulmonary criteria must be of sufficient duration to cause the loss of brain function).

218. *Id.*; *see also* Bernat et al., *supra* note 24, at 281 (stating that the cardiopulmonary standard may be used when the donor can not meet brain death criteria).

219. Menikoff, *supra* note 204, at 162.

220. *Id.* at 160.

221. *See* ALEXANDER MORGAN CAPRON, *The Report of the President's Commission on the Uniform Determination of Death Act*, *in* DEATH: BEYOND WHOLE BRAIN CRITERIA, *supra* note 51, at 156.

222. *See* Capron & Kass, *supra* note 46, at 113-14.

223. Menikoff, *supra* note 204, at 159-60.

224. DEFINING DEATH, *supra* note 41, at 7.

225. *Id.* at 37.

226. Bernat, *supra* note 164, at 20.

> diffusely infarcted and for the cessation of heartbeat and breathing conclusively to be irreversible.[227]

Similarly, one of the originators of DCD, the Maastrich University Hospital in The Netherlands, rejects the Pittsburgh protocol, preferring instead a ten-minute waiting time before organ procurement "to be sure that the patient's brain is irreversibly damaged and an equivalent situation to brain death has been reached."[228]

Intertwined with the problematic issue of whether controlled donors have irreversible brain functions is the increasing post-mortem use of artificial resuscitation to ensure viability of the organs. One technique used to preserve organs in the donor is extracorporeal membrane oxygenation (ECMO), where blood is circulated through an oxygenating system.[229] ECMO, which is a modification of the heart-lung machine used during bypass surgery, is often employed as a resuscitative intervention in those who have experienced cardiac arrest.[230] In DCD, however, ECMO is begun after the patient is declared dead to restore blood flow and to preserve the organs.[231] Once the heart is perfused with oxygen through ECMO, it may begin to beat again.[232] A recent editorial in *Anesthesia*, a British journal, described an "astonished audience" at an international conference in London in 2006 when it heard that a medical center in the United States was experimenting with ECMO after only two minutes of pulseless activity, resulting in reanimation of the heart.[233] As critics have pointed out, claiming that the patient has died and then reversing the circulatory arrest seems to profoundly misapply the irreversibility requirement.[234]

Michael A. DeVita acknowledges that a problem in non-heart-beating donation is that brain function can return after cardiac arrest if resuscitative attempts restore circulation within five to ten minutes.[235]

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227. *Id.*

228. Koostra et al., *supra* note 91, at 2893.

229. *See* Joseph F. Magliocca et al., *Extracorporeal Support for Organ Donation After Cardiac Death Effectively Expands the Donor Pool*, 58 J. TRAUMA 1095, 1096-97 (2005).

230. David Bracco et al., *The Thin Line Between Life and Death*, 33 INTENSIVE CARE MED. 751, 751 (2007).

231. Magliocca et al., *supra* note 229, at 1096.

232. Carla DeJohn & Joseph B. Zwischenberger, *Ethical Implications of Extracorporeal Interval Support for Organ Retrieval*, 52 AM. SOC'Y ARTIFICIAL INTERNAL ORGANS J. 119, 121 (2006); *see also* Magliocca et al., *supra* note 229, at 1097.

233. *Non-Heart-Beating Organ Donation*, *supra* note 91, at 432-33.

234. Joanne Lynn & Ronald Cranford, *The Persisting Perplexities in the Determination of Death*, *in* THE DEFINITION OF DEATH CONTEMPORARY CONTROVERSIES, *supra* note 207, at 106 (stating that restoring circulation after a determination of death is evidence of "confused thinking" and a misapplication of the criteria for irreversibility).

235. DeVita et al., *supra* note 57, at 1711. Michael DeVita is a professor at the University of Pittsburgh School of Medicine. *Id.* at 1709. *See also* Christopher James Doig & Graham Rocker, *Retrieving Organs from Non-Heart-Beating Organ Donors: A Review of Medical and Legal Issues*, 50 CAN. J. ANESTHESIA 1069, 1072 (2003) (suggesting that if circulatory functions and blood flow to the brain are restored, it is possible that patients could experience pain or even regain consciousness).

The practice of restoring circulation through ECMO or other techniques raises the possibility that the brain is also being resuscitated while the recovery of organs is ongoing.[236] Some advocates of DCD nevertheless encourage resuscitation of victims of cardiac arrest for the sole purpose of preserving organ viability for procurement.[237] The New York City organ recovery program envisions the transplant ambulance team continuing CPR and administering oxygen to the victim who had previously been declared dead in order to maintain blood flow during transport to the hospital.[238] This raises the specter of limited brain resuscitation.[239] Critics argue that if transplant surgeons are to use artificial means to restore circulation, it becomes imperative to wait in excess of ten minutes to confirm the total cessation of the entire brain before ECMO or other techniques are used.[240] Otherwise, it may be possible for at least some patients to regain brain functions, including awareness or the perception of pain.[241]

C. A Not So Uniform Determination of Death

In adopting the weaker construct of irreversibility, the transplant community has embraced a definition of death that is conducive to organ procurement but is at odds with the UDDA and the intentions of the President's Commission. For example, patients A and B are both in the intensive care unit.[242] A is a potential donor and refuses CPR. Patient B

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236. Joseph L. Verheijde et al., *Recovery of Transplantable Organs After Cardiac or Circulatory Death: Transforming the Paradigm for the Ethics of Organ Donation*, 2 PHILOSOPHY, ETHICS & HUMANITIES IN MED. 1, 3 (2007) (asserting that post-mortem technology to preserve organs results in the resuscitation of the heart and brain), *available at* http://www.peh-med.com/content/pdf/1747-5341-2-8.pdf.

237. *See, e.g.*, Mary Bennett & Niranjan Kissoon, *Is Cardiopulmonary Resuscitation Warranted in Children Who Suffer Cardiac Arrest Post Trauma?*, 23 PEDIATRIC EMERGENCY CARE 267, 271 (2007) (stating that the possibility of organ donation may be a reason to attempt a prolonged resuscitation); *see also* 2006 IOM Report, *supra* note 86, at 158 ("[P]remature removal of mechanical support can be a major barrier to organ donation.").

238. Stein, *supra* note 3, at A01.

239. M.D.D. Bell, *Non-Heart Beating Organ Donation: Old Procurement Strategy—New Ethical Problems*, 29 J. MED. ETHICS 176, 179 (stating that the combination of cardiac massage and administration of oxygen after death "may be associated with some restoration of brain functions").

240. Verheijde et al., *supra* note 236, at 3. To assuage the concerns of medical personnel about post-mortem beating of the heart, some transplant centers use a thoracic aortic balloon or lidocaine to prevent reanimation of the heart during ECMO. *See* DeJohn & Zwischenberger, *supra* note 232, at 121. Using a thoracic balloon will also prevent perfusion to the brain, thus avoiding the problem of brain resuscitation during ECMO. Bernat, *supra* note 14, at 671.

241. This is theoretical, of course, because once organs are removed and the patient dies, we cannot know whether the patient had any such experience. There is also a debate in the medical community about whether it is possible for patients to regain cognition or experience pain after only five minutes of absent blood flow. *See* Martha A. Q.Curley et al., Letters to the Editor, *Organ Donation After Cardiac Death: Are We Willing to Abandon the Dead Donor Rule? The Author's Reply*, 8 PEDIATRIC CRITICAL CARE MED. 507, 508 (2007) (stating that studies show patients' cognition and the ability to perceive pain are likely absent after five minutes of no cardiac output); Doig & Rocker, *supra* note 235, at 1072 (questioning whether patients in DCD protocols could experience pain or regain consciousness when brain perfusion is restored by mechanical means).

242. This scenario is adapted from a similar hypothetical described in Youngner et al., *supra* note 158, at 17.

has stated that he wants CPR if he arrests. According to current DCD practice, A can be declared dead after at least two minutes of cardiopulmonary arrest. B also suffers two minutes of asystole and apnea, but resuscitative efforts are started. Is B dead after two minutes? If B is successfully resuscitated, was he brought back from the dead, or was he not dead in the first place? The answer under the UDDA is that B is not dead because he did not suffer *irreversible* cessation of circulatory and respiratory functions. Using the weaker construal of irreversibility only for organ donors but not for other patients who suffer cardiac arrest contravenes the purpose of the UDDA, which was to set uniform criteria for the determination of death in all individuals. As the President's Commission commented:

> [S]ince the proposed statute is intended to apply in all situations, it ought not to be incorporated into a state's Uniform Anatomical Gift Act (UAGA). Placing it there would create the mistaken impression that a special "definition" of death needs to be applied to organ transplantation, which is not the case.[243]

DCD advocates point out that under the UDDA, the determination of death is to be made in accordance with accepted medical standards. Since the medical community has found DCD ethical, they reason, it falls within the standard of care.[244] But declaring a person dead after two to five minutes of absent circulation is not the medical standard of care for all patients.[245] For those who experience sudden cardiac arrest, aggressive resuscitation is the rule.[246] Under the UDDA, proof of death is both a medical and legal question.[247] The question for medical experts is whether there is biological evidence of life (or death), not whether the patient has chosen to live or die.[248] There is no separate test of death for organ transplant purposes.[249]

Further, to argue that the medical criteria for determining death have evolved since the 1980s in an effort to *shorten* the time in which

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243. DEFINING DEATH, *supra* note 41, at 80. Neither does the UAGA purport to define death for purposes of organ transplantation. *Id.* at 145.

244. *See* DuBois, *supra* note 150, at 33.

245. Kimmo Sainio, *Are Non-Heart-Beating Donors Really Dead?*, 29 ANNALS MED. 473, 474 (1997) (noting that in an emergency room, a patient with unexpected asystole would not be declared dead after two minutes).

246. *See infra* note 263 and accompanying text.

247. Randles v. Ind. Patient's Comp. Fund, 860 N.E.2d 1212, 1226 (Ind. Ct. App. 2007).

248. *See id.* ("it is the role of the medical professional to decide whether brain death or other cessation of cardiopulmonary function is present in accordance with current medical standards") (quoting 22 AM. JUR. 2D Death § 424); *see also* UNIF. DETERMINATION OF DEATH ACT (1980), *supra* note 17, prefatory note ("Time of death is a fact to be determined with all others in each individual case, and may be resolved, when in doubt, upon expert testimony before the appropriate court.").

249. *See In re* T.A.C.P., 609 So. 2d 588, 595 (Fla. 1992) (finding that anencephalic infant who lacked higher brain functions could not be declared legally dead for purposes of organ donation).

death is diagnosed is to stand medical progress on its head.[250] If anything, recent resuscitative techniques have demonstrated that some individuals whom physicians would have declared dead even a few years ago can survive and lead productive lives.[251]

The goal of increasing organs for transplantation is worthwhile, but whether there ought to be different definitions of death, depending on the context, is an issue that deserves greater scrutiny and public discussion before DCD attains widespread use. There is also some value in treating all individuals equally. "Otherwise," commentators have noted, "patients would be dead or alive, depending on whether or not they were organ donors."[252]

The lack of consistency among hospital protocols in the pronouncement of death is also troublesome.[253] If Sue is withdrawn from life support in Pittsburg, she is dead after two minutes without evidence of cardiac activity. If Sue is in Shreveport, Louisiana, she will not be declared irreversibly dead until five minutes transpire after asystole.[254] In other words, in Shreveport, Sue is just mostly dead after two minutes and her organs cannot be recovered while, in Pittsburg, Sue is really dead and her organs can be taken. In 1997, the IOM criticized as "uncomfortable" a situation where a donor could be considered dead in one OPO region while defined as alive in another.[255] Nevertheless, just three years later, the IOM countenanced such inconsistencies when it concluded that there was "room for significant differences of opinion" on the interval required to assure the irreversibility of circulatory functions.[256] This leaves patients or families who are considering donation in a disconcerting situation where they may not know or be able to choose which version of "death" will be applied to them.

Such variations in the timing of death do not engender confidence in the organ transplant system, which depends on the trust of potential donors and their families that a physician will not prematurely declare them dead to harvest organs. It also does not comport with the UDDA, which envisioned that there would be a uniform definition of death in every jurisdiction.

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250. *See* 2006 IOM Report, *supra* note 86, at 146 (asserting that evolving medical standards support the weak construal of irreversibility).

251. *See* discussion *infra* Part IV.A.

252. Stuart J. Youngner & Robert M. Arnold, *Philosophical Debates About the Definition of Death: Who Cares?*, 26 J. MED. & PHIL. 527, 531 (2001).

253. *See* Youngner et al., *supra* note 158, at 20 (arguing for uniformity among protocols to avoid public criticism).

254. LA. STATE UNIV. HEALTH SCI. CTR.—SHREVEPORT, ORGAN DONATION AFTER CARDIAC DEATH (DCD) PROTOCOL LOUISIANA ORGAN PROCUREMENT AGENCY (LOPA) 4 (2008), http://www.sh.lsuhsc.edu/policies/policy_manuals_via_ms_word/hospital_policy/h_5.7.1.pdf.

255. 1997 IOM Report, *supra* note 90, at 59.

256. 2000 IOM Report, *supra* note 20, at 39.

IV. THE EXPANSION OF DCD IN UNCONTROLLED DONORS AND CHILDREN

Does this academic discussion about the time of death in DCD matter? Those prospective donors who are voluntarily withdrawn from life support in a hospital are not going to be resuscitated and their brain function will soon be irretrievably lost due to lack of cardiac function. In other words, in a few more minutes, they are going to be all dead, not just mostly dead. At least a persuasive utilitarian argument can be made that we should remove their organs to benefit those desperately in need of "the gift of life" while the organs are still useful. Yet, as the New York City proposal for organ recovery ambulances demonstrates, DCD practices are also being applied to victims who suffer cardiac arrest outside the hospital. Children are also viewed as potential DCD donors; indeed, doctors conducted the first DCD pediatric heart transplants quite recently. There are compelling reasons, however, why organ procurement from uncontrolled donors and children should proceed slowly.

A. Uncontrolled Donors

Most current DCD protocols in the United States focus on the controlled donor as the time of cardiopulmonary arrest is known and warm ischemia time can be minimized through careful planning of the organ procurement process.[257] However, uncontrolled donors, i.e., those who suffer an unexpected or sudden cardiac arrest and who are not brain dead, may comprise the largest group of untapped donors.[258] Approximately thirty-eight percent of all deaths occur outside a hospital.[259] The IOM estimates that if persons undergoing unsuccessful resuscitation were considered as potential organ donors, there could be an additional 22,000 cadaveric donors each year.[260]

There is a "powerful potential conflict" between the interest of the prospective uncontrolled donor in a thorough and lengthy resuscitative effort and the interest of the future recipient in a viable organ procured soon after cardiac arrest.[261] If DCD is expanded to potential uncontrolled donors, will physicians wait only two to five minutes after cessation of cardiac and pulmonary functions before removing organs? The New York City proposal suggests that the same standard will apply: organ

257. Controlled donors were the primary focus of the 1997 and 2000 IOM reports and the 2005 consensus conference.

258. 2006 IOM report, *supra* note 86, at 154 (citing an estimate of 335,000 deaths a year due to sudden cardiac arrest).

259. Akinlolu O. Ojo et al., *Quantifying Organ Donation Rates by Donation Service Area*, 5 AM. J. TRANSPLANTATION 958, 961 (2005).

260. 2006 IOM Report, *supra* note 86, at 156.

261. 1997 IOM Report, *supra* note 90, at 60.

recovery ambulances will begin organ preservation methods five minutes after death is declared in the field.[262]

With the controlled donor, the patient or family has chosen to forego resuscitative measures and, in the absence of autoresuscitation, is dead (or at least soon will be dead). But with the uncontrolled donor, there is no presumption that resuscitation is not desired. The American Heart Association's current resuscitation guidelines state that "all patients in cardiac arrest should receive resuscitation," unless one of three criteria is met: the patient has a do not resuscitate order, the patient has signs of irreversible death such as rigor mortis, or no physiological benefit will be expected.[263] In other words, "irreversibility" in the context of uncontrolled donors means that circulation *cannot* be restarted with current medical technology.

The claim that a DCD donor is irreversibly dead because there is no possibility of self-resuscitation after a two-minute period of asystole is also suspect when applied to victims of sudden cardiac arrest who undergo CPR. The medical literature speaks of the "Lazarus phenomenon," where patients who have been declared dead after unsuccessful resuscitation have a delayed, unexpected return of spontaneous circulation.[264] The time from termination of CPR to return of spontaneous circulation in these patients ranges from a few minutes to as long as twenty minutes with functional recovery.[265] Some of these cases of "resurrection" have received widespread public attention. For example, Richard Selzer, a surgeon, wrote about his recovery after being declared dead.[266] While in the ICU, Selzer experienced a cardiac arrest.[267] Despite vigorous resuscitation, he had no heartbeat and a flat tracing on an ECG for over four and a half minutes.[268] The attending nurse entered the time of death and ten minutes later observed body characteristics compatible with death.[269] Suddenly, Selzer began to breathe, tracing returned to the ECG, and the heartbeat became regular.[270] On his discharge from the hospital, Selzer

262. *See supra* notes 4-5 and accompanying text.

263. *2005 American Heart Association Guidelines for Cardiopulmonary Resuscitation and Emergency Cardiovascular Care, Part 2: Ethical Issues*, 112 CIRCULATION IV-6, IV-7 (2005), *available at* http://circ.ahajournals.org/cgi/reprint/112/24_suppl/IV-6.

264. *See* Vedamurthy Adhiyaman et al., *The Lazarus Phenomenon*, J. ROYAL. SOC. MED. 552, 552 (2007) (stating that there have been thirty-eight reported cases in the medical literature of delayed spontaneous return of circulation). The article also cited a number of media reports in which patients were declared dead, but were later found alive. *Id.* at 555.

265. *Id.* at 553, Table 1; *see also* Antti Kämäräinen et al., *Spontaneous Defibrillation After Cessation of Resuscitation in Out-Of-Hospital Cardiac Arrest: A Case of Lazarus Phenomenon*, 75 RESUSCITATION 543, 544 (2007) (describing the case of a man in a body bag who was observed breathing spontaneously fifteen minutes after resuscitation ended).

266. LOCK, *supra* note 210, at 54-55.

267. *Id.* at 55.

268. *Id.*

269. *Id.*

270. *Id.*

stated, "Next time hold a feather to my lips. It's more reliable."[271] These cases are uncommon,[272] but they raise serious questions about whether very brief intervals between the cessation of CPR and the process of organ recovery should be used in uncontrolled donation when resuscitation efforts have been previously attempted.[273] To exclude the possibility of an errant diagnosis of death, several commentators have recommended that patients be observed for at least ten minutes after CPR has ended before confirming death to rule out the possibility of a delayed return of spontaneous circulation.[274] Otherwise, it may be the removal of organs that makes the uncontrolled donor's cessation of circulatory functions "irreversible."

New resuscitative techniques also hold much promise for those who suffer prolonged cardiac arrest and have made it more difficult to determine when there is an irreversible cessation of circulatory functions that would justify termination of CPR. Survival rates in individuals who suffer sudden cardiac arrest have historically been dismal. With out-of-hospital CPR, survival ranges between five and twenty-one percent.[275] In-hospital CPR results in an average fifteen percent survival rate.[276] Many of those surviving have poor neurological outcomes.[277] By using cardiopulmonary bypass as part of integrated resuscitative therapy, a recent study demonstrated a seventy-nine percent survival rate in thirty-four victims with prolonged cardiac arrest,[278] with minimal neurological damage.[279] Although this was a small patient population, the authors conclude that "[r]ecovery without adverse neurological outcomes is possible in a large number of cardiac arrest victims following prolonged manual CPR."[280] Another report documents the usefulness of ECMO in

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271. *Id.* (quoting RICHARD SELZER, RAISING THE DEAD 99 (Penguin Books 1994)).

272. The true incidence of Lazarus phenomenon may be unknown because of underreporting. Adhiyaman et al., *supra* note 264, at 552; *see also* Wolfgang H. Maleck et al., *Unexpected Return of Spontaneous Circulation After Cessation of Resuscitation (Lazarus Phenomenon),* 39 RESUSCITATION 125, 127 (1998) (suggesting that the true incidence of the phenomenon may be fairly high and that its underreporting is due to legal concerns).

273. The Lazarus phenomenon is by definition applicable to those who have previously been subjected to resuscitation efforts and, therefore, would not apply to controlled donors who have chosen to forego CPR. *See* Sam D. Shemie, *Clarifying the Paradigm for the Ethics of Donation and Transplantation: Was "Dead" Really so Clear Before Organ Donation?*, 2 PHIL., ETHICS, & HUMAN. IN MED. 1, 4 (2007), *available at* http://www.peh-med.com/content/pdf/1747-5341-2-18.pdf.

274. Adhiyaman et al., *supra* note 264, at 555 (recommending that patients be passively monitored for at least ten minutes, if not longer, after the cessation of CPR); Kämäräinen et al., *supra* note 265, at 545 (advocating minimum of ten minutes of monitoring to rule out Lazarus phenomenon).

275. Constantine.L. Athanasuleas et al., *Sudden Cardiac Death: Directing the Scope of Resuscitation Towards the Heart and Brain*, 70 RESUSCITATION 44, 45 (2006).

276. *Id.*

277. *Id.* at 45, 47.

278. The patients in the study had experienced periods of refractory cardiac arrest ranging from twenty minutes to one and one-half hours. *Id.* at 46-47.

279. *Id.* at 49 (stating that only two of the thirty-four patients had an adverse neurological outcome).

280. *Id.* at 45.

refractory cardiac arrest, including the case of a four-year-old boy who had undergone three hours of CPR before ECMO was started.[281] He survived and had normal neurological function on discharge from the hospital.[282] Additional studies confirm the significant strides in survival rates made possible by resuscitation through ECMO, cardiopulmonary bypass, or hypothermia (cooling of the body temperature).[283] One commentator suggests that with current technology, the limits of brain resuscitation after cardiac arrest can not be definitively established:

> In reality, the duration of circulatory arrest that precludes recovery of any residual amount of brain function is unknown but is lengthening. Although arrest time is paramount, the conditions of the cardiac arrest (temperature) and the manner in which the circulation is reestablished (e.g., hypertensive reperfusion, hypothermia, neuroprotective agents) will extend the time for potential recovery of various degrees of brain function well beyond 10 minutes.[284]

The success of these new interventions raises difficult questions about who decides whether a person arriving in the emergency room after cardiac arrest will be subjected to techniques like ECMO to reverse the cardiac arrest or will be declared dead and then have ECMO to preserve the organs for donation. In essence, "Where is the line between *refractory* cardiac arrest—making the patient a potential candidate for ECLS [extracorporeal life support] and *irreversible* cardiac arrest—making the patient a potential organ donor?"[285]

Even some supporters of DCD question whether the weak construal of irreversibility in controlled donors who choose not to be resuscitated should apply in other contexts. DuBois calls for a "stricter sense of irreversibility" in situations that do not involve the controlled donor.[286] In 1997, the IOM similarly warned that where death is unexpected or sudden, longer periods of observation may be necessary to ensure that the cardiac arrest is truly irreversible.[287] Yet seven years later, without explanation, the IOM suggested that with uncontrolled donors, a hands-off

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281. Bracco et al., *supra* note 230, at 751.

282. *Id.*

283. *See* Massimo Massetti et al., *Back from Irreversibility: Extracorporeal Life Support for Prolonged Cardiac Arrest*, 79 ANN. THORACIC SURGERY 178, 181 (2005) (demonstrating increased survival rates in patients with refractory cardiac arrest who received extracorporeal support); Weisfeldt & Becker, *supra* note 216, at 3037 (citing several studies showing an advantage in survival rates when controlled reperfusion or hypothermia are used).

284. Shemie, *supra* note 273, at 3. *See also* Lynn & Cranford, *supra* note 234, at 109 (recommending a delay of at least ten minutes to avoid potential error in diagnosing death in individuals undergoing resuscitation).

285. Bracco et al., *supra* note 230, at 753.

286. DuBois, *supra* note 150, at 33; *see also* Veatch, *supra* note 213, at 197 (suggesting the question of whether a patient is dead after two minutes of asystole may not be important in uncontrolled donors, but would "raise serious problems" in patients who suffer sudden cardiac arrest).

287. 1997 IOM Report, *supra* note 90, at 58. *See also* Veatch, *supra* note 213, at 197-198 (recommending periods of pulselessness longer than two minutes to establish irreversibility).

period between the end of resuscitation and transfer to an organ transplant team may not even be necessary.[288]

Finally, it is questionable whether waiting ten minutes or slightly longer after an absent heartbeat for organ procurement is detrimental to viability of the organs. One of the oldest DCD programs is at the Hospital Clínico San Carlos in Madrid, Spain, where most of the non-heart-beating donors are adults who suffer cardiac arrest outside the hospital.[289] The Madrid criteria include a requirement that the heartbeat must be absent for at least ten minutes after CPR is stopped.[290] Despite this waiting period, transplantation of kidneys from uncontrolled DCD donors have long-term outcomes similar to those of organs from brain-dead donors.[291] The University of Zurich, another program that has been using kidney transplants from non-heart-beating donors since the mid-1980s, has also demonstrated that using a ten minute interval between cardiopulmonary arrest and organ procurement does not impair long-term graft survival rates.[292] Waiting slightly longer to recover organs may diminish their quality but that seems a price most people would be willing to pay to ensure that they are not prematurely declared dead.

B. Children

Although DCD has been primarily used in adult donors, there are calls for expanding its use in pediatric populations.[293] The need for new sources of pediatric organs is particularly acute as the number of brain-dead donors in the pediatric population is decreasing due to improvements in resuscitation and rehabilitation.[294] Concerns have been voiced, however, as to whether the same criteria used in adult DCD should apply to children.[295]

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288. 2006 IOM Report, *supra* note 86, at 152-53.

289. Ana I. Sánchez-Fructuoso et al., *Victims of Cardiac Arrest Occurring Outside the Hospital: A Source of Transplantable Kidneys*, 145 ANNALS INTERNAL MED. 157, 157 (2006). The clinic began its DCD program in 1989. *Id.*

290. 2006 IOM Report, *supra* note 86, at 139.

291. Sánchez-Fructuoso et al., *supra* note 289, at 162. Organs other than kidneys may have poorer results. *Id.* at 162-63.

292. Markus Weber et al., *Kidney Transplantation from Donors Without a Heartbeat*, 347 NEW ENG. J. MED. 248, 248, 255 (2002). From 1985 until 1995, the hospital initiated organ retrieval five minutes after cardiac arrest. Beginning in 1995, it instituted a ten minute waiting period. *Id.* at 249; *see also* Menikoff, *supra* note 204, at 162 (citing to studies that indicated a longer waiting period would not impair the usefulness of organs).

293. *See* Boucek et al., *supra* note 9, at 713, 714 (encouraging pediatric heart transplantation from DCD donors); Amy L. Durall et al., *Potential for Donation After Cardiac Death in a Children's Hospital*, 119 PEDIATRICS 219, 221 (2007) (noting that the experience with DCD in pediatrics hospitals is "quite small"); Nikoleta S. Kolovos et al., *Donation After Cardiac Death in Pediatric Critical Care*, 8 PEDIATRIC CRITICAL CARE MED. 47, 47 (2007) (stating that DCD may increase the number of pediatric organs for donation).

294. Margaret Ferguson & Jeannie Zuk, *Organ Donation After Cardiac Death: A New Trend in Pediatrics*, J. PEDIATRIC GASTROENTEROLOGY & NUTRITION 219, 219 (2003).

295. The transplantation of hearts from three DCD donors by a team at Denver Children's Hospital raises questions not only about applying DCD protocols to children, but also whether hearts

DeVita, one of the leading proponents of DCD, has questioned whether adult DCD protocols are appropriate for children because children may tolerate prolonged circulatory collapse.[296] Current American Heart Association resuscitation guidelines make the same observation.[297] Others have suggested that the risk of autoresuscitation may be variable in the pediatric population.[298] There is also a heightened potential for conflicts of interest in pediatric DCD. Unlike the adult patient population in which the patient-donor is in a specialty critical care unit treated by one set of physicians and the potential recipient is at another location treated by another set of physicians, most potential pediatric donors are in multidisciplinary units, in which the same team may take care of both the potential donor and recipient.[299] This arrangement leads to "[t]he prospect of having to advise one set of parents that they should consider withdrawal of [life] support because of devastating brain injury while other patients in the same unit might become recipients of the newly deceased child's organs seems highly troubling to some intensivists."[300] This situation raises questions about conflicts inherent in terminating resuscitative efforts in the child donor.[301]

In some children's hospitals, the rush to expand pediatric DCD faces an unenthusiastic clinical staff.[302] This may be due to the lack of pediatric DCD programs and the unfamiliarity of staff with this type of organ donation.[303] The reluctance of pediatric care providers to embrace DCD may also reflect wariness in forging ahead on a new form of organ donation where there are many unanswered questions, including the appropriate time interval between the cessation of cardiac function and organ recovery.[304] With the mandates of The Joint Commission and UNOS for all hospitals and transplant centers to develop DCD policies, its use in pediatric institutions deserves more scrutiny.

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can ethically and legally be removed from adult or child DCD donors. *See infra* note 315 and accompanying text.

296. DeVita et al., *supra* note 49, at 1712.

297. *2005 American Heart Association Guidelines for Cardiopulmonary Resuscitation and Emergency Cardiovascular, Part 2: Ethical Issues*, *supra* note 253, at IV-7 (noting that intact survival in children after prolonged resuscitation has been documented).

298. *See, e.g.*, Joel E. Frader, *Deconstructing Donation After Cardiac Death*, 8 PEDIATRIC CRITICAL CARE MED. 76, 77 (2007) (stating that the pediatric community needs to study whether the risk of autoresuscitation varies with age).

299. *Id.*

300. *Id.*

301. *See* Bernat, *supra* note 14, at 670 (noting that conflicts are more of a concern where the potential donor is a child).

302. *See, e.g.*, Martha A. Q. Curly, *Pediatric Staff Perspectives on Organ Donation After Cardiac Death in Children*, 8 PEDIATRIC CRITICAL CARE MED. 212, 216-18 (2007).

303. *Id.*

304. *Id.* at 217 (reporting that thirty-eight percent of survey participants favored basing the determination of death on the absence of brain activity, while sixty percent approved an average waiting period after cardiac cessation of five minutes and a range of two to ten minutes); *see also* Frader, *supra* note 298, at 77 (calling for further research on DCD in pediatric hospitals).

V. IS DCD CAUSING THE DEATH OF DONORS?

The most serious criticism of DCD is that the removal of organs after two to five minutes of asystole causes the death of donors and is tantamount to murder.[305] This is a complex issue, particularly with controlled donors who have a constitutionally protected right to withdraw life-sustaining care.[306] Modern law recognizes the difference between killing and being allowed to die.[307] The removal of life support provides the condition for death; once the heart stops, the body can no longer supply the means of sustaining life and death through lack of oxygen to the brain follows. Hastening death by the removal of life support with the patient's consent is not unlawful.[308] The question presented by DCD is whether the act of organ recovery in donors in the minutes before brain death alters that legal principle.

Menikoff argues that, at least with controlled donors, it is not organ retrieval that factually causes death; it is the loss of oxygen to the brain caused by removal of the ventilator.[309] The intervening removal of organs during the process of dying does not affect the timing of brain death, which is occurring because of lack of blood flow.[310] Since controlled donors will not be resuscitated, it is only a matter of time before irreversible death occurs, a point that is not hastened by organ procurement.[311]

Even if organ procurement does not cause death in the controlled donor, a precept of the dead donor rule is that vital organs cannot be removed *before* a person is dead.[312] DCD donors may very well be alive at the time organs are removed. In controlled donors, this may not be significant because they have chosen to forego life support and likely will not survive even if organ removal is not performed. For those who suffer unexpected cardiac arrest and who have not made their end-of-life wishes known, however, the rush to procure organs is worrisome. Recent

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305. *See* Joan McGregor et al., *Do Donation After Cardiac Death Protocols Violate Criminal Homicide Statutes?*, 27 MED. & L. 241, 251 (2008) (contending that the removal of organs prior to brain death may be the proximate cause of death); Michael Potts, *Truthfulness in Transplantation: Non-Heart Beating Organ Donation*, 2 PHIL., ETHICS, & HUMAN. IN MED. 1, 2 (2007), *available at* http://www.peh-med.com/content/2/1/17 (calling for a ban on DCD because the donor is not dead until the organs are removed); Veatch, *supra* note 211, at 673 (asserting that removing a heart from a DCD donor after seventy-five seconds is "ending a life by organ removal").

306. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278 (1990) (stating that a competent person's liberty interest in refusing treatment could be inferred from the Court's prior decisions).

307. *See* Vacco v. Quill, 521 U.S. 793, 807 (1997) ("This Court has also recognized, at least implicitly, the distinction between letting a patient die and making that patient die.").

308. *Id.* at 802-03.

309. Menikoff, *supra* note 150, at 162.

310. *Id.*

311. *Id.*; *see also* James L. Bernat, *Are Organ Donors After Cardiac Death Really Dead?*, 17 J. CLINICAL ETHICS 122, 127 (2006) (agreeing with Menikoff that organ donation does not hasten death in controlled donors).

312. Menikoff, *supra* note 150, at 162.

studies indicate that there are many victims of sudden cardiac arrest who, provided with appropriate therapy, survive after prolonged periods of cardiac arrest and, therefore, should not be considered dead after only two to five minutes of absent circulation.[313] For at least some victims of sudden cardiac arrest, whether in or out of a hospital, a decision to begin organ procurement minutes after stopping CPR deprives them of an opportunity to reverse the arrest, which may be considered a hastening or direct cause of their demise. As the IOM recognized in 1997, prematurely abandoning resuscitation in the uncontrolled donor so that organ recovery can proceed "may forfeit the life of a patient who is otherwise a salvageable, competent person."[314]

Also troublesome are the removal of hearts from DCD donors and their reanimation in recipients. As Veatch has pointed out, how can irreversible cardiac death be diagnosed when the functions of the heart are later reversed?[315] The use of ECMO to restart circulation in a person declared dead because of irreversible cessation of circulation raises the same concern. Although it may be true that in most cases, withdrawal of life support and the accompanying cessation of breathing and circulation are the cause of death, this hypothesis does not account for cases in which circulation is restored after "death." If blood flow is restored through artificial means shortly after the declaration of cardiac death, there is a possibility of brain resuscitation.[316] Thus, it would seem that surgeons need to postpone organ recovery until brain death occurs.[317] As one commentator explains, "If the state of death is reversed, then harvesting organs from the reanimated patient prior to death occurring a second time is failure to respect the dead donor rule: it constitutes restoring life and killing."[318]

Absent reanimation of the patient, however, it would be an onerous task for a prosecutor to bring homicide charges because of the difficulty, if not impossibility, of proving at what point in the organ procurement process the dying patient was alive or had reached the point of irreversibility. Patients' clinical conditions vary and so does the speed at which they die after cardiac arrest. Potential controlled donors who are taken off life support and who are already severely neurologically compromised may die sooner than those who have not suffered a prior brain

313. *See* discussion *supra* Part III.A.
314. 1997 IOM Report, *supra* note 90, at 49.
315. Veatch, *supra* note 211, at 673.
316. McGregor et al., *supra* note 305, at 250.
317. *See* McGregor et al., *supra* note 305, at 251 (recommending a waiting time of fifteen to twenty minutes until brain death).
318. James M. DuBois, *Non-Heart Beating Organ Donation: A Defense of the Required Determination of Death*, 27 J.L. MED. & ETHICS 126, 130 (1999).

insult.[319] Controlled and uncontrolled donors who have an intact brain prior to cardiac arrest may have a more prolonged process of dying.[320] Although there may be clear-cut cases in which a patient's death is hastened by organ recovery, in most cases, there are probably too many unknowns in locating the precise moment of death that, with the high burden of proof, would negate criminal prosecution of physicians who practice DCD.[321]

Further, there may not be the sense of public outrage over DCD that would spur a prosecutor to examine homicide charges.[322] Like many experts, the public may believe that it is acceptable to procure organs from patients voluntarily removed from life support who may not be quite dead—after all, they will be dead shortly. Norman Fost suggests that Americans have little interest in esoteric arguments about life and death in organ donation, noting that when concerns about DCD in controlled donors were raised by the media, the public was apathetic in its response.[323] A recent study also indicates that many members of the public may be willing to violate the dead donor rule because they are confused about the definition of brain death and when organs can legally be procured from those who suffer devastating neurological injuries.[324]

It is debatable whether the public will be apathetic about the expansion of DCD to victims of sudden cardiac arrest. New York City's plan for organ recovery ambulances is the first of these initiatives to be aired by the mainstream media.[325] While many individuals may be confused about the concept of brain death, they no doubt understand what it means when the heart stops beating. Many are also understandably concerned about the level of care they will receive in the event of an unexpected cardiac arrest at home or at work. It is one thing to argue that adults who consent to the withdrawal of life support be allowed to donate organs even if we are not quite sure at what point in the process they are potentially alive or irreversibly dead. It is quite another to hastily remove organs from victims of cardiac arrest who expect a thorough resuscitation.

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319. *See* Rady et al., *supra* note 86, at 327 (recognizing that although donors who have preexisting neurological injuries may not have meaningful brain activity at the time of arrest, the same may not be true of potential donors who have intact brain function prior to arrest).

320. *Id.*

321. The California transplant surgeon who allegedly administered excessive and unnecessary medication is not being prosecuted for homicide, but for dependent adult abuse and prescribing a controlled substance without a medical purpose. McKinley, *supra* note 28, at A1.

322. *See* Norman Fost, *Reconsidering the Dead Donor Rule: Is It Important that Organ Donors be Dead?*, 14 KENNEDY INST. ETHICS J. 249, 255 (2004) (arguing that prosecutors have tolerated "clearly illegal behavior" by physicians in sympathetic cases).

323. *Id.* at 254-56.

324. Laura A. Siminoff et al., *Death and Organ Procurement: Public Belief and Attitudes*, 14 KENNEDY INST. ETHICS J. 217, 228 (2004) (reporting that ninety-eight percent of study participants had heard of brain death, but that only one-third believed that brain-dead persons were legally dead. Of those who considered a brain-dead person alive, over sixty-six percent said they would donate organs).

325. Cara Buckley, *City To Explore a Way To Add Organ Donors*, N.Y. TIMES, June 1, 2008.

Although most people support organ donation in theory, many are unwilling to become donors or to donate a family member's organs.[326] One of the explanations for this reluctance is the fear of being declared prematurely dead or that emergency care will be compromised.[327] The question that must be asked is, under what circumstances will the public be willing to accept a certain level of error in diagnosing death in order to promote organ procurement?

VI. HOW SHOULD DEATH BE DEFINED IN DCD DONORS?

Recognizing that defining death is not a simple matter, some in the medical community question whether this is even an important issue. Under the title, "Philosophical Debates About the Definition of Death: Who Cares?," Stuart J. Youngner and Robert M. Arnold argue that the concept of irreversibility is impossibly muddled and that the conversation should turn instead to whether it is permissible to take organs from patients who are "beyond harm," but who may not be dead.[328] Robert D. Truog, a prominent bioethicist, has long argued that the dead donor rule should be abandoned and that people whom we consider alive, but who are terminally ill or permanently unconscious, should be allowed to donate organs while still alive, because the harm inflicted on these patients is minimal.[329] For example, a person in a persistent vegetative state (PVS), who is not legally dead,[330] should be allowed the pre-mortem opportunity to donate her organs. For these people, the quality of life is so unacceptable or death is so imminent that, with their consent, we ethically can take their organs before they die.[331] Similarly, other notable medical ethicists, including Fost, assert that the very premise on which we remove vital organs—death of the donor—is scientifically flawed, so that certain patients should have the right to donate organs even if it means a premature death.[332]

Others contend that we should not abandon the dead donor rule but rather allow individuals the choice of defining the conditions in which they could be considered dead so as to allow the removal of organs. Veatch has argued for over three decades that brain death should include

326. *See* Laura A. Siminoff et al., *Factors Influencing Families' Consent for Donation of Solid Organs for Transplantation*, 286 J. AM. MED. ASS'N 71, 71 (2001) (citing studies showing that while more than seventy-five percent of people said they would donate their organs if asked, less than half of families actually agreed to donation after death).

327. *See* DuBois, *supra* note 318, at 132 (citing surveys showing that significant numbers of people fear their health care will be compromised if they agree to be organ donors).

328. Youngner & Arnold, *supra* note 252, at 533.

329. Robert D. Truog, *Brain Death—Too Flawed to Endure, Too Ingrained to Abandon*, 35 J.L. MED. & ETHICS 273, 278 (2007).

330. A person in a persistent vegetative state (PVS) is not brain dead under the UDDA because the person has not suffered whole brain death; PVS patients have brain stem functions. *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 266 n.1 (describing the physiological state of Nancy Cruzan, who was in a PVS).

331. Truog, *supra* note 329, at 278.

332. Fost, *supra* note 322, at 250-51.

not only those who have complete loss of brain functions including the brain stem, but also those who have lost only higher brain or cerebral activity.[333] According to Veatch, those who are no longer "members in full standing of the moral community" (such as those in PVS) should be able, at their option, to be defined as dead so that organs could be legally taken without violating the dead donor rule.[334]

The UDDA, UAGA, and most state laws defining death stand in the way of proposals to abandon the dead donor rule or except certain groups from its confines. Under the UAGA, one needs to be deceased to be a donor, and the UDDA defines brain death as death of the whole brain, including the brain stem.[335] Homicide laws also prohibit intentionally causing death through the removal of vital organs.[336] There have been no serious attempts to change the legal definition of death and it is to be expected that the public, courts, and legislators may balk at allowing physicians to remove organs from the living (as presently defined).[337]

Others who have expressed unreserved support for the dead donor rule in removing organs from brain-dead donors struggle with its application in the DCD context. Despite his early criticism of the Pittsburg Protocol for allowing organ recovery in patients who were not dead,[338] Bernat now concludes that it is irrelevant whether DCD violates the dead donor rule.[339] He acknowledges that by using the true meaning of irreversible, i.e. that a patient can not be successfully resuscitated, some DCD donors may not be dead.[340] To avoid the problem of removing organs from one who is not irreversibly dead, he advocates substituting the word "permanent" for "irreversible" in describing the loss of circulatory functions in DCD donors.[341] Permanent in this context means that functions will not be restored, either spontaneously by the patient or through artificial resuscitation.[342] Bernat does not advocate changing the UDDA to reflect this change in terminology, however, because he believes that most physicians are already using the permanence standard in practice.[343] He candidly recognizes that using permanent loss of func-

333. Robert M. Veatch, *The Dead Donor Rule: True by Definition*, 3 AM. J. BIOETHICS 10, 10-11 (2003).

334. Robert M. Veatch, *Abandon the Dead Donor Rule or Change the Definition of Death*, 14 KENNEDY INST. ETHICS J. 261, 269 (2004).

335. A number of states also codify the dead donor rule. *See supra* note 152.

336. Truog recognizes the legal difficulty in abandoning the dead donor rule, as it would mean that organ recovery is the cause of a patient's death. He counters that the transplant physician's actions could be ethically regarded as not constituting a homicide. Truog, *supra* note 329, at 279.

337. *See In re* T.A.C.P., 609 So. 2d 588, 592 (Fla. 1992) (refusing to declare an anencephalic infant dead for purposes of organ transplantation).

338. Bernat, *supra* note 164, at 20 (stating that at the time organs are procured under the Pittsburgh protocol, "death has not yet occurred").

339. Bernat, *supra* note 311, at 128-29.

340. *Id.* at 125, 128.

341. *Id.* at 124-25.

342. *Id.* at 124.

343. *Id.* at 127.

tions as the test for death in DCD donors may transgress the dead donor rule, but argues that this exception is justified because the patient soon will be dead and the outcome is the same whether using a permanence or irreversibility standard.[344]

For Truog, Bernat's recommendation for a change in terminology confirms the obsolete nature of the dead donor rule.[345] He views Bernat's proposal as an implicit acknowledgment that patients under a DCD protocol are not dead.[346] By acknowledging the fact that DCD donors may be alive, Truog contends the transplant community has already crossed the boundary of the dead donor rule and should be honest and abolish it, both as to brain death and cardiac death.[347] Similarly, Joseph L. Verheijde and colleagues, who have been vociferous critics of DCD because it violates the dead donor rule, support efforts to eliminate the dead donor rule as long as patients and their families give meaningful informed consent to the removal of organs before death.[348]

There may be legitimate reasons for reconstructing the definition of death as it applies to organ donation after cardiac death. From a purely utilitarian view, increasing the supply of organs is a social good. Particularly, in cases of planned withdrawal from life support—where the patient or surrogate has chosen not to resuscitate—it may be morally defensible to declare death within a short period of time in order to facilitate organ retrieval. Again, a comparison of patients in an ICU is illustrative of this principle.[349] Patient A wishes to withdraw life support and to donate organs. B, also a patient in the ICU, declines CPR, but does not wish to be an organ donor. B has a cardiac arrest but is not resuscitated. At what point is B irreversibly dead? The answer is that, in most cases, the exact time of death does not matter because no surgical intervention, such as organ procurement, is to be immediately performed on the body.[350] Patient B could be declared dead at the time of asystole. But it is also likely that a physician will not rush to declare B dead and that some delay will occur before B is transported to the morgue. Just like A, B will be "allowed to die," but precisely when B becomes irreversibly

344. *Id.* at 128-29. Ten years ago, Bernat took a much different position: "Accepting a circulatory formulation for death immediately throws into jeopardy the entire multiorgan transplantation program unless the dead donor rule is sacrificed." Bernat, *supra* note 164, at 22.

345. Robert D. Truog & Thomas I. Cochrane, *The Truth About "Donation After Cardiac Death,"* 17 J. CLINICAL ETHICS 133, 136 (2006).

346. *Id.* at 133, 136 (stating that DCD is a misnomer because donors are "dying but not yet dead").

347. *Id.* at 136.

348. Verheijde et al., *supra* note 236, at 7.

349. This scenario is also adapted from a similar hypothetical described in Youngner et al., *supra* note 158, at 17.

350. The time of a non-donor's death could be of legal significance under some circumstances, however, such as whether a person survived another under the Uniform Simultaneous Death Act. UNIF. SIMULTANEOUS DEATH ACT §§ 2-4 (1993), 8B U.L.A. 147 (2001).

dead is generally of little moral or legal consequence.[351] Some have argued that if B can be considered dead when cardiopulmonary functions cease, why should we not consider A, the controlled donor, dead at the same moment?[352] Both A and B are patients in whom we cannot clearly define the line between life and death, and locating the moment of irreversible death is more of a moral decision than a legal one. Defining irreversibility to mean that the heart *will not* be started in controlled DCD at least fulfills the patient's wishes to end life-sustaining care and to become an organ donor. As John Robertson argued:

> Not to regard her then as dead because she might have been resuscitated in a situation in which she never will be resuscitated is counterintuitive to common understandings of death held by the general public, families, health care providers, and most ethicists, philosophers, and lawyers who study these issues.[353]

There may be limits, however, to how far the transplant community can legally or ethically venture in controlled DCD. Even some supporters of DCD draw the line at calling death in less than two minutes and do not support transplanting hearts from DCD donors, a practice which seems on its face to squarely contradict any notion of the irreversibility of circulatory functions.[354] But accepting some restrictions, preferably set in place by legislators along with medical experts, DCD in adult controlled donors could proceed.

Nonetheless, this resolution of the debate also means that, with DCD, death will be defined not by an irreversible physiological state but by the context it which it occurs. If we redefine irreversibility in order to retrieve viable organs from controlled donors, where will our "gerrymandering"[355] of death criteria end? Truog argues that if DCD is ethically acceptable even if donors are not quite dead, it should be permissible for other consenting terminally ill or neurologically devastated patients to donate their organs under general anesthesia before death.[356] After all, it is certain that they, too, will soon be dead and their organs will be

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351. *See* Jerry Menikoff, *The Importance Of Being Dead: Non-Heart-Beating Organ*, 18 ISSUES L. & MED. 3, 6 (2002) (stating that until physicians wanted to remove organs from non-heart-beating donors, there was no rush to declare death and a person could be pronounced dead as long as an hour after the heart stopped beating).

352. *See* Bernat, *supra* note 311, at 127 (defending the timing of death in DCD donors because it is consistent with how death is usually determined in the non-donor).

353. Robertson, *supra* note 200, at 12.

354. *See* Bernat, *supra* note 14, at 671(stating that recovering hearts from DCD donors and determining death seventy-five seconds after heart stoppage exceed the boundaries of DCD); Veatch, *supra* note 211, at 673 (contending that the removal of hearts from DCD donors is the cause of death).

355. Arnold & Youngner, *supra* note 151, at 222 (arguing that the concept of brain death was an effort to "gerrymander" the definition of death to increase the donor pool).

356. Troug, *supra* note 329, at 278.

more useful if recovered before death.[357] Ultimately, "For better or for worse, the bright line [between life and death] is growing dimmer."[358]

With controlled donors, we can say their intent is to have life support removed, to die, and to donate their organs. The public may not care whether these patients are declared dead a little early in the dying process.[359] But this reasoning cannot seamlessly be applied to uncontrolled donors. We can not easily determine the wishes of those in sudden or unexpected cardiac arrest. In most cases, these patients want to be resuscitated and to live. To begin the organ procurement process only a few minutes (or seconds) after "unsuccessful" resuscitation in victims of sudden cardiac arrest seems to give insufficient respect to their personal autonomy and to jeopardize their small, but increasing, chance of survival.

Under the protocol being considered in New York City, emergency responders will call the time of death when further resuscitative efforts are deemed futile.[360] With the organ recovery ambulance hovering nearby, there is a risk that some people will fear that they will be abandoned too soon. Such suspicions may not always be justified, but they are understandable and can undermine confidence in the transplantation system. We should proceed cautiously if DCD is to be expanded to this population so that organs will not be inadvertently removed from those few who may still be "slightly alive."[361]

There are several possible solutions to this debate. The first, and most preferable, option is to alter death statutes to define irreversibility in patients voluntarily withdrawing life support (who are not brain dead) as the time of cessation of circulatory functions plus a period that scientific studies demonstrate would exclude the possibility of self-resuscitation. This definition would affect not only organ donors; death would have the same meaning for all who electively withdraw life-sustaining measures. Part of the dilemma over the meaning of irreversibility is that the UDDA and many state death statutes were enacted before patients had a legal right to choose whether to be kept alive through extraordinary medical treatment. In promoting a standard of irreversibility that requires an inability to resuscitate, the UDDA fails to recognize that many deaths in hospitals today are from a planned withdrawal of life support in patients who refuse further resuscitation. Thus, defining death in this population to mean the cessation of cardiopulmonary functions plus a waiting period to exclude self-resuscitation acknowledges both legal approval and social

357. Truog, *supra* note 345, at 134.
358. Arnold & Youngner, *supra* note 151, at 224.
359. Bernat, *supra* note 311, at 129.
360. *See* Buckley, *supra* note 2.
361. *See, e.g.*, William J. Burke, *More Donors Could be Survivors*, ST. LOUIS REV. ONLINE, June 13, 2003, http://www.stlouisreview.com/article.php?id=4179 (asserting that DCD deprives some donors of a chance at survival and calling for a halt to the practice in Catholic hospitals).

acceptance of the "right to die." Along with this statutory recognition, the medical community must come to a common understanding and clear criteria about how long an interval is necessary to rule out the possibility of autoresuscitation. The idea that, after two minutes (or seventy-five seconds), one can be considered dead in one hospital but alive in another is inexcusable.

Although a delay of only a few minutes from arrest to declaration of death in patients for whom there will be no resuscitative efforts may be acceptable, that short an interval is not tolerable in individuals undergoing CPR. Irreversibility in its common sense notion—that functions *cannot* be reversed—should be retained for all other individuals, a standard that takes into account the great strides in resuscitation being made today and that provides a measure of safety from an erroneous diagnosis of death.

The second option is to wait at least ten minutes or longer to declare death in all DCD donors to make sure that any attempt at resuscitation would fail, i.e. we *can not* reverse because the brain is irreversibly damaged.[362] The transplant community has resisted this construal of irreversibility because of concerns about how longer waiting times can affect organ viability. Yet studies over the last two decades tend to demonstrate that a ten-minute waiting time does not impair long-term survival rates in recipients of kidneys, the organs most in demand. The primary drawback to this proposal is using a fixed period of time to determine irreversibility in the uncontrolled donor. With victims of sudden cardiac arrest, the prevailing view has been that after ten to fifteen minutes of pulselessness, irreversible brain damage inevitably follows. As discussed previously, recent studies have demonstrated that with innovative resuscitative therapies, some patients can survive prolonged periods of cardiac arrest, with little neurological sequelae. The period of time from arrest to organ procurement should, therefore, vary according to current medical knowledge and technology. Appointing a fixed hands-off waiting period to uncontrolled donors may deny future victims a possible chance of survival.

The third solution is to do nothing. DuBois argues that the meaning of irreversibility should remain vague and left to physicians to define depending on the context.[363] The do-nothing solution may preserve the status quo in controlled donors, but in light of the apparent expansion of DCD to uncontrolled donors, to children, and to heart transplants, public engagement on this question is inevitable. There are cutting edge issues associated with DCD that have received little attention. Protocols acceptable in the adult population may not transfer in toto to child DCD

362. Menikoff, *supra* note 204, at 162 (suggesting that a ten to fifteen minute wait might be appropriate).

363. DuBois, *supra* note 318, at 127.

donors. Recovering hearts and reanimating them in the recipient or using ECMO or other techniques to restore circulation and possibly resuscitate the brain seem to transgress the "prudent boundaries" of DCD.[364] These are practices that should not be pursued until such time as they have been fully examined and approved by both the medical community and policymakers.

CONCLUSION

The focus of organ transplantation has been almost exclusively on the welfare of the recipient of organs rather than the donor. Perhaps that is as it should be; medicine needs to concentrate on the living rather than on the dying. Denton Cooley, one of the pioneers of heart transplantation, stated: "We should not jeopardize the possible survival of the recipient while we are waiting around to make a decision whether the cadaver, as you call it, is dead or not."[365] Pragmatism, however, can only go so far before basic legal and ethical principles are compromised, and it is worthwhile to ask if we should redefine who is dead in order to salvage their organs.

Donation after cardiac death from controlled donors has been proceeding with little public or legislative discussion of whether these patients meet the legal criteria for death. In our incessant demand for organs, we have glossed over difficult questions: what does it mean to be dead, and is death, however defined, a necessary condition for organ donation? There is a need to air the debate over DCD in the public arena before it is extended to other situations that present new legal and ethical challenges. Otherwise, what seems controversial today, for example, removing hearts from infants seventy-five seconds after arrest and reanimating them in other children, may become routine and acceptable tomorrow.

Some argue this is an academic controversy that will not spark any public interest or concern among lawmakers.[366] Others are worried that if the public is alerted to the debate about the uncertainty of death, its willingness to donate organs will diminish.[367] Yet this is a public policy issue that should not be decided by the medical community alone.[368] The organ transplant system depends on civic participation, and the dispute over whether organs should be taken from some patients before death deserves discussion beyond the pages of scholarly journals. As DCD

364. Bernat, *supra* note 14, at 671.

365. LOCK, *supra* note 210, at 87-88.

366. *See, e.g.*, Fost, *supra* note 322, at 254-56.

367. *See* Robert A. Burt, *Where Do We Go From Here?*, *in* THE DEFINITION OF DEATH: CONTEMPORARY CONTROVERSIES, *supra* note 207, at 332, 333 (arguing that legislative changes may provoke public distrust of organ donation).

368. *See* Menikoff, *supra* note 351, at 20 (contending that the debate over the definition of death should not be sidestepped as it squarely addresses the kind of protections we are willing to give people in our society).

moves from consenting patients in hospitals to unexpected victims in the streets, the public needs to be reassured that the medical community will not further manipulate the blurred line between life and death.

The disquiet over DCD may be rendered moot by the inevitable progress of science. Through xenotransplantation or the growing of organs from stem cells, we may someday be able to look to alternative sources of transplantable organs. Until that happens, the only source of organs is from humans—wanted, dead or alive.[369]

369. "Wanted, dead or alive" is a common phrase from the Old West, but it was also used in the title of an article about the UDDA. Goldsmith, *supra* note 56, at 871.

BEYOND "THINKING LIKE A LAWYER" AND THE TRADITIONAL LEGAL PARADIGM: TOWARD A COMPREHENSIVE VIEW OF LEGAL EDUCATION

JESS M. KRANNICH, JAMES R. HOLBROOK, AND JULIE J. MCADAMS[†]

INTRODUCTION

As anyone who is familiar with the annual *U.S. News and World Report* survey of American law schools is aware, there are a great number of institutions engaged in the business of educating lawyers in this country—currently, there are nearly two hundred accredited law schools.[1] America's law schools have vastly different rates of enrollment. For example, the Thomas M. Cooley School of Law reported 3,606 students enrolled for the 2006-2007 academic year, while the University of Montana School of Law reported 83 students.[2] The size of the schools' first-year entering classes also varies wildly. Again, the Thomas M. Cooley School of Law was at the high end of the range in 2006, with 1,691 first-year students entering its program last fall, while the University of South Dakota welcomed only 72 first-year students.[3] Given these ranges and the sheer number of law schools, both public and private, it is clear that a vast number of students begin an education in the field of law each year.

Despite the differences among American law schools, however, the students' education will be remarkably similar, regardless of which institution they attend. Legal education—perhaps more than any other type of instruction—is characterized by a distinctive teaching methodology designed to create a common experience and mindset for all who are exposed to it. A lawyer who was educated in Boston can tell a lawyer who attended school in Los Angeles about the time his contracts professor questioned him regarding the rule of mitigation. Not only will the lawyer from Los Angeles be familiar with the type of classroom dialogue the lawyer from Boston is referring to, but he will likely also be able to identify with the precise feelings the exchange engendered.

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† Jess M. Krannich, Associate, Kirkland & Ellis, LLP; J.D., University of Utah S.J. Quinney College of Law; B.S., with Honors, University of Utah. James R. Holbrook, Clinical Professor of Law, University of Utah S.J. Quinney College of Law; J.D., University of Utah College of Law; M.A., Indiana University; B.A., Grinnell College. Julie J. McAdams, Adjunct Professor of Law, University of Utah S.J. Quinney College of Law; J.D., Columbia Law School; B.S., Utah State University.

1. *See* U.S. News and World Report, Best Law Schools (2008), http://grad-schools.usnews.rankingsandreviews.com/grad/law/search.

2. *See* U.S. News and World Report, Best Law Schools Index (2008), http://grad-schools.usnews.rankingsandreviews.com/grad/law/items.

3. *Id.*

This common educational experience results from the fact that American law schools have historically emphasized one specific skill—known as "legal analysis," "legal reasoning," or simply "thinking like a lawyer"—in their curricula, and have almost universally used a particular type of instruction to develop this skill. Indeed, the foundation of modern legal education is the institutionalized belief that students' legal aptitude is best developed through a classroom dialogue known as the "Socratic method," whereby professors force students to distill "rules" from case law and apply those rules to various factual scenarios. This type of instruction has dominated legal education for more than one hundred years, and during that time legal reasoning has been the primary skill taught to law students.

That law schools collectively focus on developing students' skill in legal analysis is not, in and of itself, a problem. It is natural for those who have been educated in a particular profession to have shared experiences; certainly all medical students learn how to chart a patient's progress. It is also beyond debate that legal reasoning is a crucial skill for the legal practitioner, and is thus a necessary component of a proper legal education. However, many law schools tend to focus on legal analysis to the exclusion of other equally important skills, and therefore give students an incomplete understanding of legal practice. As a result, a common perspective among new lawyers is that law school taught them how to *think* like a lawyer, but if they wish to actually learn how to *be* a lawyer, they must do so after earning their degree. This is a pessimistic, but realistic, view for many students, and not one that we should be proud of as educators. We should also be alarmed by the toll that the standardized teaching methods take on many students. A wealth of recent research has demonstrated that law schools' heavy emphasis on legal analysis—and the teaching methodology that is used to develop this skill—has unintended consequences that detrimentally impact students both personally and professionally.

In the materials that follow, we first detail the historical underpinnings of traditional legal education and the impetus for law schools' focus on the skill of legal reasoning. We then discuss in depth the limitations and consequences of this method of instruction. Finally, we address the changes that have been occurring in the institutional culture of legal education in recent years, changes that stem from the shortcomings of the traditional model. As discussed below, we believe that these changes are the harbinger of a broad shift in the nature of legal education—a shift toward a more comprehensive, integrated approach designed to teach students the broad range of skills and perspectives they will need to succeed as professionals.

I. TRADITIONAL LEGAL EDUCATION AND THE "PIGEON-HOLE" OF LEGAL REASONING

Modern legal education can be traced to Dean Christopher Columbus Langdell's development of the case method as a tool for teaching the skill of legal analysis at Harvard Law School in the 1870s.[4] Prior to Langdell's appointment to the deanship,

> students were typically taught black-letter law by professors who lectured from treatises, and they learned practical skills by applying their knowledge in apprenticeships.[5] Law was widely regarded as a profession grounded in the humanities, and legal education took an interdisciplinary approach emphasizing literature and philosophy.[6] Indeed, one of the profession's stalwarts, Judge Learned Hand, consistently advocated an interdisciplinary approach to legal education during his lifetime, believing "that law is centrally located in the humanities, and is not complete unless it draws nourishment from them."[7] Langdell, on the other hand, viewed law as a form of science premised on a distinctive methodology—legal analysis.[8]

For Langdell, "legal science" consisted, principally, of the art of reading a relatively closed set of materials found in libraries: the decisions of judges, particularly those at the appellate level. From these decisions the legal scientist would then discern, through the power of legal analysis, the structures of overarching doctrine that could unite such seemingly disparate topics as the sale of potatoes and the sale of slaves into one subject matter called "contracts."[9]

Langdell thus viewed legal training as a process of learning how to synthesize rules by dissecting cases, a process that was distinctly scientific and did not require input from humanistic disciplines.[10] Langdell's

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4. *See, e.g.*, Daniel R. Coquillette, *The Legal Education of a Patriot: Josiah Quincy Jr.'s Law Commonplace*, 39 ARIZ. ST. L.J. 317, 324 (2007) (discussing Langdell's development of case method of legal education at Harvard law School in 1870); Adam Todd, *Neither Dead Nor Dangerous: Postmodernism and the Teaching of Legal Writing*, 58 BAYLOR L. REV. 893, 915-16 (2006) ("Most doctrinal law classes are taught in a modernist paradigm little changed from the pedagogical classes introduced by Christopher Langdell at Harvard Law School in 1870. . . . The professor is seen as holding the truth or core knowledge about the subject and students are tested at the end of the semester using exams where formalism and black letter law are expected to be mechanically applied to limited fact patterns."); Jack M. Balkin & Sanford Levinson, *Law and the Humanities: An Uneasy Relationship*, 18 YALE J.L. & HUMAN. 155, 159-60 (2006) (discussing Langdell's influence on "[t]he modern American legal academy" due to the prominence of the case method to develop the skill of legal analysis (or, in the words of the authors, "legal craft")); Nancy B. Rapoport, *Eating Our Cake and Having it, Too: Why Real Change is So Difficult in Law Schools*, 81 IND. L. J. 359, 374 n.26 (2006) ("Langdell's innovative methodology resulted not just in a new, optional pedagogical tool, but became the foundational basis for what was to become established conventional practice in American legal education." (citation omitted)).

5. Coquillette, *supra* note 4, at 323-24.

6. *See* Balkin & Levinson, *supra* note 4, at 155-57.

7. *Id.* at 157.

8. *Id.* at 159-60.

9. *Id.*

10. *See* Coquillette, *supra* note 4, at 324.

theory was quickly put into practice at Harvard, and it soon became the dominant view of legal education in America.[11] In particular, Oliver Wendell Holmes, Jr. helped champion Langdell's cause. In his legendary speech entitled "The Path of the Law," delivered at the Boston University School of Law in 1897, Holmes endorsed a scientific perspective of legal education, predicting that the future of legal academics would rely more on economic theory than on philosophy.[12] Holmes' speech was certainly prophetic; Langdell's approach has remained in vogue for more than a hundred years, and during that time the most prominent interdisciplinary perspective to be introduced has been the law and economics movement, the ultimate view of law as science.[13]

In order to fulfill his "avowed mission . . . to transform American legal education into 'scientific analysis,'"[14] Langdell devised a new method of instruction so powerful that it has persisted until the present day. Known as the "case method," Langdell's model required professors to teach using compilations of cases—typically from appellate courts—known as casebooks, rather than treatises.[15] The compilations were organized by doctrinal topic, which had the additional effect of reorganizing Harvard's first-year curriculum into the core courses that are still taught to nearly every 1L student in America: constitutional law, contracts, criminal law, property, torts, and civil procedure.[16] Langdell's case method was also designed to rely on a Socratic style of classroom dialogue, instead of lectures, as the means of instructing students in legal doctrine.[17] In a typical Socratic class, the professor will pose questions to the students about the cases they have been assigned to read for that particular day. A Socratic law professor rarely indicates when his questions have been answered correctly, but instead manipulates the course of the classroom dialogue so that the students themselves are forced to distill the governing rules from the cases they have read. The relevant legal principles are thus teased out through a nuanced discussion and applied to various hypothetical scenarios devised by the professor. In many ways, a Socratic professor functions as a conductor or puppet master, carefully orchestrating the questions and arguments to guide the discourse in a preordained direction. A case method classroom therefore centers on the professor himself, and the students typically view the professor as holding the truth to the subject, but rarely revealing it.[18]

Langdell's case method is a calculated means of developing a very specific set of skills. Superficially, the case method trains students to

11. *See* Balkin & Levinson, *supra* note 4, at 160.
12. *Id.* at 157.
13. *Id.* at 159-60.
14. *Id.* at 159.
15. Coquillette, *supra* note 4, at 324.
16. *Id.*
17. *Id.*
18. Todd, *supra* note 4, at 916.

synthesize overarching rules of law by dissecting raw cases and extracting snippets of doctrine that, when viewed cumulatively, make up a body of law in a particular subject. Students learn how to recognize not just the rules used in certain cases, but also, hopefully, the policies animating the rules. Without an understanding of the policies—historical, political, economic, and social—upon which rules are premised, a lawyer cannot truly master a particular area of law, for it is these policies that give the rules both predictability and fairness. A lawyer who cannot grasp the reasoning behind the evolution of rules from case to case—which requires an understanding of the history and purposes of the field of law in which the rules exist—cannot predict the future evolution of rules, which is a key attribute for effective advocacy. In addition to teaching students how to understand and synthesize rules of law, the case method also trains students to apply the rules they have synthesized to specific disputes. In fact, students' grades in nearly every first-year course are determined by a single, comprehensive exam in which students must predict the legal outcome of hypothetical fact patterns devised by their professor by applying the legal doctrine they have learned during the course of the semester.

While the case method, on the surface, teaches students to recognize and apply legal rules, its most profound impact is on the way students think. Put simply, legal reasoning is a subtle thinking process in which legal rules, as extrapolated from case law, are applied to facts, real or hypothetical, to predict outcomes.[19] The process is not an intuitive one, and few students arrive at law school with an understanding of it. Prior to law school, most students' academic experience has centered on memorizing information and supplying the right answers to professors' questions, whether in class or on exams. Those who are qualified enough to gain admittance to law school have obviously become adept at this process, and many are surprised to find that it has little to do with law school success. Indeed, most first-year students struggle, at least initially, with the fact that the case method requires them to continually try to answer questions that appear to have no "right" answer. The process leaves many students feeling that their professors are "hiding the ball." But the point of the case method is that there usually is not a right answer; students are being trained to analyze disputes a certain way, rather than to solve the particular issues at hand.

19. This definition of legal reasoning, which is the best we have found in all our research, is taken from a classroom handout that John J. Flynn, Hugh B. Brown Professor Emeritus of Law at the University of Utah S.J. Quinney College of Law, frequently gave to his first-year students. The handout is entitled "Why 'Why'?," and it provides an excellent description of why first-year doctrinal courses are taught as they are, explaining that the skill of legal reasoning is an inductive, not deductive, thinking process that is best learned when students are forced to struggle with questions having no apparent right answer. We are deeply indebted to Professor Flynn for his wisdom and insight, which informs much of the content in this section. For those who have further interest, Professor Flynn's handout remains on file with the authors. John J. Flynn, Why "Why"? (unpublished handout, on file with authors).

From the moment they set foot in their 1L classrooms, first year law students are being initiated into a distinctive method of thinking that will forever alter the way they analyze disputes. Non-lawyers typically view disputes from a narrative standpoint, focusing on the "story" of the characters involved.[20] This perspective tends to emphasize the social and interpersonal dynamics involved in situations of conflict.[21] And most law students initially approach their coursework from this perspective, focusing on the story behind each case they read.[22] In class, however, students quickly learn that law professors are not interested in narrative accounts of disputes and do not particularly care about the relationships or emotions of the characters involved. Rather, in a case method classroom students are encouraged to focus on only the strategic positions of the parties.[23] Through Socratic questioning, professors prompt students to reframe the narratives involved in the cases students have read by organizing the "facts" in terms of legal claims and precedent.[24] Students are repeatedly encouraged to siphon all non-essential facts from the disputes they analyze and to focus instead on only those facts relevant to the specific legal principles at issue.[25] Form is thus elevated over substance, and students are conditioned to disregard the emotional, interpersonal, moral, and social consequences of disputes as extraneous concerns that will only confuse the legal analysis to be performed.[26] Students quickly learn "that to 'think like a lawyer' means redefining messy situations of actual or potential conflict as opportunities for advancing a client's cause through legal argument before a judge."[27] Many come to see legal reasoning as a tool used to formalistically "pigeon-hole" the facts of a par-

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20. *See, e.g.*, 32 LAW & SOC. INQUIRY 869, 874-75 (2007) (reviewing and summarizing ELIZABETH MERTZ, THE LANGUAGE OF LAW SCHOOL: LEARNING TO "THINK LIKE A LAWYER" (Oxford 2007) and Elizabeth Mertz, *Inside the Law School Classroom: Toward a New Legal Realist Pedagogy*, 60 VAND. L. REV. 483, 494-95 (2007) ("When students attempt to tell the stories of conflict embodied in the cases assigned for their courses, they typically start by focusing on the content of the story.") [hereinafter Mertz Summary]); Susan Daicoff, *Law as a Healing Profession: The Comprehensive Law Movement*, 6 PEPP. DISP. RESOL. L.J. 1, 6 (2006) (non-lawyers tend to focus on personal aspects of disputes).

21. *See* Daicoff, *supra* note 20, at 6 (citing Sandra Janoff, *The Influences of Legal Education on Moral Reasoning*, 76 MINN. L. REV. 193, 219-22 (1991) and CAROL GILLIGAN, IN A DIFFERENT VOICE 17-21 (1982)).

22. *See* Mertz Summary, *supra* note 20, at 494-95.

23. *Id.* at 498-99.

24. *See id.* at 493-94; *see also* WILLIAM M. SULLIVAN, ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 187 (The Carnegie Foundation for the Advancement of Teaching 2006) (discussing effects of case method style of instruction on first-year law students) [hereinafter CARNEGIE REPORT].

25. CARNEGIE REPORT, *supra* note 24, at 187 ("[S]tudents are led to analyze situations by looking for points of dispute or conflict and considering as 'facts' only those details that contribute to someone's staking a legal claim on the basis of precedent."); Daicoff, *supra* note 20, at 5 ("Law schools traditionally teach students to sift through facts and issues to eliminate 'irrelevant' concerns and focus only on what is 'relevant' to the rule of law. The emotional and interpersonal dynamics of a matter are deemed irrelevant to the pure legal analysis learned in the first year of law school.").

26. *See* Mertz Summary, *supra* note 20, at 498-99; CARNEGIE REPORT, *supra* note 24, at 187-88.

27. CARNEGIE REPORT, *supra* note 24, at 187.

ticular dispute into legally relevant categories, discarding those that cannot be so categorized.

The pedagogical power of the case method and its accompanying Socratic classroom dialogue cannot be denied. In an extremely short educational period, the case method forces students "to grasp the law as a subject characterized by a particular way of thinking, a distinctive stance toward the world."[28] As the Carnegie Foundation for the Advancement of Teaching ("Carnegie Foundation") found in its recent ground-breaking study of legal education:

> Within months of their arrival in law school, students demonstrate new capacities for understanding the legal processes, for seeing both sides of legal arguments, for sifting through facts and precedents in search of the more plausible account, for using precise language, and for understanding the applications and conflicts of legal rules. Despite a wide variety of social backgrounds and undergraduate experiences, they are learning, in the parlance of legal education, to "think like a lawyer."[29]

From this perspective, the case method must be viewed as a resounding success, a nearly fool-proof strategy for training students in the art of legal reasoning. And because legal analysis is uniformly prioritized in legal education—the doctrinal courses at nearly every law school (the majority of which are encompassed in the standardized first-year curriculum) overwhelmingly rely on the case method—there "is a striking conformity in outlook and habits of thought among legal graduates."[30] Regardless of their patterns of thought prior to law school, students leave law school with the ability to cull legally relevant facts from complicated disputes and organize those facts around persuasive legal arguments.

While the uniformity with which law schools produce students skilled in legal reasoning is an impressive feat, the flip-side of the coin is that, by heavily prioritizing such training, schools are also uniformly creating the same deficiencies. Indeed, Langdell's methodology has been so successful that law schools have steadfastly adhered to it, even in the face of mounting empirical research demonstrating that the traditional methods of instruction suffer from major shortcomings.[31] As discussed in the following section, the case method of legal instruction, when used in isolation, has many unintended consequences that ultimately impair lawyers' professional development and well-being. The combined effect of these consequences has resulted in an imbalance in Amer-

28. *Id.*
29. *Id.* at 186.
30. *Id.*
31. *See* Balkin & Levinson, *supra* note 4, at 160.

ican legal education and in the practice of law, an imbalance that can be corrected by a more comprehensive approach to legal instruction.

II. THE LIMITATIONS OF TRADITIONAL LEGAL EDUCATION

While there is no question that the traditional model of legal education produces dramatic results, it also has equally dramatic and unintended consequences. At most law schools, the genius of Langdell's methodology has not been matched by an equally well-considered means of instructing students in legal practice. Legal institutions have mastered the process of teaching students how to *think* like lawyers, but not the process of "teaching students how to *use* legal thinking in the complexity of actual law practice."[32] Courses that emphasize practical skills and real-world training typically hold a subordinate place to doctrinal courses in most law schools' curricula.[33] Furthermore, the course offerings that are designed to prepare students for the practice of law are not nearly as synchronized or refined as the doctrinal part of the curriculum, and there is little integration between the two types of courses.[34] In the required portion of legal education, which is primarily doctrinal, students are inundated with training in legal reasoning via a coordinated set of "core" classes. But most students are then left to tailor the remainder of their law school experience, including any practical courses they wish to take, haphazardly. Because little emphasis is placed on direct training in professional practice, legal analysis thus overshadows the entirety of students' education, "conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients."[35] Most students' educational experience is therefore dominated by the process of learning to "think like a lawyer."[36] The result of this unbalanced and inaccurate perspective is that many students spend the third (and even second) year of law school figuratively treading water, having been taught the skill of legal reasoning but not provided a structured way to place this skill in the context of legal practice.[37] The second two years of law school thus provide diminishing returns in terms of students' educational advancement, with a great number of students simply waiting to graduate and begin practice even though they have little knowledge of what the practice of law actually entails.[38] While this gap between education and practice highlights a major inefficiency in American legal education, the more alarming consequence is that America's

32. CARNEGIE REPORT, *supra* note 24, at 188 (emphasis added).
33. *Id.*
34. *See id.* at 194.
35. *Id.* at 188.
36. *Id.* at 186.
37. *See id.* at 195.
38. *See id.* at 77.

law schools are not producing lawyers equipped with the skills necessary to thrive as professionals.[39]

When the skill of legal reasoning is considered within the context of the actual practice of law, it is clear why the focus of the case method is so narrow. The American judicial system is premised on an adversarial, winner-take-all approach to dispute resolution in which legal rules are formalistically applied to the facts of a particular conflict and the party with the more persuasive position is assigned the contested resource.[40] Traditional legal education is deliberately geared toward developing the primary skill needed to operate within this system; the case method drills students to focus exclusively on the legal rights, liabilities, obligations, duties, and entitlements present in a given fact pattern.[41] To this end, students are trained to disregard all facts and consequences that are outside the precise legal issue at hand and recognize as relevant only those facts that pertain to the legal tests that will be used in court.[42] This purposeful simplification of conflicts removes all peripheral issues from the equation, preventing students from being distracted by moral concerns or compassion and allowing them to focus solely on honing their analytical skills.[43] From a litigation standpoint, this perspective makes sense: to zealously represent or advise a client faced with a lawsuit, a lawyer must be able to evaluate and marshal the facts presented by the client by reference to the law that will apply to the dispute in court.[44] Legal analysis is therefore an essential skill for lawyers practicing in the American legal system, but it is far from the only skill needed, even for litigators.

In practice, lawyers provide analysis, advocacy, and advice to both people and organizations regarding an infinite number of different transactions, disputes, and problems, both legal and non-legal. To provide competent representation to their clients,[45] all lawyers, regardless of specialty, must draw on a vast array of skills and perspectives beyond the pure legal analysis that is emphasized in law school. For example (and

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39. Of course, a great many law students who are successful at learning legal analysis are also successful at learning practical skills during their first few years after graduation. But the point is that law school is, for most students, the only opportunity to learn practical legal skills in a simulated, structured environment. By not emphasizing and integrating this aspect of the curriculum, law schools are failing to provide crucial and necessary training to the next generation of practicing attorneys.

40. ROBERT A. BARUSCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION 56-58 (Jossey-Bass Publishers 1994).

41. *See* Daicoff, *supra* note 20, at 5.

42. *Id.*

43. CARNEGIE REPORT, *supra* note 24, at 187.

44. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.3 (2002) ("A lawyer must . . . act with commitment and dedication to the interests of a client and with zeal in advocacy upon the client's behalf.").

45. *Id.* R. 1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.").

without attempting to be exhaustive), every lawyer needs excellent social and ethical skills.[46] Despite the rapid growth and change that has occurred in recent years, the legal profession remains a people-centered business.[47] Attorneys interact with a large assortment of characters, including clients, potential clients, co-workers, opposing lawyers, experts, witnesses, and judges. It is therefore crucial that practicing attorneys have well-developed, versatile communication skills and a proficiency for interpersonal relations. Yet, it is surprising how many attorneys are deficient in these areas. Law schools rarely train students in these skills in any structured manner, and thus the lawyers who have excellent communication abilities are either those who are naturally endowed with them or those who have developed such skills through trial and error in practice.[48] Indeed, two of the most common complaints lodged against the legal profession are that lawyers "tend to put process above people" and that "certain mindsets and attitudes stand between [clients] and the lawyers they hire."[49] Analysis is important, but it must be placed in context and it should not come at the expense of lawyers' abilities to relate to the people with whom they must interact.

Similarly, because of the countless relationships and dilemmas with which they are faced, practicing lawyers are regularly forced to consider the moral and ethical implications of various courses of action. It is essential for lawyers to appear to—and to actually—have firm morals and ethics because the legitimacy of the legal profession depends on the integrity of its members. And while ethics are taught in law school, typically via an upper-level course focusing on the rules that govern attorneys' conduct, the importance of moral and ethical considerations is minimized when these concerns are purposely excluded by the case method, only to be reintroduced in an isolated fashion later.[50] When morals and ethics are segregated in this manner, students are left with the impression that such matters are irrelevant for purposes of law school success and, by correlation, secondary to what counts in practice.[51] Students are also rarely given the opportunity to explore moral and ethical issues in simulated practice settings, and thus enter practice with only a marginal understanding of the manner in which these issues may affect their practical responsibilities as professionals.[52]

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46. *See* CARNEGIE REPORT, *supra* note 24, at 187-88.

47. *See, e.g.*, LARRY RICHARD & SUSAN RARIDON LAMBRETH, MAKING LAWYERS INTO LEADERS (2006), *available at* http://www.hildebrandt.com/Documents.aspx?Doc_ID=2476 (discussing "the tremendous change affecting the legal profession generally and law firms specifically").

48. *See, e.g.*, CARNEGIE REPORT, *supra* note 24, at 6 (discussing law schools' general failure to develop law students' ethical and social skills).

49. Steven W. Keeva, *Mindfulness in the Law and ADR*, 7 HARV. NEGOT. L. REV. 97, 101 (2002).

50. *Id.*

51. *Id.*

52. *Id.*

Every practicing attorney must also be equipped with a broad set of problem-solving skills. At base, lawyers are advisors and advocates who use their expertise to help clients solve legal problems. To provide thorough and competent counsel to clients, lawyers must take into account an immense number of disparate issues, both legal and non-legal. This requires the ability to view legal problems comprehensively and from many different perspectives. While the problems lawyers are called upon to solve frequently require the skill of legal reasoning, this is not always the case, and legal reasoning is rarely the exclusive skill needed. For example, a lawyer representing an automobile parts supplier in a breach of contract dispute with a manufacturer will probably need to assess the likelihood of prevailing if the case should go to trial. But if the parties engage in settlement discussions, the lawyer will also need to, among other things, discuss and consider the client's goals (including non-legal goals, such as business productivity and good will), conduct a detailed risk analysis that takes into account the costs and benefits of various non-litigation alternatives, devise a negotiation strategy in light of the various personalities and interests involved, and negotiate the potential settlement. This is a scenario that practicing lawyers face on a regular basis, for settlement is a possibility in virtually every lawsuit and, statistically speaking, is an exponentially more likely outcome than trial.[53] Yet, the tasks described above require perspectives and skills that are much more broadly-focused and nuanced than the pure legal analysis that is emphasized in doctrinal law school courses.

As another example, consider the issues an attorney representing a party in a bitter divorce action might face. Legal analysis is often less important in such situations because most states have enacted no-fault divorce statutes,[54] and the parties' respective factual positions relative to the applicable law therefore often have less impact on the outcome.[55] Extralegal concerns may in fact be far more important. For instance, the parties may view the psychological and emotional impact of the divorce as the most important issue because they have young children and will need to maintain a cordial relationship going forward. They may want family counseling to be an important component of the separation agreement in order to provide a forum for the children to deal with their feelings. They may see the children's education as a crucial concern, and want to prioritize this issue in discussing the financial ramifications of

53. *Cf.* David Sherwyn, J. Bruce Tracey, and Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 150 (1999).

54. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 5/406 (West 2007).

55. Of course, legal analysis may still be relevant in such situations. The parties may, for example, dispute the amount of alimony that should be paid. The resolution of this issue will depend largely on the parties' respective earning capacities and the pre-divorce standard of living, evaluated in light of the applicable statute. This is obviously a classic example of legal analysis. Our point, however, is that other concerns often dominate divorce proceedings, and extralegal considerations will likely remain relevant even when legal analysis is necessary to resolve a specific issue.

the divorce. The parties' needs in a situation such as this have very little to do with legal analysis, and their interests will likely not be served if they become embroiled in protracted litigation. To effectively represent the parties in such a scenario, the lawyers must therefore be able to take into account a variety of extralegal concerns, such as the emotional consequences of various courses of action, and must be able to carefully manage the tensions between the parties. Obviously, training in legal analysis does not equip a lawyer to provide such representation; rather, the case method encourages students to ignore such concerns.[56]

Recent research has also shown that leadership skills are tremendously valuable to practicing attorneys but, like social, ethical, and problem-solving skills, are not purposely taught or adequately emphasized in law school.[57] This should not be surprising, for leadership is a "people-focused, inspirational, emotional, non-linear and visceral" skill, and most of these qualities are de-emphasized by traditional legal education.[58] Law school graduates have a tendency to be "less sociable and more skeptical, urgent, analytical, autonomous, and more defensive and thin-skinned than the general public—by a wide margin."[59] While these characteristics make us good legal analysts, they usually also make us mediocre leaders. Leadership is a skill that is based on one's ability to exhibit certain key behaviors; because these behaviors can be learned, leadership can also be learned.[60] According to Larry Richard and Hillary Lambreth, the key behaviors include: thinking outside the box and experimenting with new and better ways of doing things; advocating positive, forward-looking goals; collaborating with, encouraging, and praising co-workers rather than hoarding power; acting in accordance with the values and principles to which others are held; and being self-aware enough to take responsibility for and determine how to overcome setbacks.[61] Certainly these behaviors could be incorporated into legal education—for example, by teaching certain practice-based courses using a team-based approach and encouraging students to brainstorm both legal and non-legal solutions to problems. Currently, however, law schools rarely take such considerations into account, and the case method of instruction does little to promote these behaviors.

Not only does the singular focus of traditional legal education fail to adequately develop the full range of skills students will need as lawyers,

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56. *See, e.g.*, CARNEGIE REPORT, *supra* note 24, at 6 ("[T]he task of connecting [legal] conclusions with the rich complexity of actual situations that involve full-dimensional people, let alone the job of thinking through the social consequences or ethical aspects of the conclusions, remains outside the case-dialogue method."); Daicoff, *supra* note 20, at 6 ("[I]n law school, emotional and interpersonal concerns are strongly de-emphasized, if not blatantly ignored.").

57. Richard & Lambreth, *supra* note 47.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

but the teaching methods themselves also have a detrimental impact on law students. The case method is designed to require summative assessments in which students' competence in doctrinal subjects is measured solely by comprehensive examinations given at the end of the semester.[62] The usual result of summative assessments is to rank, sort, and filter those being assessed.[63] Certainly this is most students' experience with the high-stakes exams given during the first year of law school, which have the effect of opening academic and career options for some students and closing them for others.[64] In certain situations, summative assessments are a preferable form of evaluation. For example, the bar examination is a summative assessment designed to create a barrier to entry in the legal profession by ensuring that those who are admitted have basic levels of competency.[65] Such an examination may be desirable in some law school courses, but the dominance of this form of evaluation in law schools is troubling. Studies have shown that formative assessments—in which students are evaluated periodically, allowing educators to better chart and encourage students' progress—are far more conducive to learning.[66] Yet, formative evaluations are rarely utilized in law school classes.[67] If law schools' mission is truly to educate, then schools should consider using a variety of teaching methodologies so that students' capacity for learning is maximized.

The prominence of the case method in legal education also has a proven negative impact on students' psyches. By forcing students to narrowly focus on only the legal consequences of disputes, the case method excludes the social context in which disputes occur from students' frames of reference.[68] For purposes of instructing students in legal analysis, this is an effective strategy. But law schools typically reintroduce the social, moral, interpersonal, psychological, and emotional dynamics of legal issues haphazardly, if at all, leaving students to determine on their own the relevance of such issues to legal practice.[69] As discussed above, this frequently leaves students with the misimpression that such concerns are irrelevant in legal practice when, in fact, nothing could be further from the truth. But the lack of attention given to such matters in traditional legal education also has another, more personal consequence. Many students find the narrow, formalistic approach emphasized in law school to be disillusioning because it discourages the ideals and goals that bring a great many students to law school in the first place, such as

62. CARNEGIE REPORT, *supra* note 24, at 7.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *See* Mertz Summary, *supra* note 20, at 5; CARNEGIE REPORT, *supra* note 24, at 6.
69. *See* Daicoff, *supra* note 20, at 5-6; CARNEGIE REPORT, *supra* note 24, at 6-7.

helping people or promoting social justice.[70] On one hand, the case method eliminates misconceptions about how the law works; in a great many individual cases the law operates in a manner counter to students' ideals and aspirations, and legal results are often reached without reference to social or moral consequences.[71] But one would hope that lawyers, as officers of the American judicial system, aspire to something greater in their representation of clients than the simple ability to manipulate legal rules. When law students are conditioned to believe that the practice of law entails nothing more, they are forced to either shift their goals and values or reluctantly accept the hand they have been dealt. Commentators have found that both types of changes regularly occur in law students, resulting in a great deal of cynicism and anxiety.[72]

For example, Kennon M. Sheldon and Lawrence S. Krieger recently completed a three-year longitudinal study of law students at two different law schools.[73] The first school heavily emphasized abstract legal theory and analysis in its curriculum, while the second attempted to integrate this traditional approach with a heavy dose of practical skills training.[74] Using a variety of statistical tests, Sheldon and Krieger measured the students' well-being as they progressed through law school.[75] The results of the study are striking. At both schools, the students experienced a decline in emotional and psychological well-being.[76] Sheldon and Krieger attribute this decline to multiple factors. First, they found that the students experienced a dramatic shift in their value systems during law school, from a generally intrinsic focus to a generally extrinsic fo-

70. *See, e.g.*, Mertz Summary, *supra* note 20, at 5 ("[T]he way legal reasoning is taught and practiced creates a closed linguistic system that is capable of devouring all manner of social detail, but without budging from its core assumptions." (internal quotation marks omitted)); CARNEGIE REPORT, *supra* note 24, at 6 ("Students often find [the exclusion of moral concerns from their training in legal analysis] confusing and disillusioning. The fact that moral concerns are reintroduced only haphazardly conveys a cynical impression of the law that is rarely intended.").

71. *See* CARNEGIE REPORT, *supra* note 24, at 6.

72. *See, e.g.*, Milton C. Regan, Jr., Book Review, 55 J. LEGAL EDUC. 454, 464 (2005) (reviewing JEAN STEFANCIC & RICHARD DELGADO, HOW LAWYERS LOSE THEIR WAY: A PROFESSION FAILS ITS CREATIVE MINDS (Duke Univ. Press 2005) ("On a personal level, lawyers confront stories that evoke visceral moral responses; on a professional level, they are consistently denied recourse to those responses when they do their work . . . . It's easy to see that this can be a recipe for cynicism and despair, because it undermines the very notion that human beings can achieve a degree of moral order by establishing a legal system."); Kennon M. Sheldon & Lawrence S. Krieger, *Does Legal Education Have Undermining Effects on Law Students? Evaluating Changes in Motivation, Values, and Well-Being*, 22 BEHAV. SCI. & LAW 261, 283 (2004) (finding that students generally experience increasing distress during law school associated with a shift in values and perspectives) [hereinafter Sheldon & Krieger: Motivation, Values, and Well-Being].

73. Kennon M. Sheldon & Lawrence S. Krieger, *Understanding the Negative Effects of Legal Education on Law Students: A Longitudinal Test and Extension of Self-Determination Theory*, PERS. & SOC. PSYCHOL. BULL. (forthcoming 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=913824 [hereinafter Sheldon & Krieger: Negative Effects].

74. *Id.* at 11.

75. *Id.* at 15-19.

76. *Id.* at 4.

cus.[77] On entering law school, most students' values were oriented toward societal contribution, helping others, emotional connections, and personal growth.[78] Over the course of law school, however, students became less likely to act based on personal interest or inherent satisfaction and more likely to act based on extrinsic rewards such as image, appearance, and prestige.[79] This shift in values understandably caused a great deal of distress for the students, for it represented a change in many students' self identities.[80] Sheldon and Krieger also found that the students' levels of need satisfaction declined during law school, resulting in an overall loss of motivation.[81] Their studies linked the decline in need satisfaction to lower levels of autonomy (i.e., feelings of independence and self-sufficiency), intrinsic satisfaction (i.e., the ability to satisfy personal needs and values), and psychological satisfaction (i.e., feelings of competence and relatedness to others).[82]

According to Sheldon and Krieger, the methodology of traditional legal education is primarily responsible for the decline in well-being that they identified.[83] While students' emotional and psychological well-being declined at both schools, it declined much more precipitously at the school that heavily emphasized legal theory.[84] Sheldon and Krieger found that this disparity resulted from the difference in social contexts at the two schools.[85] When the social context in law school supports students' autonomy, gives them balanced interdisciplinary training, and focuses on satisfying students' psychological needs, such as competence and relatedness, students' need satisfaction increases.[86] And when students' needs are satisfied, their emotional well-being and psychological health is enhanced, their performance (as measured by, for example, GPA) improves, and their self-determined job motivation increases.[87] Self-determined job motivation is a particularly important gauge of institutional success, for it is highly correlative with professional achievement and fulfillment after graduation.[88] Unhappy lawyers make unprofessional lawyers, and therefore we must train law students in a way that

77. *Id.*; *see also* Sheldon & Krieger: Motivation, Values, and Well-Being, *supra* note 72, at 272-83 (discussing law students' shift in values during law school).

78. Sheldon & Krieger: Negative Effects, *supra* note 73, at 4; Sheldon & Krieger: Motivation, Values, and Well-Being, *supra* note 72, at 264-78.

79. Sheldon & Krieger: Negative Effects, *supra* note 73, at 4; Sheldon & Krieger: Motivation, Values, and Well-Being, *supra* note 72, at 272-83.

80. *See, e.g.*, Sheldon & Krieger: Motivation, Values, and Well-Being, *supra* note 72, at 283 (discussing law student distress).

81. Sheldon & Krieger: Negative effects, *supra* note 73, at 4-5, 28-32.

82. *Id.*

83. *Id.* at 28-33.

84. *Id.* at 11, 21.

85. *Id.* at 11, 32.

86. *Id.* at 28-33.

87. *Id.*

88. *Id.* at 31.

promotes intrinsic fulfillment and encourages them to pursue personally satisfying career options.[89]

However, traditional legal education, with its formalistic use of the case method and narrow focus on legal analysis, does not provide a social atmosphere conducive to students' intrinsic needs.[90] In fact, when used in isolation, the standard methods of legal instruction tend to stifle students' needs and promote a shift in values that is detrimental to students and, consequently, to the profession.[91] Sheldon and Krieger suggest that even schools that focus primarily on teaching legal analysis can foster a culture that improves students' well-being by, for example, focusing on student concerns, providing students with choices, and including rationales and explanations for mandatory requirements.[92] But their study also found that law schools with a balanced, comprehensive curriculum are much more likely to create such a culture because students who are given the opportunity to learn and implement a larger range of legal skills have increased feelings of independence and competence.[93] Thus, the second school in Sheldon and Krieger's study was able to temper the negative effects they identified by balancing the development of traditional legal skills with application-based practical courses.[94]

Analyses such as Sheldon and Krieger's help explain the alarming rates of depression, cynicism, and career dissatisfaction that afflict the legal profession. Recent studies have shown that lawyers suffer depression at a rate four times higher than the general population; in fact, in a study of more than 100 professions, lawyers had the highest incidence of depression.[95] In a survey of lawyers with six to nine years of experience, only forty one percent reported being satisfied with their career.[96] Of that same group, only thirty-five percent would recommend a legal career to a young person.[97] Commentators have attributed these ills to the general lack of intrinsic fulfillment and intrapersonal development in the legal profession,[98] problems that, as demonstrated by Sheldon and Krieg-

89. *See* Lawrence S. Krieger, *The Inseparability of Professionalism and Personal Satisfaction: Perspectives on Values, Integrity and Happiness*, 11 CLINICAL L. REV. 425, 426 (2005).

90. Sheldon & Krieger: Negative effects, *supra* note 73, at 4-5, 28-33.

91. *See id.* at 3-4 (noting that the case method style of instruction, when used in isolation, "thwart[s] the needs and preferences of typical law students" because it "train[s] students to ignore their own values and moral sense, undermine[s] students' sense of identity and self-confidence, and create[s] cynicism"); *see also* Sheldon & Krieger: Motivation, Values, and Well-Being, note 72, at 272-83 (discussing impact of traditional legal training on law students' values).

92. Sheldon & Krieger: Negative effects, *supra* note 73, at 5-6.

93. *Id.* at 32.

94. *Id.* at 11, 32.

95. Joan E. Mounteer, *Depression Among Lawyers*, 33 COLO. LAW., Jan. 2004, at 36, 37, *available at* http://www.cobar.org/tcl/tcl_articles.cfm?ArticleID=2963.

96. Stephanie F. Ward, *Pulse of the Legal Profession*, A.B.A. J., Oct. 2007, http://www.abajournal.com/magazine/pulse_of_the_legal_profession.

97. *Id.*

98. *See, e.g.*, Daicoff, *supra* note 20, at 53-54 (noting that the "crisis" facing the legal profession is that many lawyers' do not have the "ability to know themselves well").

er, can be traced back to a lawyer's education.[99] In an educational system that promotes such a rapid shift in thought processes—away from intrinsic fulfillment and growth—it should come as little surprise that disillusionment reverberates through many lawyers' early careers, particularly when the intrinsic impact legal education has on who law students are as people is not addressed at an institutional level.

In summary, legal analysis is merely the tip of the iceberg in terms of the skills practicing lawyers require. None of the skills discussed in this section are taught in a structured manner or even emphasized in most law schools' curricula, yet all are crucial for professional success. Thus, when the case method is used in isolation and legal analysis is emphasized to the exclusion of other important skills and perspectives, students are being short-changed because they are trained to analyze disputes from only one narrow point of view. Students graduate with an incomplete set of tools and are therefore ill-prepared for the variety of situations they will face as practicing attorneys. The dominant methods of legal instruction also have a negative emotional and psychological impact on students, causing a shift in perspectives and values that fosters cynicism and distress. The failure of legal institutions to attend to students' well-being and satisfaction has a tendency to create disillusioned students, and this does not serve those being educated, the profession, or society as a whole. As educators, we can do better. Law schools are institutions of higher learning, and their educational mission should be to educate the best lawyers possible. When schools are instead churning out masses of unprepared, disenchanted practitioners, it is time to reevaluate our teaching methodologies. With this background in mind, the following section examines the changes currently underway in legal education and suggests an approach that will both give students more comprehensive training in legal practice and also maximize the personal benefit students receive from their law school experience.

III. TOWARD A COMPREHENSIVE VIEW OF LEGAL EDUCATION

Law is a profession of immense depth, and it would be impossible to convey a full understanding of all its nuances and intricacies during a mere three-year instructional period. Indeed, legal education is a process that can never be viewed as "complete," for law is never static and those who practice it will continue to update their doctrinal knowledge and hone their skills throughout their careers. The best lawyers are those that remain eager to learn and improve their craft long after they have accumulated enough experience to be considered seasoned practitioners. Thus, law school must be viewed as the beginning of students' legal education rather than an experience that will impart everything they need to

99. Sheldon & Krieger: Negative Effects, *supra* note 73, at 4; Sheldon & Krieger: Motivation, Values, and Well-Being, *supra* note 72, at 272-83.

know for a career as a lawyer. Nonetheless, the significance of the institutional failures that are occurring in American law schools cannot be overstated. Law school is the singular experience that unites all members of the legal profession, "where the profession puts its defining values and exemplars on display, and future practitioners can begin both to assume and critically examine their future identities."[100] When law students are educated in a manner that is not only inadequate but also fosters cynicism and distress, the entire profession suffers and, correspondingly, so does society in general. After all, lawyers are officers of the court, and the legal profession is the sole supplier of personnel for the judicial branch of our government, which is sworn to serve the public by justly deciding disputes. The training this nation's legal institutions impart to future lawyers is vital to the successful functioning of American democracy.[101] It is therefore crucial that law schools redefine their educational mission and begin to train students in more of the skills and perspectives they will need to maximize their success as professionals.

Reforming the institution of legal education will not be easy. It is a testament to the pedagogical power of Langdell's approach that the case method remains firmly entrenched as the dominant form of legal instruction despite mounting criticism in recent years. And while all institutional cultures are generally resistant to change, legal education may be even more so. The prevailing mindset in the profession is not one that encourages change; most educators have been trained to "think like a lawyer" and contest conflicting information, rather than alter their approach when contradictory data are presented.[102] Furthermore, because the current regime has morphed into a reliable method of sorting students for prestigious law firms and the government,[103] the most influential actors in the profession do not have a strong incentive to promote reform.[104]

Nonetheless, American legal education has been gradually evolving in spite of these obstacles. Indeed, law students currently receive more practical skills training and are exposed to a broader range of interdiscip-

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100. CARNEGIE REPORT, *supra* note 24, at 4.

101. Carnegie Foundation, Carnegie Examines the Education of Lawyers and Calls for Change, 2007, http://www.carnegiefoundation.org/news/sub.asp?key=51&subkey=2152 ("The calling of legal educators is a high one—to prepare future professionals with enough understanding, skill and judgment to support the vast and complicated system of the law needed to sustain the United States as a free society worthy of its citizens' loyalty.").

102. *See, e.g.*, Mertz Summary, *supra* note 20, at 5-6 (contrasting the mindset of those trained in legal reasoning with "that of academics in, for example, social sciences, who are forced, at least eventually, to revise their theories when confronted with conflicting or contradictory data").

103. Steven W. Keeva, *Practicing From the Inside Out*, 7 HARV. NEGOT. L. REV. 97, 105 (2002).

104. On the other hand, legal employers would ultimately benefit if law schools reliably produced more self-aware, well-rounded lawyers. Not only would new lawyers enter the workforce with a larger set of skills, but they would also be more in touch with their professional goals and desires, and would thus be less likely to leave their jobs (or the profession) at such a rapid rate.

linary perspectives than ever before.[105] For example, many law students now receive real world legal experience through clinical programs,[106] and the vast majority of law schools offer courses that teach practical legal skills such as interviewing, counseling, and negotiation.[107] In addition, a variety of novel approaches to legal practice have sprung up within just the last ten years and have been incorporated to some extent in law school curricula. Examples of these alternative approaches include: "(1) collaborative law, (2) creative problem solving, (3) holistic justice, (4) preventive law, (5) problem solving courts, (6) procedural justice, (7) restorative justice, (8) therapeutic jurisprudence, and (9) transformative mediation."[108] These recent developments are all responsive to the dilemma of traditional legal education outlined previously; in law school, students are trained in analysis, issue-spotting, fact siphoning, and logical deduction but regularly need a broader and more dynamic skill-set to solve the problems with which they are confronted in practice.[109] The skills and perspectives making their way into legal education have thus developed to fill the vacuum created by the case method's singular focus. Many of these perspectives are interdisciplinary in nature and are designed to provide lawyers with a different "lens" through which to view disputes or problems.[110] For example, therapeutic jurisprudence is a distinctly psychological practice in which lawyers consider the effect of legal options on the well-being of the characters involved in a particular dispute in addition to the usual legal concerns, such as rights and duties.[111] "[G]iven two different options for achieving a particular legal result, if one option is more therapeutic than the other, the lawyer should attempt to pursue the more therapeutic course of action."[112] Similarly, the discipline of creative problem solving is "a broad approach to solving legal problems that takes into account a wide variety of non-legal issues and concerns and then seeks creative, win-win solutions to otherwise win-lose scenarios."[113] While traditional legal analysis is often a starting point, a creative problem solving approach encourages students to explore options and solutions beyond what would result from the formal application of legal rules.[114]

Although the recent advances in legal education encompass a variety of skills and approaches, the reforms all share several common pers-

105. *See, e.g.*, CARNEGIE REPORT, *supra* note 24, at 189 ("Compared to fifty years ago, law schools now provide students with more experience, more contextual experience, more choice and more connection with the larger university world and other disciplines.").
106. Daicoff, *supra* note 20, at 47.
107. *Id.*
108. *Id.* at 1-2 (footnotes omitted).
109. *Id.* at 46.
110. *Id.* at 10.
111. *See id.* at 11-12.
112. *Id.* at 12.
113. *Id.* at 20.
114. *Id.* at 20-21.

pectives. First, an interdisciplinary view of legal practice in which extra-legal concerns such as resources, goals, morals, values, psychological well-being, and interpersonal relations are integrated with legal reasoning is becoming increasingly prominent.[115] A second and related development is that a broad problem-solving approach to dispute resolution is being stressed instead of the narrow focus of pure legal analysis. Finally, many of the changes represent an implicit recognition of the personal nature of legal practice and the corresponding need for lawyers to develop excellent human relations and communication skills.[116] These common threads have led some commentators to refer to the changes cumulatively as the "comprehensive law movement"[117] or "postmodern" legal education.[118] Viewed collectively, the recent reforms reflect a gradually increasing shift back to legal education's humanistic roots as law schools broaden their curricula and begin exposing students to a more diverse range of skills and perspectives.

While the focus of legal education has certainly changed during the last fifty years, the reforms have not yet stimulated the type of improvements that are necessary to maximize students' law school experience. Most of the changes that have occurred "have been more piecemeal than comprehensive."[119] In other words, most law schools have treated alternative skills and perspectives in an additive fashion, refusing to intrude on the priority given to training in legal analysis.[120] Courses in, for example, practical legal skills are thus subordinated to doctrinal training and are not integrated into the curriculum or developed to the extent that traditional courses are.[121] Although the majority of students graduate with a well-developed capacity for legal analysis, most are still trained in other crucial skills only haphazardly.[122] As a result, the deficiencies identified in the prior section persist.[123]

What is needed is an integrated, comprehensive approach to legal education. In his revolutionary book, *The Fifth Discipline: The Art and Practice of the Learning Organization*, Peter Senge gives the DC-3, the world's first twin engine airplane that was introduced in 1935, as an example of a comprehensive approach in the field of engineering.[124] As Senge writes,

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115. *Id.* at 4.
116. *Id.* at 4, 46-48.
117. *Id.* at 3.
118. Todd, *supra* note 4, at 895.
119. CARNEGIE REPORT, *supra* note 24, at 190.
120. *Id.*
121. *Id.*
122. *See id.* at 188.
123. *Id.* at 191-92.
124. PETER M. SENGE, THE FIFTH DISCIPLINE: THE ART AND PRACTICE OF THE LEARNING ORGANIZATION 6 (New York Doubleday 1990).

> [t]he DC-3, for the first time, brought together five critical component technologies that formed a successful ensemble. They were: the variable-pitch propeller, retractable landing gear, a type of lightweight molded body construction called "monocoque," radial air-cooled engine, and wing flaps. To succeed, the DC-3 needed all five; four were not enough.[125]

Law schools need to adopt such an approach to creating lawyers: a comprehensive, integrated curriculum focused on developing a greater range of the skills and perspectives lawyers need to succeed in practice. As an institution, legal education must acknowledge the deficiencies of the traditional methods of legal instruction and recognize that practical legal skills and diverse perspectives, such as those emphasized in the comprehensive law movement, are every bit as essential to a lawyer's development as legal analysis.

Dean Erwin Griswold of Harvard Law School once stated that law students need human relations and communication training because "lawyers deal with people. They deal with people far more than they do with appellate courts."[126] Similarly, in discussing attorneys' role in society, former Chief Justice Warren E. Burger said, "[w]e must be legal architects, engineers, builders, and from time to time, inventors as well. We have served, and must continue to see our role, as problem-solvers . . . ."[127] Law schools should respond to the calling of these two great scholars and integrate the practical and non-traditional parts of their curricula with the standard doctrinal training. In its recent study of American law schools, the Carnegie Foundation advocated such an approach, urging schools to "bridge the gap between analytical and practical knowledge" by "unit[ing] the two sides of legal knowledge: formal knowledge and experience of practice."[128] This requires numerous changes in the way law schools approach legal training. While doctrinal instruction and legal analysis are central to legal education, they should not overwhelm the curriculum or represent "the exclusive content" of students' first-year experience.[129] From the beginning of their law school experience, students should be taught the importance of legal analysis to legal practice but also its limits. Schools can promote such a perspective by, for example, emphasizing other skills in their doctrinal classes, even while teaching students how to narrowly analyze disputes in the traditional sense. To illustrate, doctrinal classes could be taught using a team-based approach in which students are asked to analyze specific cases in small groups. Professors can also ensure that extralegal concerns are not ig-

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125. *Id.*

126. David M. Hunsaker, *Law, Humanism, and Communication: Suggestions for Limited Curricular Reform*, 30 J. LEGAL EDUC. 417, 421 (1980).

127. Warren E. Burger, *The Decline of Professionalism*, 61 TENN. L. REV. 1, 5 (1993).

128. CARNEGIE REPORT, *supra* note 24, at 12.

129. *Id.* at 195.

nored by discussing the social and moral consequences of specific results, or asking students to assume the role of a party's attorney and discuss how they would approach a particular case from both legal and non-legal standpoints. We explicitly use such an approach in our courses by encouraging students to incorporate extralegal goals and values into their formalistic decision-making.

Law schools should also give students practical experience early on by including in the first year curriculum at least one course that develops practical skills and teaches students to "think like a lawyer" in simulated practice settings.[130] The practical aspects of legal education should then be expanded as students progress through law school, giving students an increased opportunity to assume the responsibility of acting on behalf of clients.[131] In this manner, students would gradually transition from learning how to *think* like a lawyer to learning how to *act* like a lawyer. For example, schools could construct various sequences of practical courses—organized by, for instance, practice settings such as litigation or transactional work—in which students would learn and apply comprehensive skills. A commonly-taught course that follows this model is a pre-trial practice class, which typically builds on first-year civil procedure and other doctrinal courses by requiring students to apply their analytical knowledge to a simulated legal dispute as it progresses from discovery to trial. Law schools should also expand and refine their clinical training and require students to perform supervised legal work while in law school.[132] Ideally, students would work in small clinical groups and meet weekly with their supervisor in a classroom setting to discuss their experiences. By organizing clinics in this manner, schools would provide students with real-world experience and also a forum in which to brainstorm, share ideas, and receive advice and feedback.

In addition to emphasizing practical knowledge, schools should also seek to expose students to alternative perspectives, such as those that comprise the comprehensive law movement, either integrated with existing classes or as free-standing courses. This would allow schools to promote extralegal and interdisciplinary perspectives explicitly in addition to the implicit recognition such perspectives would receive in a more integrated curriculum. Furthermore, law schools must give increased emphasis to the ethical aspects of lawyering. Simply requiring a class on professional conduct is insufficient; training in professional ethics should be required earlier in law school and integrated with practice settings as students progress so that they can more fully appreciate the manner in which ethical and moral concerns impact their actions as practicing attorneys. For example, in our courses we often use practical simulations,

130. *See id.* at 188 (arguing that law schools should "employ well-elaborated case studies of professional work" to teach students how to use their skills in practice settings).

131. *Id.* at 178.

132. *Id.*

such as working with a client with diminished capacity, that require students to account for moral and ethical concerns in addition to legal analysis. An example of a similar approach in a doctrinal course would be a corporations professor teaching a hypothetical that required the students to address the policy concerns behind the attorney reporting requirements of the Sarbanes-Oxley Act. By integrating these types of concerns, law schools can provide a structured framework for the "exploration and assumption of the identity, values and dispositions consonant with the fundamental purposes of the legal profession."[133]

The integration discussed above would dramatically improve legal education by maximizing the impact of the second and third years of law school and training students in a more complete set of skills.[134] It would also, in and of itself, improve students' well-being and professional outlook by creating more well-balanced, self-aware, and satisfied law school graduates.[135] But law schools must also "be responsive to both the needs of our time and recent knowledge about how learning takes place."[136] Legal education as a whole needs to consider "the actual and potential effects of the law school experience on the formation of future professionals"[137] and engage in a self-critical examination of its teaching methodologies. This requires a recognition of the effects of not only the case method—which would be largely addressed by integrating the law school curriculum—but also of the way we teach and test across the board. If, as educators, we are truly committed to creating the best lawyers possible rather than ranking students so that law firms can determine who to hire, we must reevaluate the purpose of summative teaching and testing in legal education. This is not to say that summative assessment has no place in law school but rather that it should not be used to the exclusion of other methods that would enhance learning. To the extent possible, students should be evaluated periodically during the course of every law school class, even those in which grades are determined primarily on the basis of a final comprehensive exam. This would give professors the chance to assess students' progress and give them feedback and students the opportunity to improve and maximize their learning experience in each course.

Finally, law schools should also explicitly address the personal impact that their training—integrated or not—has on students. Legal education has a tremendous impact on the way students think and view the world; we cannot pretend that it does not also have an immeasurable

133. *Id.*

134. *See, e.g., id.* at 36-37 (discussing need for law schools to make better use of the second and third years of law school).

135. *See, e.g.*, Sheldon & Krieger: Negative Effects, *supra* note 73, at 28-33 (discussing the negative effects of traditional legal education on students' well-being and job motivation and the positive impact a more comprehensive approach to instruction would have).

136. CARNEGIE REPORT, *supra* note 24, at 12.

137. *Id.*

effect on who students are as people (nor should we want to).[138] When the personal, intrinsic changes that occur during law school are ignored, young lawyers enter the profession disillusioned, without a compass to guide their professional growth. Yet, the professional identities that students will carry with them into practice are forged from the intersection of their personalities and their newly developed capacities and perspectives. It is therefore essential that students develop a deep understanding of both who they are as individuals and how the legal training they are receiving can be integrated with their sense of self. To this end, law schools must create focused opportunities for students to reflect on their intrapersonal development.[139] Law schools must also help students develop a self-awareness of who they want to be as professionals by encouraging them to integrate their intrinsic goals and needs with the practice area they choose to pursue.

CONCLUSION

In essence, what we are advocating is a legal education focused on the practical and humanistic aspects of the profession to the same extent as the theoretical. By critiquing the current state of legal education, we do not purport to solve all of its ills. Education is fluid, and institutions maximize their potential by remaining flexible and dynamic, not by adhering to hard and fast rules. Change and growth are inevitable even under a comprehensive, integrated view of legal education because law schools must be responsive to the demands of the legal profession and society. But we believe that the narrow perspective of traditional legal education has become antiquated and that the comprehensive law movement is the harbinger of a rapidly approaching paradigm shift in legal education. By integrating the doctrinal and practical aspects of their curricula and providing direct training in the skills and perspectives outlined herein, law schools would provide students with a much more comprehensive toolkit with which to view disputes. Students would enter the legal profession as creative problem-solvers, rather than mere legal analysts. Such an approach would be much more consonant with society's need for lawyers. We must not forget that the law is founded on the social and moral evolution of humankind, not merely black-letter treatises, codes, or casebooks..

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138. *See, e.g.*, Joshua E. Perry, *Thinking Like a Professional* (unpublished essay on file with the authors) ("Over the course of their legal education, our students evolve both personally and professionally along complex and rich domains."); Parker J. Palmer, *A New Professional: The Aims of Education Revisited*, CARNEGIE FOUNDATION, Nov./Dec. 2007, http://www.carnegiefoundation.org/change/sub.asp?key=98&subkey=2455 (discussing how professional education has a tendency to focus exclusively on objective, analytical perspectives at the expense of important humanistic, emotional elements); Keeva, *supra* note 49, at 98 ("Almost nowhere in our modern lexicon does the use of the word practice suggest that side by side with acquiring knowledge of our chosen field we are simultaneously called on to make an active, ongoing effort to work with ourselves inwardly if we are to engage in the full practice of our profession.").

139. *See* Perry, *supra* note 138, at 9.

PRAYING FOR A TAX BREAK: CHURCHES, POLITICAL SPEECH, AND THE LOSS OF SECTION 501(C)(3) TAX EXEMPT STATUS

KEITH S. BLAIR†

INTRODUCTION

"Barack knows what it means to be a black man living in a country and a culture that is controlled by rich white people. Hillary can never know that."[1] Those words were part of a Christmas morning sermon preached by the Reverend Jeremiah Wright who, at the time, was the senior pastor of the Trinity United Church of Christ in Chicago, Illinois.[2] The sermon was noteworthy for at least two reasons. One, then-Senator Barack Obama was a member of Trinity United Church of Christ. Partly because of that sermon, then-Senator Obama came under fire for Reverend Wright's views,[3] and subsequently had to respond with speech dealing with Reverend Wright's sermons.[4] More importantly for purposes of this piece, Reverend Wright put his church's tax-exempt status in jeopardy with this sermon.

On October 31, 2004, two days before the presidential election, the Reverend George Regas preached a sermon at the All Saints Church in Pasadena, California entitled "If Jesus Debated President Bush and Senator Kerry."[5] That sermon precipitated a chain of events that endangered the All Saints Church's tax-exempt status.

Bill Keller, an evangelist based in Florida, was under fire for comments made about Mitt Romney while Romney was a candidate to be the

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† Assistant Professor of Law and Head of Tax Clinic, University of Baltimore School of Law. B.A. 1982, Andrews University; J.D., 1993, Brooklyn Law School. I would like to that the junior faculty scholarship group at the University of Baltimore School of Law for their feedback and encouragement. I would like to thank my research assistants, Dominic Markwordt and Samuel Nalli for their tireless work. Funding for this article was provided a University of Baltimore Educational Foundation Summer Research Fellowship. Finally, I would like to thank my wife, Faith Blair, for her support.

1. *See* Suzanne Sataline, *Obama Pastors' Sermons May Violate Tax Law*, WALL ST. J., Mar. 10, 2008, at A1.

2. *Id.*

3. *See* Jeff Zeleny, *Obama Works to Shift Campaign Back to Domestic Issues*, N.Y. TIMES, Mar. 20, 2008, *available at* http://www.nytimes.com/2008/03/20/us/politics/20speech.html?_r=1&ref=politics&oref=slogin.

4. *See generally* Barack Obama, *A More Perfect Union*, Speech at the National Constitution Center (Mar. 18, 2008), *available at* http://www.nytimes.com/2008/03/18/us/politics/18text-obama.html?em&ex=1206158400&en=8b748f91c621f76e&ei=5087%0A.

5. George F. Regas, Rector Emeritus, All Saints Church, Sermon at the All Saints Church: If Jesus Debated Senator Kerry And President Bush (Oct. 31, 2004), *available at* http://www.allsaints-pas.org/sermons/(10-31-04)%20If%20Jesus%20Debated.pdf.

Republican nominee for president. Americans United sent a letter to the Internal Revenue Service (IRS) requesting that it investigate Keller for stating that "if you vote for Mitt Romney, you are voting for Satan."[6] Reverend Keller has defended his statement, asserting that he was making a spiritual statement, not a political one.[7] Reverend Keller will not be the person making that decision however.

These are but three examples of a situation that is becoming more problematic in American society—that of religious organizations, particularly churches,[8] providing guidance to their parishioners on how to vote and for whom to vote. These churches and ministers that preside at the churches do not feel they are doing anything wrong. Rather, they believe that they are providing information to their parishioners on which candidates support issues that are important to the church. Critics of these churches and ministers contend that no matter how it is characterized, such speech violates the prohibition on tax-exempt organizations participating in the political process. Therefore, the critics maintain that those churches should lose their tax-exempt status.

Churches enjoy tax-exempt status pursuant to Section 501(c)(3) of the Internal Revenue Code.[9] That section provides the parameters by which churches and other tax-exempt organizations may enjoy the benefits of tax exemption. One requirement is that they do not engage in political speech or otherwise entangle themselves with the political process.

Churches and houses of worship are unique entities in American society. They minister to their parishioners, run food banks, distribute food, offer job counseling and, generally, deliver services to the community at large. Indeed, the federal government has recognized that churches are necessary providers of these services, and has enabled churches and other religious organizations to receive funds under the "faith based initiative" of the 1996 welfare reform act.[10] Some churches

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6. *See Separation of Church and State and Tax Exemptions*, WASHINGTON POST, June 1, 2007, at A04.

7. *Id.*

8. Throughout the course of this article the word "church" will be used to reference church, temple, mosque, and other houses of worship. "Certain characteristics are generally attributed to churches. These attributes of a church have been developed by the IRS and by court decisions. They include: distinct legal existence; recognized creed and form of worship; definite and distinct ecclesiastical government; formal code of doctrine and discipline; distinct religious history; membership not associated with any other church or denomination; organization of ordained ministers; ordained ministers selected after completing prescribed courses of study; literature of its own; established places of worship; regular congregations; regular religious services; Sunday schools for the religious instruction of the young; schools for the preparation of its ministers. The IRS generally uses a combination of these characteristics, together with other facts and circumstances, to determine whether an organization is considered a church for federal tax purposes." *See* INTERNAL REVENUE SERVICE, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS, 27, *available at* http://www.irs.gov/pub/irs-pdf/p1828.pdf.

9. 26 U.S.C. § 501(c)(3) (2007).

10. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 104(A) and (B), 110 Stat. 2105. *See also* Michele Estrin Gilman, *If At First You*

also believe that part of their calling is to speak out on issues that affect their parishioners and their community. Accordingly, churches should be able to speak on any issue that is of interest and importance to its parishioners without fear of the loss of tax-exempt status.

This article explores the issues involved with churches and political speech. Part I examines the relationship between religion and the state starting with examples from the Christian Bible. It also briefly discusses the history of religious tax exemptions through modern times. This Part also examines how churches and religion have affected American life.

Part II examines Section 501(c)(3) of the Internal Revenue Code and discusses how the ban on political intervention came to be, and reviews *Branch Ministries v. Rossotti*,[11] the seminal case involving churches, political speech, and tax-exempt status. This Part will also review the Political Activities Compliance Initiative, a program started by the IRS to review alleged political intervention by tax-exempt organizations. The IRS, through this program, has investigated a number of organizations.

Part III explores the constitutional issues related to churches and political speech. Specifically, this Part will examine the interplay of the First Amendment and Section 501(c)(3) and whether the ban on political intervention poses any constitutional problems.

Part IV discusses the problems of the political intervention ban in Section 501(c)(3). It will also look at problems that are unique to churches and structural problems with Section 501(c)(3).

Part V will demonstrate how Section 501(c)(3) actually affects churches through a case study of the IRS's investigation of All Saints Church. The All Saints investigation provides a current and public example of what can happen if the IRS decides to investigate a church. All Saints Church has posted all of its correspondence with the IRS on its website. That has provided an unprecedented picture of how a church investigation is conducted. This Part will then propose a limited solution to the problem. Recognizing that there are legitimate reasons both for having a ban on political intervention by churches and for allowing churches to keep tax-exempt status despite making what is deemed political speech, I will propose that a small exception be carved out for churches. While my solution will likely not please either side in this debate, it is a reasonable and necessary step.

Don't Succeed, Sign An Executive Order: President Bush And The Expansion Of Charitable Choice, 15 WM. & MARY BILL RTS. J. 1103, 1104-06 (2007). Professor Gilman's article examines President Bush's charitable choice executive orders to determine whether the orders were constitutional.

11. 211 F.3d 137 (D.C. Cir. 2000).

I. AN EXAMINATION OF THE RELATIONSHIP BETWEEN CHURCHES AND THE STATE

A. A Brief History of Churches and Tax Exemptions

Religion and politics have had a close relationship since Biblical times. According to the Bible, ancient Israel was a theocracy which was ruled by a series of "judges" appointed directly by God.[12] Subsequently, when Israel demanded a king, God, through the prophet Samuel, chose Saul.[13] Israel's fortunes were directly affected by its obedience to God's rule. For example, Israel was subject to three years of no rain until it rejected Baal and pledged allegiance to God.[14] Israel's apostasy led to its captivity by ancient Babylon.[15]

Given the close relationship between religion and the state, it is not surprising that special privileges would be afforded to churches. The earliest tax exemptions for churches can be traced to the Roman Empire.[16] Emperor Constantine, after he joined the early Christian church, granted preferences to the church. One of the preferences was a total exemption from all forms of taxation.[17]

England also has a history of tax exemption for churches dating back to the Middle Ages.[18] The common law in England during the sixteenth century governed all aspects of church life.[19] It dictated what was preached, where churches were located, the duties of its ministers, and corporate form of the church, among other things.[20] In addition to the governance of church operations, the English common law governed church taxation.[21]

Church property used for "religious" purposes was generally exempt from taxation.[22] The rationale for this exemption apparently was that the church performed governmental functions and in exchange for

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12. See, generally, the Biblical book of Judges for a description of the theocracy in ancient Israel.

13. 1 *Samuel* 10:1.

14. 1 *Kings* 16:32-33; 17:1; 18:1.

15. 2 *Chronicles* 36:16-17, 20.

16. *See* Vaughn E. James, *Reaping Where They Have Not Sowed: Have American Churches Failed to Satisfy the Requirements for the Religious Tax Exemption*, 43 CATH. LAW. 29, 35 (2004). Professor James discusses the question of whether churches in the United States are not complying with the requirements of Section 501(c)(3) of the Internal Revenue Code but still benefit by obtaining tax-exempt status. Ultimately, Professor James concludes that churches have been engaging in political activity and that Congress should amend Section 501(c)(3). *See Id.* at 78-79.

17. *Id.* at 35-36 (citing ALFRED BALK, THE FREE LIST: PROPERTY WITHOUT TAXES 21 (1971)).

18. *Id.* at 36 (citing ROUNDELL, ANCIENT FACTS AND FICTIONS CONCERNING CHURCHES AND TITHES 194 (Macmillan and Company 1888)).

19. *See* John Witte, Jr., *Tax Exemption of Church Property: Historical Anomaly or Valid Constitutional Practice?*, 64 S. CAL. L. REV. 363, 369 (1991).

20. *Id.*

21. *Id.* at 371-72.

22. *Id.*

those functions would receive a tax exemption.[23] In essence, there was a *quid pro quo* for the church performing functions that the state either could not or did not wish to perform.

B. Religious Tax Exemption in American Life

It should be no surprise that churches benefitted from tax exemptions in early American life. Prior to the American Revolution, nine of the thirteen colonies provided tax relief to established churches.[24] Congress as early as 1802 provided a tax exemption for churches.[25]

When Congress enacted the first income tax during the Civil War, it exempted charitable organizations.[26] In the Tariff Act of 1894, Congress explicitly provided a tax exemption for entities organized for religious purposes.[27] In 1917, Congress added a provision allowing deductions to be taken for making a charitable contribution to organizations that operated exclusively for religious purposes.[28]

In 1934, there was an attempt by Congress to enact a ban on political activity by tax-exempt organizations.[29] However, Congress was unable to come to an agreement on language that would have protected certain charitable organizations and the ban was not passed. A ban on lobbying by tax-exempt organizations was enacted.[30]

C. The Importance of Churches in American Secular Life

Governments have given churches and religious organizations tax exemptions because of the value that these entities provide to society. Churches and religious leaders, however, are involved in numerous areas of social work and political discourse which do not, at first glance, appear to relate directly to the spiritual well-being of their congregants.

A recent study by the Pew Research Center found that 78% of American adults reported belonging to some Christian faith and 5% reported belonging to some other faith, leaving only 16% unaffiliated with

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23. *Id.* at 375.

24. *See* John K. Wilson, Comment, *Religion Under the State Constitutions 1776-1880*, 32 J. CHURCH & ST. 753, 754 (1990).

25. *See* Vaughn E. James, *The African-American Church, Political Activity and Tax Exemption*, 37 SETON HALL L. REV. 371, 376 (2007).

26. *Id.*

27. *Id.*

28. *See* David M. Anderson, *Political Silence at Church: The Empty Threat of Removing Tax-Exempt Status for Insubstantial Attempts to Influence Legislation*, 2006 BYU L. Rev. 115, 123-24 (2006). The exemption also applied to contributions made to organizations that were organized and operated exclusively for charitable, scientific or educational purposes.

29. *See* Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 23 (2003).

30. *Id.*

any particular religion.[31] While not every person who reported being affiliated with a religion is a devout follower, it is not inconceivable that a large number of people get more than traditional "spiritual" guidance from their various denominations. These people receive guidance on issues affecting their entire lives, not just on traditional "spiritual" issues.[32]

Clergy are speaking on a wide range of social issues.[33] Survey respondents who attended church services once or twice a month reported that their ministers spoke about the following issues from the pulpit: hunger and poverty, abortion, the war in Iraq, homosexuality, the environment, evolution, the death penalty, stem cell research, and immigration.[34] These are issues that touch all sectors of life in the United States. If a church believes that it has a social justice mission, it would not be a surprise that church leaders would want to speak on these issues.

Interestingly, the public is virtually evenly split on the question of whether churches should actually speak out on political and social issues. A survey conducted by the Pew Center found that 51% of respondents believed that churches should speak out on political and social issues.[35] This split is not surprising. The United States is not monolithic in its values. There are very few issues on which a solid majority agrees, absent a national crisis. Churches, like society, are not monoliths—some are conservative, some are liberal, and others cannot be labeled. The survey participants' ambivalence on the issue of speaking out on political and social issues is a reflection of society.

D. Churches' Influence on Society

Churches and ministers have been at the forefront of social and political change throughout the history of the United States. It is hard to imagine what our society would look like if churches had not been involved in social justice. From civil rights to abortion to the peace movement, churches have spoken out, marched, sat-in, and generally rallied our country around these issues. And, churches have taken varying positions on some of the issues, which has enriched the debate on the various issues.

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31. *See* PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 10 (2008), http://religions.pewforum.org/pdf/report-religious-landscape-study-chapter-1.pdf. This survey examined the public's acceptance of churches addressing topics than those that might be considered purely Biblical. The survey generally found that while most Americans found that religion was losing influence in the daily lives of Americans, religion was gaining influence in politics and government.

32. *See* STEPHEN L. CARTER, THE CULTURE OF DISBELIEF 73-74 (Basic Books 1993).

33. *See generally* THE PEW FORUM ON RELIGION & PUBLIC LIFE, MANY AMERICANS UNEASY WITH MIX OF RELIGION AND POLITICS 9 (Aug. 24, 2006), http://pewforum.org/publications/surveys/religion-politics-06.pdf.

34. *Id.*

35. *Id.* at 8.

1. Reverend Martin Luther King and the Civil Rights Movement

The Reverend Martin Luther King is probably the most prominent example of a religious leader who influenced social policy and the political process during the twentieth century. In 1955, Reverend King, while the pastor of the Dexter Avenue Baptist Church, organized the Montgomery bus boycott which was precipitated by Rosa Parks's refusal to give up her seat on a bus.[36] As a result of the boycott, the Supreme Court ended segregation in public transportation.[37] Reverend King further helped found the Southern Christian Leader Conference, a prominent civil rights organization in the 1950s and 1960s.[38]

There can be little doubt that the "church" and the teachings of the "church" played a prominent role in Reverend King's leadership and in the lives of the thousands who participated in the civil rights movement because of him. It is not overstating the issue to say that the modern civil rights movement would not have been as successful were it not for the support of Reverend King's church and other black churches. Church members were mobilized by their ministers. They were informed of civil rights developments in church. The information shared in these churches was not strictly religious in nature. However, those messages were informed by shared beliefs grounded in the faith of those who gave the messages and those who heard them. None of this would have been possible were it not for the church.

2. President Bush's Faith-Based Initiative

The federal government is aware of the importance of churches in providing social services to their communities. President Bush made his "faith-based initiative" a centerpiece of his domestic policy. On January 29, 2001, he issued an Executive Order which created the White House Office of Faith-Based and Community Initiatives.[39] This office was created to facilitate the awarding of funds to faith-based organizations that wish to compete for federal funds to provide social services.[40] This initiative has been a major priority of President Bush. Since its inception in 2001, eleven federal agencies have participated in the program;[41] and

36. *See* JOHN A. KIRK, MARTIN LUTHER KING JR., 19-36 (Pearson Education Limited 2005) (2005).

37. *See* Marc Brenman, *Transportation Inequity in the United States: A Historical Overview*, 34 HUM. RTS., Summer 2007, at 7, 9.

38. Southern Christian Leadership Conference, Our History, http://sclcnational.org/net/content/page.aspx?s=25461.0.12.2607 (last visited Dec. 16, 2008).

39. Exec. Order No. 13,199, 66 Fed. Reg. 8,499 (Jan. 29, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/01/20010129-2.html.

40. White House Faith-Based & Community Initiative http://www.whitehouse.gov/government/fbci/president-initiative.html (last visited Dec. 16, 2008).

41. *Id.*

more than $2.1 billion in grants were awarded pursuant to this initiative in the 2005 fiscal year.[42]

Religious organizations receiving funds under the initiative do not have to hide the fact that they are, indeed, religious entities when providing services.[43] They can retain religious symbols and icons in the facilities where they provide services. They also can take religion into account when making employment decisions.[44] They may not, however, perform "inherently religious" activities when providing social services pursuant to the federal grant. They also may not discriminate on the basis of religion against the recipients of the services that they are providing.[45] This appears to be an attempt by the administration to allow religious organizations to retain some of their religious identity while recognizing that separation of church and state must not be breached. It is also another example of how religious organizations are integrated into all areas of life, including those areas connected to politics.

Even absent the faith-based initiative, religious organizations remain major providers of social services in the United States. Organizations such as Catholic Charities and Adventist Community Services provide vital services to communities that local, state, and federal governments do not provide. These religious organizations provide job training, meals, day-care services, counseling services, and a host of other social services to their communities. These services do not involve teaching religious doctrine, but they are biblically based. Were it not for organizations like these, either the recipients of the services would do without, or local, state, and federal governments would have to provide them.

These are but a few examples of how churches and other religious organizations are an integral part of American life. Churches provide value and service to their communities that the local, state and federal governments do not and most likely cannot provide. Indeed, the federal government encourages churches to provide social services that it is not providing through the faith-based initiative.

Many Americans depend on their churches for guidance in all parts of their lives, including politics: "The truth—an awkward one for the guardians of the public square—is that tens of millions of Americans rely on their religious traditions for the moral knowledge that tells them how to conduct their lives, including their political lives."[46] Given that so

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42. Press Release, Office of the Press Secretary, Fact Sheet: Compassion in Action: Producing Real Results for Americans Most in Need (Mar. 9, 2006), http://www.whitehouse.gov/news/releases/2006/03/20060309-3.html

43. GOVERNMENT ACCOUNTABILITY OFFICE, REPORT TO CONGRESSIONAL REQUESTERS, FAITH-BASED AND COMMUNITY INITIATIVES 2 (June 2006), *available at* http://www.gao.gov/new.items/d06616.pdf.

44. *Id.*

45. *Id.*

46. *See* CARTER, *supra* note 32, at 67.

many people rely on their faith to guide their daily living choices, it stands to reason that churches want to give that guidance.

The fact that churches touch on so many aspects of people's lives makes them different from other charitable and social justice organizations. A person might join Planned Parenthood or NARAL Pro-Choice America[47] because they agree with one of the groups' position on abortion. They might even vote for a political candidate based on whether the candidate's views on abortion conform to their own and the group's views. However, it is unlikely that either group will provide the range of social services, let alone the moral teachings, that churches provide.

The members of individual churches also share strong religious bonds that members of other organizations might not share.[48] These bonds can shape a congregant's life in all aspects, from making moral choices, marriage decisions and, ultimately, the decision for whom to vote. While other tax-exempt organizations have members that are passionate about them, those organizations just do not touch on as many areas of their members' lives as churches do.

II. HOW AND WHY SECTION 501(C)(3) OF THE INTERNAL REVENUE CODE LIMITS WHAT CHURCHES MAY SAY

In 1954, circumstances occurred which led to the passage of the ban on political activity as we now know it. Although there is little legislative history, it is generally accepted that the following facts probably led to the ban.[49] In 1954, Senator Lyndon Johnson was running for reelection in his home state of Texas.[50] Senator Johnson faced a primary challenge from one Dudley Dougherty, a rancher-oilman, who also happened to be a millionaire. Dougherty was supported by the Committee for Constitutional Government ("Committee"). The Committee, a conservative political group, produced material which, among other things, advocated limiting the treaty-making authority of the President.[51] The material also advocated voting for Senator Johnson's opponent, Dougherty, and against Johnson.[52]

Senator Johnson became aware of the material, and asked his counsel, Gerald Siegel, for an opinion on its legality.[53] Siegel informed John-

47. Formerly The National Abortion and Reproductive Rights Action League.

48. *See* Allan J. Samansky, *Tax Consequences When Churches Participate in Political Campaigns*, 10-11 (Ohio State Pub. Law and Legal Theory, Working Paper No. 76, 2006), *available at* http://ssrn.com/abstract=924770.

49. *See* Chris Kemmitt, *RFRA, Churches and the IRS: Reconsidering the Legal Boundaries of Church Activity in the Political Sphere*, 43 HARV. J. ON LEGIS. 145, 152 (2006).

50. *See* Oliver A. Houck, *On the Limits of Charity: Lobbying, Litigation, and Electoral Politics by Charitable Organizations under the Internal Revenue Code and Related Laws*, 69 BROOK. L. REV. 1, 24 (2003).

51. *Id.* at 25.

52. *Id.* at 25-26.

53. *Id.* at 27.

son that while the materials violated Texas law, they did not violate federal law as there was no prohibition against directly or indirectly attempting to influence a political campaign.[54] Senator Johnson subsequently introduced an amendment to Section 501(c)(3) that would prohibit tax-exempt organizations from attempting to influence political campaigns.[55] The present ban, codified in Section 501(c)(3) of the Internal Revenue Code, resulted.

A. *Section 501(c)(3) of the Internal Revenue Code and How it Affects Churches*

The Internal Revenue Code provides tax exemptions for more than thirty types of organizations. These organizations are usually governed by one of five sections of the Code: 501(c)(3); 501(c)(4); 501(c)(5); 501(c)(6); and 527. Each of these sections controls a different type of organization.

Section 501(c)(3) provides the guidance for "charitable organizations."[56] A charitable organization is one "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition . . . or for the prevention of cruelty to children or animals . . . ."[57] Section 501(c)(3) organizations are prohibited from undertaking any political campaign activity and may only engage in a *de minimus* amount of lobbying activity.[58] No other tax-exempt organizations have this limitation.

Entities receiving a tax exemption pursuant to Section 501(c)(4) are generally referred to as "social welfare" organizations. These organizations bear some similarity to those governed by Section 501(c)(3), but there are some significant differences. First, Section 501(c)(4) organizations are prohibited from receiving tax-exempt contributions, while Section 501(c)(3) organizations have no such prohibition.[59] Second, Section 501(c)(4) entities are not as limited in the amount of political activity that they may undertake, while Section 501(c)(3) organizations have strong limitations.[60]

Section 501(c)(5) organizations are described as labor, industrial, or horticultural organizations.[61] Section 501(c)(6) organizations are described as "business leagues, chambers of commerce, [and] real-estate

54. *Id.*
55. *Id.* at 28-29.
56. 26 U.S.C. § 501(c)(3) (2007).
57. *Id.*
58. *See id.*
59. 26 U.S.C. § 501 (c)(3)–(4).
60. *Id.*
61. 26 U.S.C. § 501 (c)(5).

boards . . ." among others.[62] Section 527 organizations are political organizations created for the purpose of accepting political contributions.

Generally speaking, the Internal Revenue Code exempts religious (and charitable) organizations from the payment of taxes.[63] There are three conditions that must be met in order to receive the exemption. First, no part of net earnings of the entity may benefit any private shareholder or individual. Second, no substantial part of the organization's activities may consist of lobbying or attempting to otherwise influence legislation. Finally, the entity may not participate in or intervene in a political campaign for any political office—state, local, or federal.[64] Taxpayers that contribute to these organizations are able to deduct those contributions on their individual income tax returns.[65]

The Internal Revenue Code mandates that religious organizations seeking to obtain tax-exempt status from the IRS apply for a determination that they do, indeed, meet the requirements for tax-exempt status.[66] Churches, however, are exempt from this advance filing requirement. A church may simply hold itself out as tax-exempt.[67] In addition, churches are relieved from reporting requirements that other tax-exempt organizations face.[68] Nevertheless, in order to maintain their tax-exempt status, churches and other religious organizations must comply with the prohibition against political lobbying and participating or intervening in political campaigns.[69]

B. Political Activity

The Internal Revenue Code prohibits 501(c)(3) entities from "participating in, or intervening in" political campaigns "on behalf of (or in opposition to) any candidate for public office."[70] Section 501(c)(3) gives no further guidance as to what exactly "participating" or "intervening" in a political campaign actually is. The regulations accompanying Section 501(c)(3) are similarly unhelpful. The regulations simply state that "the publication or distribution of written or printed statements or the making of oral statements on behalf of or in opposition to such a candidate" are prohibited activities.[71]

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62. 26 U.S.C. § 501 (c)(6).
63. 26 U.S.C. § 501 (c)(3).
64. *Id.*
65. 26 U.S.C. § 170(a) (2007).
66. 26 U.S.C. § 508(a) (2007).
67. 26 U.S.C. § 508(c)(1)(A).
68. *See* James, *supra* note 25, at 377.
69. Although the focus of this paper is not on lobbying, a brief discussion on lobbying is instructive. Section 501(c)(3) states that "no substantial part" of a tax exempt organization's activities may be lobbying, which is described as "carrying on propaganda, or otherwise attempting to, influence legislation." 26 U.S.C. § 501(c)(3) (2007).
70. 26 U.S.C. § 501(c)(3) (2007).
71. *See* Treas. Reg. §1.501(c)(3)-1(c)(3)(iii) (as amended in 2008).

The IRS has issued a revenue ruling which attempts to clarify the situations for tax-exempt organizations because the Code and the regulations are so vague.[72] The revenue ruling describes twenty-one situations and, in each hypothetical situation, attempts to answer the question of whether the entity has intervened in a political campaign.[73] The IRS makes the obvious and somewhat unhelpful statement that "whether an organization is participating . . . , directly or indirectly, in any political campaign on behalf of or in opposition to any candidate for public office depends upon all of the facts and circumstances of each case."[74] The situations described in the revenue ruling are grouped into various categories of activities.

The first type of activity analyzed is voter education, voter registration and "get out the vote" drives.[75] Section 501(c)(3) entities are allowed to engage in these activities as long as the activity is non-partisan. The activities must not favor or oppose one candidate over another.[76]

The revenue ruling next considers individual activities by leaders of a 501(c)(3) organization. The IRS recognizes that the leaders have expression rights separate and apart from the organization that they represent, and thus there is no restriction on these individuals taking part in a political campaign. However, these individuals cannot make partisan statements in any organization publication or at official functions of the organization.[77]

The next activity tackled is candidate appearances. Candidate appearances have become a major issue over the last few election cycles. A 501(c)(3) organization may invite a candidate to speak and keep its tax-exempt status. If a candidate is invited to speak in his or her capacity as a candidate, the IRS will look at a number of factors to determine whether the entity is impermissibly intervening in a political campaign. The three factors[78] listed in the revenue ruling are: 1) whether the organization provided an equal opportunity for other candidates for the same office to participate; 2) whether the organization indicated either support or opposition to the candidate; and 3) whether fundraising occurred at the event.[79] No one factor is dispositive of the issue.

A timely example of the seriousness of this issue is the recent IRS investigation into the United Church of Christ, the denomination to

72. *See* Rev. Rul. 2007-41, I.R.B. 25 (2007).
73. *Id.* at 1421.
74. *Id.*
75. *Id.* at 1422.
76. *Id.*
77. *Id.* at 1422-23.
78. Although the Revenue Ruling indicates that the list is not exhaustive, no other factors are listed as guidance for organizations. *Id.* at 1423.
79. *Id.*

which then-Senator Barack Obama belongs.[80] While the revenue ruling states that whether other candidates are given an equal *opportunity* to participate is a factor that the IRS will consider, the letter from the IRS to the United Church of Christ states: "If a candidate is invited to speak in his or her capacity as a candidate, then other candidates running for the same office *must also be invited to speak* and there should be no indication of support for, or opposition to, any candidate by the organization."[81]

This inconsistency between the ruling's text and its application is also reflected in one of the examples in the revenue ruling for Section 501(c)(3). In the example, a minister invites a candidate to preach at her church during worship services and invites no other candidates. The example states that "by selectively providing church facilities to allow Candidate X to speak in support of his campaign, Church O's actions constitute political campaign intervention."[82] What was listed as one factor that the IRS will consider has become, in the same revenue ruling, an absolute ban on inviting a sole candidate to make an appearance. This inconsistency provides no guidance to churches and other organizations that wish to invite a candidate to speak. Admittedly, given the example in the revenue ruling, a church might determine that the safest course of action would be to invite all candidates for a political office to speak. The IRS's letter to the United Church of Christ would certainly seem to reinforce that belief. But the revenue ruling's text is inconsistent with its examples, and an organization could make a legitimate argument that inviting multiple candidates is not required.

Similarly, if an organization invites a candidate to speak as a non-candidate, but the candidate is "publicly recognized" by the organization, then the IRS will consider the following factors in determining whether there has been an impermissible intervention in a political campaign: 1) whether the individual has been chosen to speak solely for reasons unrelated to his candidacy; 2) whether the individual is speaking in a non-candidate capacity; 3) whether either the individual or organization makes mention of the political candidacy; 4) whether any campaign activity occurs in connection with the appearance; 5) whether there is a "nonpartisan atmosphere" at the event where the candidate is present; and 6) whether the organization indicates the capacity the individual is appearing and does not mention the individual's candidacy.[83] It appears

80. *See* Letter from Marsha Ramirez, Dir., Exempt Orgs., Examinations, to United Church of Christ (Feb. 20, 2008), *available at* http://www.ucc.org/news/pdf/lettrirs.pdf. Then-Senator Obama spoke at the United Church of Christ's biennial General Synod at the Hartford Civic Center on June 23, 2007. Additionally, a number of volunteers to the Obama campaign staffed tables outside the event promoting then-Senator Obama's candidacy.

81. *Id.* (emphasis added).

82. *See* Rev. Rul. 2007-41, 2007-25 I.R.B. 1421.

83. *Id.*

that as long as the individual's candidacy is not mentioned the IRS will not find that the inviting entity intervened in a political campaign.

The next category of activities is issue advocacy. Section 501(c)(3) organizations may take positions on issues as long as they do not favor one candidate over another.[84] The IRS lists a number of factors that it will consider when making a determination on whether an organization intervened in a political campaign on this basis.[85] Although "all facts and circumstances need to be considered," the communication will probably be deemed an intervention in a campaign if it makes reference to candidates or an upcoming election.[86]

The IRS also scrutinizes business activities and website links, but these activities are beyond this paper's scope and will not be discussed.

C. Branch Ministries v. Rossotti

The seminal case dealing with churches and political speech is *Branch Ministries v. Rossotti.* The defendant, Branch Ministries, Inc., operated the Church at Pierce Creek, in Binghamton, New York. It placed advertisements in *USA Today* and the *Washington Times* four days before the 1992 presidential election. The advertisements, which bore the headline "Christians Beware," asserted that Bill Clinton's positions on abortion, homosexuality, and condom distribution to teenagers were contrary to the Bible and urged all Christians not to vote for him.[87] At the bottom of the advertisement was a statement informing the reader that the advertisement was co-sponsored by the Church at Pierce Creek and other unnamed churches and concerned Christians nationwide. It further stated that tax-deductible donations for the advertisement would be accepted and gave a mailing address for donations.[88]

A newspaper article in the *New York Times* mentioned that the advertisement was scheduled to run in 157 more newspapers.[89] Not only did the *New York Times* take note of the advertisement, but the IRS also noticed. On November 20, 1992, the Regional Commissioner of the IRS notified Branch Ministries that he had authorized a "church tax inquiry"[90] because there was "a reasonable belief . . . that you may not be

84. *See id.*
85. *Id.*
86. *Id.*
87. *Id.* at 140.
88. *Id.*
89. Peter Applebome, *Religious Right Intensifies Campaign for Bush*, N.Y. TIMES, Oct. 31, 1992, at A1.
90. The Internal Revenue Service can initiate a "church tax inquiry" pursuant to Section 7611 of the Internal Revenue Code. The inquiry can only be "initiate[d] . . . if the Director, Exempt Organizations, Examinations reasonably believes . . . that the [church]: (a) may not qualify to be tax-exempt; or (b) may not be paying tax on an unrelated business or other taxable [entity]." *See* INTERNAL REVENUE SERVICE, TAX GUIDE FOR CHURCHES AND RELIGIOUS ORGANIZATIONS, at 26, *available at* http://www.irs.gov/pub/irs-pdf/p1828.pdf.

tax-exempt or that you may be liable for tax."[91] As part of the inquiry, the IRS summoned information from Branch Ministries. Branch Ministries refused to fully comply with the summons.[92] The IRS then began an examination of Branch Ministries. The examination proved to be unproductive, and as a result the IRS revoked the churches tax-exempt status. Branch Ministries subsequently sued over the loss of its tax-exempt status.[93]

In district court, the church asserted that the revocation of its tax-exempt status violated its right to free speech and free exercise of religion, and the Religious Freedom Restoration Act of 1993. The church also asserted that the IRS engaged in selective prosecution in violation of the Fifth Amendment's Equal Protection Clause.[94] The district court eventually granted the United States' motion for summary judgment.[95]

On appeal, the D.C. Circuit dealt with three arguments raised by Branch Ministries. First, it rejected the argument that the IRS did not have the statutory authority to revoke Branch Ministries' tax-exempt status.[96] Branch Ministries made the somewhat clever argument that the statutory language of Section 501(c)(3) refers to religious organizations, not churches, and that Section 508(c)(1)(A) exempts churches from applying in advance for tax-exempt status.[97] Therefore, according to Branch Ministries, a church's tax-exempt status flows from the fact that there is no provision in the tax code for the taxation of churches.[98] The D.C. Circuit rejected this argument stating that although every religious organization is not a church, every church is a religious organization. Therefore, Section 501(c)(3) applied to Branch Ministries.[99] Additionally, Branch Ministries applied for and received an advance determination from the IRS that it indeed was a church.[100]

The court next dismissed Branch Ministries' free-exercise claim, finding that the revocation of its tax-exempt status did not "substantially burden" its right to practice religion.[101] Specifically, the court found that withdrawing from electoral politics would not impact the church's religious beliefs. The court found that "the sole effect of the loss of the tax exemption will be to decrease the amount of money available to the Church for its religious practices."[102] The court also found that the

91. *See* Branch Ministries v. Rossotti, 211 F.3d 137, 140 (D.C. Cir. 1998).
92. *Id.*
93. *Id.*
94. *Id.* at 141.
95. *See* Branch Ministries v. Rossotti, 40 F. Supp. 2d 15, 27 (D.D.C. 1999).
96. *See* Branch Ministries v. Rossotti, 211 F.3d 137, 141 (D.C. Cir. 1998).
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* at 142.
102. *Id.*

church could establish a separate organization under Section 501(c)(4) of the Internal Revenue Code, and have that organization set up a political action committee to engage in political speech.[103] Finally, the court rejected the church's claim that the government violated the Fifth Amendment of the U.S. Constitution by engaging in selective prosecution. The court stated that the church did not show it was similarly situated to the other churches.[104]

While the *Branch Ministries* court came to the correct result given the facts of the case, it is likely it reached that result for the incorrect reasons. As noted earlier, the court found that "the sole effect of the loss of the tax exemption will be to decrease the amount of money available to the Church for its religious practices."[105] The court was probably correct in recognizing that the church would have less money available to it.

However, the court appears to have taken the position that this loss would be irrelevant to whether the church could continue in its ministry. That view does not give enough weight to the effect of losing tax-exempt status. It is hard to imagine that a church would be able to minister to its congregants and provide pastoral care and services at the same level if the amount of money available to it were to decrease. Loss of the tax exemption would directly impact how a church is able to exercise its religion.

III. THE FIRST AMENDMENT AND TAX EXEMPTIONS

Although churches are bound by the same ban on political activity as other tax-exempt organizations in Section 501(c)(3), they differ from other tax-exempt and social justice organizations. The first major difference between churches and other charitable organizations is that religion is specifically mentioned and protected in the U.S. Constitution.[106] The Free Exercise Clause and the Establishment Clause set religion and churches apart from other charitable and social justice organizations. It is instructive that protection for religion was included in the very first amendment to the Constitution. The First Amendment contains provisions that the government shall not establish a state religion, the Estab-

103. *Id.* at 143. The Court did note that the Section 501(c)(4) organization would need to be separately incorporated and maintain records that demonstrated that no tax-exempt donations were used to support the political action committee.

104. *Id.* at 144. In order to prevail in a claim of selective prosecution, it must be shown that (1) the party was singled out for prosecution from others that were singularly situated; and (2) the prosecution was improperly motivated. The Court found that Branch Ministries did not show that other churches had placed advertisements in national newspapers and solicited donations to pay for the advertisements. It appears that the scope of the political speech by Branch Ministries played a role in the Court's reasoning.

105. *Id.* at 142. The Court also stated that it thought that the impact of the decrease in money was "overstated." The IRS asserted, and the Court agreed, that the Church may hold itself out as a 501(c)(3) organization in the future and that donors would be tax deductible as long as the donors established that the Church met the requirements of Section 501(c)(3). *Id.* at 142-43.

106. U.S. CONST. amend. I.

lishment Clause, and that citizens shall be able to freely exercise their religion, the Free Exercise Clause.[107]

The First Amendment is an acknowledgement that, for many, religion is an important part of American life. The First Amendment protects those who value religion from those that do not and, just as important, it protects those who do not value religion from those that do. While the NAACP, ACLU, and NRA are important parts of the lives of those who are members of those organizations, these organizations do not receive the explicit protection that churches do through the First Amendment.

A. Establishment Clause

The Establishment Clause provides that the government may not prefer one religion over another.[108] The seminal Establishment Clause case is *Lemon v. Kurtzman.*[109] In *Lemon*, taxpayers in Rhode Island and Pennsylvania challenged statutes that gave state aid to non-public schools. [110] In Rhode Island, the state provided a salary supplement to teachers in non-public schools at which the average expenditure per student on secular education was less than the average in the state's public school.[111] At the time of the trial, 250 teachers had applied for the supplement, all of whom were employed in Roman Catholic schools.[112] A federal district court found the Rhode Island statute unconstitutional as a violation of the Establishment Clause.[113]

Similarly, a Pennsylvania statute allowed non-public schools to be directly reimbursed for teacher salaries, textbooks, and instructional materials.[114] However, it limited reimbursement to "secular" subjects and prohibited reimbursement for a course that contained materials expressing religious teaching.[115] A Pennsylvania federal district court found that the Pennsylvania statute did not violate the Free Exercise Clause or the Establishment Clause.[116] The U.S. Supreme Court decided to consolidate the two cases.[117]

The Supreme Court held that both statutes were unconstitutional and articulated a three-part test for the analysis of cases which impacted the religion clauses. First, a statute must have a secular purpose; second,

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107. *Id.*
108. *Id.*
109. 403 U.S. 602 (1971).
110. *Id.* at 606-07.
111. *Id.* at 607.
112. *Id.* at 608.
113. *Id.* at 609.
114. *Id.*
115. *Id.* at 610.
116. *Id.* at 611.
117. *See id.* at 606 ("These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools.").

the statute must neither advance nor inhibit religion; and finally, the statute in question must not cause an "excessive entanglement" with religion.[118] The Court found that both the Pennsylvania and Rhode Island statutes had an impermissible entanglement with religion.

B. Free Exercise Clause

The more interesting part of the religion clauses when it comes to an analysis of churches and political speech is the Free Exercise Clause. The Free Exercise Clause provides that "Congress shall make no law . . . prohibiting the free exercise [of religion] . . ."[119] First and foremost, "The free exercise of religion means . . . the right to believe and profess whatever religious doctrine one desires."[120] Because an argument can be made that the current prohibition on political activity by churches prevents them from exercising their religious rights, a free exercise analysis must be undertaken.

The Supreme Court's current jurisprudence regarding the Free Exercise Clause is explained in *Employment Division v. Smith*.[121] In *Smith*, the government fired two men from their jobs for using peyote, a hallucinogenic drug, during ceremonies at their Native-American church. The employees were subsequently denied unemployment benefits because of a state law barring persons from receiving unemployment benefits if they were fired for misconduct. The men sued the state asserting that the denial of benefits violated their First Amendment right to free exercise of their religion. The Supreme Court subsequently held that the state statute did not violate the Free Exercise Clause.

The Court, however, stated that a statute that not only infringed on the Free Exercise Clause but also implicated another First Amendment right could be unconstitutional.[122] An example of this "hybrid" type of claim is one that involves a Free Exercise claim and a freedom of speech claim. Because *Smith* only involved a Free Exercise claim, it was not subject to analysis under the hybrid claim analysis and the statute in question was upheld.

C. First Amendment Analysis of Section 501(c)(3)

Section 501(c)(3) of the Internal Revenue Code is a blanket prohibition on entities that wish to remain tax-exempt from undertaking any political activity.[123] This prohibition implicates both freedom of speech and freedom of religion and, therefore, is subject to analysis under *Smith*.

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118. *Id.* at 612-13.
119. U.S. CONST. amend. I.
120. Employment Div. v. Smith, 494 U.S. 872, 877 (1990).
121. *Id.* at 874.
122. *Id.* at 881.
123. *See* 26 U.S.C. § 501(c)(3) (2007).

1. Freedom of Speech

There should be no doubt that Section 501(c)(3) impacts the free speech rights of churches. Religious speech and political speech can be hard, or sometimes impossible, to differentiate.[124] Where one person might assert that a minister is making a political statement, another might say the minister is making purely religious remarks.

For example, a minister might preach a sermon on the New Testament parable of the Good Samaritan.[125] The minister might use the parable to encourage his congregation to help all people regardless of their differences. That would be a fairly benign use of the parable and would not implicate Section 501(c)(3).

But suppose the minister wished to use the parable to make the case that a candidate running for public office advocated positions which ran counter to the church's position on helping all. Or, what if the pastor wished to point out that another candidate advocated positions which would have made it easier to minister to people of different nationalities or ethnicities? Including either of those facts into a sermon might invite an inquiry from the IRS.

Could the sermon be given without reference to either of the candidates? Yes, of course it could. Would it be as effective? That is a question that only the minister can answer. Would a minister omit the references to the candidates in order to avoid an investigation by the IRS? Clearly, there are some churches and pastors that do not let the threat of an IRS investigation deter them; that is why this issue is growing in visibility and significance. However, there are some churches that may be deterred from speaking out on issues because of the fear of losing tax-exempt status.[126] This is a colorable infringement on speech that should trigger a hybrid claim under *Smith*.

2. Free Exercise

For a church that believes that it has a social justice mission, speaking out on matters that may be deemed political in nature may be an es-

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124. *See* Deirdre Dessingue, *Prohibition in Search of a Rationale: What the Tax Code Prohibits; Why; To What End?*, 42 B.C. L. REV. 903, 907, 911 (2001).

125. *Luke* 10:25-37. In the parable of the Good Samaritan, a Jewish traveler is accosted by robbers along a road and left for dead. A priest and a Levite see the traveler but do not stop to help. A Samaritan sees the traveler, stops, and helps the man to a place of safety. The significance of the parable is that Samaritans and Jews were enemies.

126. A real-life example of this occurred in the controversy over the remarks made by Reverend Jeremiah Wright and then-Senator Obama's subsequent speech in response to the furor. Then-Senator Obama's speech occurred just days before Easter Sunday, and some ministers thought that would be an appropriate time to address the issues of race raised by then-Senator Obama. Some ministers, however, were afraid to speak on the subject for fear of triggering an investigation by the Internal Revenue Service. *See* Laurie Goodstein and Neela Banerjee, *Obama's Talk Fuels Easter Sermons*, N.Y. TIMES, Mar. 23, 2008, at A1.

sential part of its ministry.[127] The moral issues that churches in particular and society in general care about cannot be spoken about solely by referencing the Bible or the Koran or any other religious book. These messages must have context, and that context is society at large. This "mixed message" is important for churches. If a church is precluded from speaking on an issue because it fears the loss of its tax-exempt status, that is an arguable infringement on the church's free exercise rights.[128]

For example, a church wishing to teach on the abortion issue will not only instruct its congregants from the Bible (or Koran) but will also speak about the effect that abortion has on the parties involved and on society. The church might also want to speak on the legality of abortion in this country and, presumably, the positions that politicians have taken on the issue.

Consider again the hypothetical of the church that wishes to preach on the Good Samaritan and reference political candidates. In that situation, a minister has two options.[129] One option is to preach the sermon with references to the candidates and let the chips fall where they may. There are churches that choose this option, but it cannot be expected that all churches would do so. Churches, after all, are organizations that believe in keeping the law. While some churches do advocate civil disobedience in certain circumstances, this might not be the issue that forces a church into civil disobedience.

A second option would be for the minister to preach the sermon but forego making reference to the candidates. The sermon would still give instruction to the congregants on Biblical teaching, but the decision is being made because the church does not want to lose its tax-exempt status. In other words, the church is limiting its speech in order to obtain a governmental benefit. That is an infringement on speech colorable enough to implicate a hybrid claim under *Smith*.

IV. PROBLEMS WITH THE LAW

It should be apparent that Section 501(c)(3) provides enforcement problems both for the IRS and for churches, although both issues are intermingled to some extent.

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127. *See* Megan J. Ryan, *Can the IRS Silence Religious Organizations*, 40 IND. L. REV. 73, 92 (2007).

128. *See id.*; *see also* Deirdre Dessingue Halloran & Kevin M. Kearney, *Federal Tax Code Restrictions on Church Political Activity*, 38 CATH. LAW. 105, 129-30 (1998).

129. There actually might be a third option. The Church could operate a separate entity under Section 501(c)(4) and make all of its "religious" pronouncements through that organization. There are problems with this approach, however. Setting up a separate entity under Section 501(c)(4) may be less attractive for churches and religious organizations because contributions to 501(c)(4)s are not deductible for the donor. There may also be extensive record-keeping issues and problems associated with determining how to account for a pastor's time who both preaches for a 501(c)(3) and advocates for a 501(c)(4).

A. *Problems for Churches*

For many people, their religious faith touches on all aspects of their lives.[130] These people rely on their religious faith to govern who they marry, where they educate their children, how they invest their money, and all aspects of their lives. It would be heretical to expect these people to make a life decision, be it major or minor, without their faith playing a role in the decision. For a few, adherence to religious principles is just as or more important than adherence to civil laws.[131] Given the importance of faith in their lives, some church members might want their church to give guidance on issues that touch on politics.

Churches also have an important role in society. They can provide moral clarity to issues that are problematic to society as a whole. Also, churches of various denominations may take differing positions on issues and provide more voices for society to hear.

The ban on churches engaging in political speech deprives society of a voice that adds diversity to the dialogue on issues important to society.[132] Churches have a distinct voice, and the public square is diminished when churches avoid speaking because of the ban in Section 501(c)(3).[133] While every person might not want to hear the voice of the church, churches still need to be heard.

Additionally, the ban on political activity forces churches to make a distinction between what is "purely religious" and what is "political."[134] This distinction ignores the fact that a church's message goes further than its religious doctrine. Many churches take to heart the call to social activism in the Christian Bible and call on their members to feed the hungry, clothe the naked, and help the poor.[135] These churches, when they see an injustice in society, will combat that injustice by sitting in, marching, and yes, speaking out. Sometimes that speech will necessarily call out a politician that the church believes can and should do more to help.

All churches, however, do not feel a "social justice" call. There are many churches that do not feel it is their place to do so, and it is their

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130. *See* Mark Totten, *The Politics of Faith: Rethinking the Prohibition on Political Campaign Intervention*, 18 STAN. L. & POL'Y REV. 298, 310 (2007).

131. *See* Eduardo Moisés Peñalver and Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1130 (2007).

132. *See* Richard Garnett, *A Quiet Faith? Taxes, Politics, and the Privatization of Religion*, 42 B.C. L. REV. 771, 799-800 (2001). Garnett argues that by restricting a church's political involvement the government is interpreting the means by which religious groups live out their faith and reinforcing the notion that religion is and should be kept merely a private matter and in essence privatizes religion. This treatment encourages non-believers to view religion as a private matter and reinforces the government's own view of the nature of religion to the detriment of faith communities.

133. *See* Goodstein and Banerjee, *supra* note 126, at A1.

134. *See* Kemmitt, *supra* note 49, at 167.

135. *See Matthew* 25:34-40.

right under the First Amendment to refrain from this mission if they do not feel they are called to it. However, there are many churches that feel the call to social justice, and they should not be prohibited from heeding that call because of the threat of losing tax-exempt status.

The fear of losing tax-exempt status most certainly raises free exercise issues for churches. The loss of tax-exempt status for engaging in speech or activities that churches feel are mandated by their religious beliefs effectively forces churches to change their behavior in order to receive tax-exempt status. "Churches that convey a religious message . . . are taxed; churches who abstain are not."[136] As one commentator stated, "Section 501(c)(3) . . . pays churches through tax-exempt status to be silent on issues deemed by the state to be political."[137]

Churches face the false choice of choosing to retain tax-exempt status or to exercise their faith in the manner they feel they are called to do.[138] Very few churches have the wherewithal and financial ability to engage the IRS in a battle over whether their activities are tax-exempt.[139] Thus, most churches will most likely not choose to forego tax-exempt status, but rather will not engage in arguably "political" activity.

Some commentators claim that lifting the ban on political activity might be a free exercise violation because it would be a "subsidy" by the government to churches to practice religion.[140] Setting aside the issue of whether tax-exempt status truly is a subsidy, that claim ignores the fact that even with the prohibition on political activity, the government is providing a "subsidy" to churches to engage in the free exercise of religion, albeit absent political activity.

The harm that would be the most catastrophic for churches is also the one most difficult to measure—the loss of contributions by congregants because of the loss of tax deductibility. If a church loses its tax-exempt status, donations to that church are no longer tax deductible.[141] Most of a church's income is derived from donations.[142] The best statistics indicate that thirty percent of taxpayers itemize their deductions.[143] What is unknown is how many church-goers itemize their deductions. It

136. *See* Kemmitt, *supra* note 49, at 171.

137. Randy Lee, *When A King Speaks Of God; When God Speaks To A King: Faith, Politics, Tax Exempt Status, And The Constitution In The Clinton Administration*, 63 LAW & CONTEMP. PROBS., Spring 2000, at 391, 434.

138. Dessingue, *supra* note 124, at 920.

139. *See* Halloran & Kearney, *supra* note 128, at 131.

140. *See* Donald B. Tobin, *Political Campaigning by Churches and Charities: Hazardous for 501(c)(3)S, Dangerous for Democracy*, 95 GEO. L.J. 1313, 1347 (2007).

141. 26 U.S.C. § 170(c) (2007).

142. *See* Ellen Aprill, *Churches, Politics and the Charitable Contribution Deduction*, 42 B.C. L. REV. 843, 844-45 (2001); *see also* Michael Hatfield, *Ignore the Rumors—Campaigning from the Pulpit is Okay: Thinking past the Symbolism of Section 501(c)(3)*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 125, 155 (2006). Aprill and Hatfield cite statistics that estimate that religious organizations receive either 84% (Hatfield) or 94 % (Aprill) of their revenue from donations.

143. Aprill, *supra* note 142, at 845.

would not be unreasonable to believe that church-goers itemize at the same rate as the rest of the taxpaying public.[144] However, the real, and for churches the frightening, unknown is how many of the donors would stop donating if a church were to lose its tax-exempt status. That is a question whose answer can only be known if, and when, a church loses its tax-exempt status. Congregants may assert they are contributing because of their religious convictions, but until those congregants are faced with the loss of the deductibility of their donations, and potentially higher tax liabilities, there is no way to know what they will do.

Given that churches are so dependant on donations, the loss of even a small portion of their revenue could be problematic. It stands to reason that a church would have to cut back on the services that it offers. The choice might come down to scaling back the services that a church provides to its members or scaling back the services that it provides to its community.

B. Structural Problems

The IRS must necessarily monitor church services and communications to ensure that their content does not cross the line into political advocacy.[145] It must also determine who spoke, when the speech took place, if anyone else was invited to speak, and what was said. This examination into the affairs of Section 501(c)(3) organizations is intrusive, at best. This examination of churches runs dangerously close to an entanglement between the government and churches that violates the Free Exercise Clause.[146]

Less apparent, but equally serious, are confidentiality issues.[147] Section 6103 of the Internal Revenue Code prohibits the IRS from disclosing taxpayer information in almost every circumstance.[148] This prohibition was enacted to protect taxpayer privacy.[149] However, the prohibition also means that the public is unaware when or if a church is being investigated for a possible violation of Section 501(c)(3) unless, of course, the church discloses the fact that it is being investigated. This confidentiality poses unique problems in this circumstance.

Because of the confidentiality requirement, churches do not have clear guidance regarding the circumstances under which an investigation will be started or what activities are permissible or impermissible.[150] Moreover, because these investigations involve politics, there is suspicion that the investigations are, or at least might be, politically moti-

144. Hatfield, *supra* note 142, at 157.
145. *See* Samansky, *supra* note 48, at 28.
146. *Id.* at 49.
147. *See* 26 U.S.C. § 6103 (2007); *see also* Tobin, *supra* note 140, at 1355-56.
148. 26 U.S.C. § 6103(a) (2007).
149. Tobin, *supra* note 140, at 1355.
150. *Id.* at 1356.

vated.[151] And, because of Section 6103, the IRS cannot defend itself against charges of selective or politically motivated investigations.[152]

Additionally, given the intensively factual nature of these investigations, there is no bright-line test for churches on what is and is not permissible. Section 501(c)(3) is vague and the regulations do not add much, if any, clarity to the discussion. Add to that the fact there is a scarcity of case law and that creates a sea of uncertainty for churches.[153]

An additional problem is that the law has historically not been stringently enforced. There has only been one court case where a church has lost tax-exempt status for violating the ban on political activity.[154] However, in 2004, the IRS started what it called the "Political Activities Compliance Initiative."[155] In a report issued on the initiative, the IRS stated that the objective of the initiative was to "promote compliance with the IRC § 501(c)(3) prohibition against political campaign intervention by reviewing and addressing allegations of political intervention by tax-exempt organizations on an expedited basis during the 2004 election year."[156] The initiative focused on the 2004 election cycle and covered referrals through November 2004.[157]

The IRS initially assigned 132 cases to the field for examination, but determined during an initial review that twenty-two of them would be closed without contacting the organization, resulting in 110 actual examinations.[158] Of the remaining 110 examinations, forty involved churches.[159] Within the forty church examinations, the IRS found that thirty-seven churches intervened in a political campaign and were either issued an advisory by the IRS that the church had impermissibly intervened or had an excise tax assessed.[160] Given the vast number of churches in the United States and the seemingly large number of churches that appears to, at the least, dabble in politics this enforcement appears to be minimal.

This lax enforcement by the IRS is definitely counter-intuitive. It would be easy to believe that the churches are being investigated constantly for violating the ban on political intervention in Section 501(c)(3). However, that is not the case, despite the perceived level of

151. *Id.*
152. *Id.*
153. *Id.* at 1357-58.
154. *See* Branch Ministries v. Rossotti, 211 F.3d 137 (D.C. Cir. 2000).
155. *See* INTERNAL REVENUE SERVICE, FINAL REPORT, PROJECT 302, POLITICAL ACTIVITIES COMPLIANCE INITIATIVE (2004), *available at* http://www.irs.gov/pub/irs-tege/final_paci_report.pdf.
156. *Id.* at 1.
157. *Id.*
158. INTERNAL REVENUE SERVICE, 2004 POLITICAL ACTIVITY COMPLIANCE INITIATIVE (PACI), SUMMARY OF RESULTS (Feb. 16, 2004), *available at* http://www.irs.gov/pub/irs-tege/one_page_statistics.pdf.
159. *Id.*
160. *Id.*

non-compliance with the statute.[161] Lax enforcement by the IRS may result in more churches that may feel emboldened to violate the ban given the low number of investigations of churches.[162] While this article calls for Section 501(c)(3) to be amended, it does not call for widespread flouting of the law.

The IRS's minimal enforcement of Section 501(c)(3) undoubtedly leads to enforcement that is at best inequitable for similarly situated churches.[163] While a high-profile church might be investigated for an alleged violation of Section 501(c)(3), a church with a lower profile might engage in the same conduct and not draw the attention and scrutiny of the IRS. Because of the confidentiality rules of Section 501(c)(3), neither church might be aware of the disparate treatment. While there were very few examinations of churches during the 2004 election cycle and fewer determinations of noncompliance, it is likely that noncompliance with Section 501(c)(3) was more widespread.

V. REAL LIFE EXAMPLES AND A PROPOSED SOLUTION

While hypothetical examples can show the problems of the current law regarding tax-exempt status, there is a real-life example that shines a light on the issue.

A. *The All Saints Investigation*

Two days before the 2004 election, the Reverend George Regas preached a sermon entitled, "If Jesus Debated President Bush and Senator Kerry."[164] Reverend Regas is the Rector Emeritus and former pastor of the All Saints Church. In the sermon, Reverend Regas immediately stated two things: 1) that Jesus wins; and 2) that he (Reverend Regas) does not intend to tell anyone how to vote.[165] Reverend Regas then proceeded to preach a sermon touching on the peace movement, poverty, and abortion. At times, the sermon used hypothetical questions from Jesus addressing both President Bush and Senator Kerry. Other times, the questions were addressed solely to President Bush. At another point, Reverend Regas took on conservative politicians who allegedly have more compassion for fetuses than for children after they were born. Reverend Regas then closed the sermon with the following words: "When you go into the voting booth on Tuesday, take with you all that you know about Jesus, the peacemaker. Take all that Jesus means to you. Then vote your deepest values. Amen."[166]

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161. *See* Lloyd Hitoshi Mayer, *Grasping Smoke: Enforcing the Ban on Political Activity by Charities*, 6 FIRST AMENDMENT. L. REV. 1, 4 (2007).
162. *See id.* at 16, 19-20.
163. *See* Tobin, *supra* note 140, at 1356.
164. Regas, *supra* note 5, at 1.
165. *Id.* at 1.
166. *Id.* at 6.

It is clear that the Reverend—in all likelihood because he was aware of the prohibition against campaigning in church—attempted make his sermon as neutral as possible. But, it is also clear that the sermon, despite best efforts, was more critical of President Bush than Senator Kerry. News of the sermon spread fast. The day following the sermon, an article appeared in the *Los Angeles Times* regarding the sermon.[167] The IRS became aware of the sermon through the article and sent All Saints a "Tax Inquiry Letter," stating that it was commencing an investigation into the sermon, and that All Saints might have violated the prohibition against political campaigning.[168] Attached to the letter was a series of questions.[169]

Ed Bacon, the pastor of the All Saints Church, informed the congregation of the investigation on November 6, 2005.[170] The day following the announcement of the investigation to the congregants, the church issued a press release regarding the IRS investigation.[171]

The IRS summons issued to All Saints started out by seeking the organizing documents for All Saints. It, however, quickly got to the heart of the matter and sought the following documents: 1) a copy of all electronic recordings of Reverend Regas's sermon; 2) a copy of all electronic recordings made of remarks to the church after the Reverend Regas's sermon which referenced the sermon; and 3) a copy of all writings which referenced Reverend Regas's sermon.[172] All Saints did not comply with the summons.

All Saints subsequently heard nothing from the Internal Revenue Service until September 10, 2007, when the IRS informed the church that it had concluded its investigation.[173] The IRS's letter to All Saints stated that All Saints had, indeed, intervened in the 2004 presidential campaign,

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167. Josh Getlin, *The Race for the White House: Pulpits Ring with Election Messages*, L.A. TIMES, Nov. 1, 2004, at A1.

168. Tax Inquiry Letter from R. C. Johnson, Dir., Exempt Org., Examinations, to All Saints Church (June 9, 2005), http://aschu.convio.net/pdf/IRS%20Letter%20to%20All%20Saints.pdf.

169. *Id.*

170. The All Saints website describes the day as one that was both joyful and sad as the Reverend Desmond Tutu preached at the church on that particular Sunday. The announcement to the congregants stated that All Saints church was "self identified" as a "peace church" since 1987. The announcement further stated that the church would "continue from a nonpartisan perspective to teach and proclaim with vigor the core values of Christianity as we stand in the prophetic tradition of Jesus the peacemaker." *See* All Saints Church News and Actions, http://www.allsaints-pas.org/site/PageServer?pagename=IRS_Exam_splash (last visited Dec. 16, 2008).

171. PRESS RELEASE, ALL SAINTS CHURCH (Nov. 4, 2005) http://aschu.convio.net/pdf/IRS%20PressRelease.pdf. The Church's tax counsel was quoted in the press release. The counsel is the former director of the IRS Exempt Organizations Division.

172. SUMMONS FROM INTERNAL REVENUE SERVICE, TAX EXEMPT AND GOVERNMENT ENTITIES DIVISION, TO ALL SAINTS CHURCH at 1 (Sept. 15, 2006), http://www.allsaints-pas.org/site/DocServer/IRS-Summons.pdf?docID=503.

173. *See* LETTER FROM MARSHA A. RAMIREZ, DIR. EXEMPT ORGS., INTERNAL REVENUE SERVICE, TO MARCUS S. OWENS, COUNSEL FOR ALL SAINTS CHURCH 1 (Sept. 10, 2007), www.allsaints-pas.org/site/DocServer/Letter_from_IRS_to_All_Saints_Church.pdf?docID=2541.

but that the intervention appeared to be a one-time occurrence and All Saints still qualified for tax-exempt status.[174]

This development, while a good one for the All Saints Church, should be unsatisfying to both opponents and proponents of the Section 501(c)(3) ban. For those supporting the ban, the good news is that the IRS found that All Saints intervened in the 2004 campaign. The bad news is that the IRS concluded that the intervention was a one-time event and allowed All Saints to keep its tax-exempt status. Given that All Saints has self-identified as a peace church, it is probable that the sermon by Reverend Regas was not the only time that All Saints has spoken out on issues that touched on politics and candidates.[175] Because All Saints did not comply with the IRS's summons and the IRS did not attempt to compel compliance, the IRS could not have conducted a complete investigation into All Saints' past practices. The IRS was probably unable to make a determination that could have sustained a revocation of All Saints' tax-exempt status.

Opponents of the ban most likely cheer the fact that All Saints did not lose its tax-exempt status—but that is probably all they are cheering about. The IRS found that All Saints intervened in a political campaign. The IRS very easily could have stripped All Saints of its tax-exempt status, as it did Branch Ministries. This fact was not lost on All Saints. Subsequent to receiving the closing letter from the IRS, All Saints called on the IRS to apologize and issue a correction.[176] Specifically, Reverend Bacon, quoted in a press release distributed by All Saints, stated that

> [w]hile we are pleased that the IRS examination is finally over, the IRS has failed to explain its conclusion regarding the single sermon at issue. Synagogues, mosques, and churches across America have no more guidance about the IRS rules now than when we started this process over two long years ago. The impact of this letter leaves a chilling effect cast over the freedom of America's pulpits to preach core moral values. We have no choice but to demand clarification on this matter with the IRS.[177]

Reverend Bacon recognized the very reason the conclusion of the investigation was unsatisfactory: There was no indication from the IRS

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174. *Id.*

175. It should be noted that the author has no evidence that the situation described above was *not* an isolated incident.

176. *See* LETTER FROM ALL SAINTS CHURCH, TO IRS (Sept. 21, 2008), http://www.allsaints-pas.org/site/DocServer/Letter_to_IRS_Commissioner_092107.pdf?docID=2542.

177. *See* PRESS RELEASE FROM ALL SAINTS CHURCH, ALL SAINTS CHURCH, PASADENA DEMANDS CORRECTION AND APOLOGY FROM THE INTERNAL REVENUE SERVICE, 1 (Sept. 23, 2007) http://www.allsaints-pas.org/site/DocServer/IRS_Press_Release_Sept_23__2007.pdf?docID=2521. All Saints also alleged in the press release that IRS might have breached confidentiality rules by discussing the case with "high-level Department of Justice personnel" and that the alleged discussions indicate that the All Saints investigation might have been politically motivated. All Saints referred its concerns to the Treasury Inspector General for Tax Administration.

as to what exactly in Reverend Regas's sermon was objectionable. All Saints, and other houses of worship, can draw no instruction from the All Saints investigation on what is objectionable speech and what is allowable speech. This is troubling and unwelcome news for churches that wish to speak out on issues that touch society in general and politics specifically.

B. A Legislative Fix to Section 501(c)(3) is Necessary

Given the numerous problems with Section 501(c)(3)—as applied to churches and other religious organizations—that the All Saints investigation illustrates, Section 501(c)(3) should be amended to repeal the ban on churches "intervening" in politics. Legislation is the preferred means of lifting the ban in Section 501(c)(3) so that churches will have some certainty as to the legality of their actions. Having the IRS or a federal court find that a particular church did or did not violate Section 501(c)(3) does not solve the problems of the statute.

The All Saints situation is an example of the problems with Section 501(c)(3) and why it should be amended. An amendment to Section 501(c)(3) is preferable to a judicial remedy. A judicial remedy in the All Saints case most likely would have determined whether All Saints impermissibly intervened in a political campaign; it likely would not have dealt with the issue of whether the ban in Section 501(c)(3) was a good policy decision. Additionally, a federal court would not have found Section 501(c)(3) unconstitutional.[178] Therefore, Congress should amend Section 501(c)(3) to allow churches to engage in political speech in limited circumstances.

Since 2001, there have been numerous pieces of legislation introduced in both the House and the Senate to amend Section 501(c)(3). None of the pieces of legislation has been enacted. An analysis of some of the legislation follows.

1. H.R. 2931—The Bright-Line Act of 2001

Representative Phillip M. Crane introduced the "Bright-Line Act of 2001" ("Bright-Line Act") to "clarify the restrictions on the lobbying and campaign activities of churches."[179] The Bright-Line Act would have allowed a church to expend up to 5% of its gross revenues each year to participate in political campaigns and up to 20% of its gross revenues on lobbying efforts.[180] A church could only spend an aggregate of 20% of its gross revenues on lobbying and participating in political campaigns.

178. *See* Totten, *supra* note 130, at 317-318.

179. *See* Bright-Line Act of 2001, H.R. 2391, 107th Cong. Preamble (2001), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h2931ih.txt.pdf.

180. *Id.* § 2.

The bill was referred to the House Ways and Means Committee which received comments and held a hearing on the bill on May 14, 2002.[181] The Ways and Means Committee did not hold a vote on the bill.[182]

While the Bright-Line Act was a noble attempt at solving the problem, it had flaws. The main problem was that by setting a limit on the amount of expenditures that can be made for "political activity" and for lobbying, it would have required the IRS to examine the financial records of a church to determine if the church had exceeded the limits in the bill. This would still have the IRS making an intrusion into the internal affairs of a church. Additionally, after the threshold has been reached, the IRS would be in the same situation as it currently is in—examining religious activities to determine if a violation of Section 501(c)(3) occurred. Given that the current statute has numerous problems, the Bright-Line Act would only have been a band-aid.

2. S. 2886—The Houses of Worship Political Speech Protection Act

In 2002, Senator Bob Smith of New Hampshire introduced the Houses of Worship Political Speech Protection Act, which would have amended section 501(c)(3) to "ensure the religious free exercise and free speech rights of churches and other houses of worship to engage in an insubstantial amount of political activities."[183] The bill was referred to the Senate Finance Committee, where, apparently, no action was taken.

This bill, which was better than the Bright-Line Act because it omitted the "gross revenues" provision, also had a major problem. The bill would have allowed political activity as long as it was "insubstantial."[184] However, nowhere in the bill was "insubstantial" or "substantial" defined. Currently, the word substantial is not well-defined in the tax code.[185] There is no bright-line rule for what "substantial" means in the Internal Revenue Code. There is some indication that between five and fifteen percent of an organization's activities as measured by time, effort, expenditures, and other relevant factors is "insubstantial."[186] Likewise, a comprehensive definition of "substantial" might have alleviated some of the problems with this bill. However, a church would then be subject to

181. *See Review Of Internal Revenue Code Section 501 (c)(3) Requirements For Religious Organizations: Hearing Before The Subcomm. on Oversight of the Comm. on Ways and Means*, 107th Cong. (2002), *available at* http://waysandmeans.house.gov/legacy.asp?file=legacy/oversite/107cong/5-14-02/107-69final.htm. The hearing had eight witnesses on both sides of the issue. There also were written submissions by numerous individuals and organizations on both sides of the issue.

182. *See* Mayer, *supra* note 161, at 4 n.8.

183. *See* Houses of Worship Political Speech Protection Act, S. 2886, 107th Cong. Preamble (2002), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:s2886is.txt.pdf.

184. *Id.* § 2.

185. *See* Anderson, *supra* note 28, at 125.

186. *See* Halloran & Kearney, *supra* note 128, at 108 n.18.

the same government entanglement in its affairs that implicate the Free Exercise Clause.

3. H.R. 235—The Houses of Worship Free Speech Restoration Act of 2005

On January 4, 2005, Representative Walter Jones of North Carolina introduced the Houses of Worship Free Speech Restoration Act of 2005.[187] This bill would have allowed a church to maintain tax-exempt status even if they intervened on behalf of or in opposition to a candidate for public office in the course of a "homily, sermon, teaching, dialectic, or other presentation made during religious services or gatherings."[188] It also would have allowed church members and leaders to express their personal views on political matters at religious services "as long as those views are not disseminated beyond the members and guests assembled together at the service."[189]

This bill most likely was unsatisfactory to both those who opposed the current ban and those who supported the current ban. Obviously, those who supported the current ban would have felt that no change was necessary in the first place. This bill would have allowed political intervention at any church service that was primarily intended for church members and for personal views on politics to be given at those services. This undoubtedly would not have been acceptable to those who support the current ban.

Those who opposed the ban might not have been happy that the bill was relatively narrow. The bill would have limited political activity to religious services and the activity must have been targeted primarily to members. While those that opposed the ban likely would have been happy that the ban was relaxed, they likely would have wished that the limitation on speaking primarily to members was not present.

4. S. 178—The Religious Freedom Act of 2007

The most recent attempt to amend Section 501(c)(3) was by Senator James Inhofe, who introduced the Religious Freedom Act of 2007.[190] The goal of the act was "to protect freedom of speech exercisable by houses of worship or meditation and affiliated organizations."[191] The act

187. *See* Houses of Worship Free Speech Restoration Act of 2005, H.R. 235, 109th Cong. (2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h235ih.txt.pdf. Representative Jones also introduced bills which would have relaxed the political activity ban for churches in 2001. *See, e.g.*, Nonprofit Political Speech Act, H.R. 355, 107th Cong. (2001), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h355ih.txt.pdf.

188. H.R. 235 §. 2(a).

189. *Id.* § 3.

190. *See* The Religious Freedom Act of 2007, S. 178, 110th Cong. (2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:s178is.txt.pdf.

191. *Id.* at Preamble.

would prohibit the government from denying churches, and their donors, tax exempt status if the churches engaged in "comment on public issues, election contests, and pending legislation made in theological or philosophical context of such organization."[192] The act was referred to the Senate Finance Committee, which took no action on it.

This act was not an amendment of Section 501(c)(3) but rather a separate bill. It was the most far-reaching of the proposed legislation. It would have completely allowed churches and church leaders to engage or comment on political issues. Interestingly, the act declared that such activity is constitutionally protected activity.[193] This act was very broad and would have allowed churches the virtually unfettered ability to speak on political issues if they believed that this was part of their theological mission.

C. *A Limited Proposal*

There is no proposal that will completely satisfy those who want to allow churches the freedom to engage in political activity. However, an incremental step would provide churches with more freedom to speak on issues that are important to the church.

None of the proposed bills examined earlier is completely suitable as a replacement for the current ban. One bill, however, could probably satisfy proponents of lifting the ban. Section 2 of the Houses of Worship Free Speech Restoration Act of 2005 would have allowed churches to maintain tax-exempt status and engage in political activity so long as the activity was in a "homily, sermon, teaching, dialectic, or other presentation made during religious services or gatherings."[194] That is a fairly broad area in which churches would be able to speak freely to members regarding issues that touch on politics.

Allowing churches to communicate with its members in religious services and other meetings is not an unheard of proposition.[195] A similar, though not identical, proposal has been advocated by other commen-

192. *Id.* § 2(a).

193. *Id.*

194. *See* Houses of Worship Free Speech Restoration Act of 2005, H.R. 235, 109th Cong. § 2(a) (2005), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h235ih.txt.pdf. This paper is not advocating that Section 3 of the Act be adopted. The personal views of the members and leaders of a church really are irrelevant. The ability of the church to teach according to its religious principles is what is at issue, not the personal views of particular members.

195. *See* Samansky, *supra* note 48, at 27, 28 (2006). Professor Samansky's proposal allows churches and religious leaders to communicate freely about political candidates with their members as long as the church or religious leaders do not officially endorse a candidate for public office. Churches would not be allowed to undertake activities they don't usually engage in and as long as the activity in question is not targeted at nonmembers. Any communication must take place as a routine part of a church's activity geared primarily toward members and the hope is that this will "reduce entanglement of the government and religion."

tators.[196] There are several benefits to this limited proposal. First, the proposal only applies to churches, and not to other religious organizations. Second, the proposal is limited to regularly scheduled religious services which should calm fears about churches taking out advertisements endorsing candidates.[197] Third, the proposal eliminates the "restraint on the issues a religious leader might address."[198] In other words, churches would be able to freely discuss issues of importance to the members of the church without fear of an IRS investigation or loss of tax-exempt status.

Limiting the exception to religious services resolves a number of issues with the current ban. First, churches would be allowed to speak directly to their members about issues that the church leaders believe are an integral part of religious life without fear of an investigation. Churches would also be allowed to freely compare candidates, as was done in the sermon preached at All Saints Church before the 2004 election. Churches would also be able to examine how a candidate's position on various issues conforms to its positions on issues without fear of losing tax-exempt status. The IRS would no longer be allowed to scrutinize sermons and other church teachings and make determinations on whether the sermon or teaching was "religious" in nature.

The proposal is also appealing because the communication must be intended primarily for church members. Therefore, a sermon or church bulletin would not be subject to review. And, because the communication must be intended primarily for members, churches would be prevented from running campaign events for the community and still expect to keep tax-exempt status.

An added benefit is that enforcement issues will go away. Because the IRS will have fewer opportunities to investigate churches, concerns about lax and uneven enforcement would be alleviated. Even though the IRS has historically conducted relatively few investigations, the number of investigations is sure to rise in the future given the increased interplay between religion and politics. This proposal is one way to eliminate most investigations.

Even without the above benefits, the proposal still should be enacted as an acknowledgement of the special role churches have in society. As discussed above, churches have played a unique role in American life. Because of this unique role and the fact that what some might consider political speech cannot be separated from "purely religious" speech, churches should have the ability to meet their unique mission. Absent a change to Section 501(c)(3), churches that believe their mission

196. *See* Totten, *supra* note 130, at 321-22. Totten's proposal would only apply to oral, not written, communications.

197. *Id.*

198. *Id.* at 322.

is to speak out on social justice issues will not be able to do so if that speech touches on "political activity."

CONCLUSION

Allowing churches to speak directly to their members on matters that walk the line between purely "religious" and purely "political" would allow them to fulfill their religious mission. It would allow a community of faith to reason together and discuss issues that are important to them as a community without fear of the government infringing on their free expression rights.

Churches play a unique and complicated role in American society. Amending Section 501(c)(3) would be an acknowledgment of that role. An amendment of Section 501(c)(3) would also allow churches to fulfill their theological mission if they feel that the mission requires them to speak out on social issues.

The proposal set forth in this paper is not perfect and will not please everyone. It is not likely that Congress will act on the issue of churches, tax-exempt status and political speech given the history of prior pieces of legislation. A discussion is needed, however, on churches and their role in society and politics and my hope is that this article will add to the discourse.

THE RIGHT OF PRIVACY AND AMERICA'S AGING POPULATION

KRISTINE S. KNAPLUND[†]

INTRODUCTION

"Justice O'Connor's Husband Finds New Love," reported CBS News in 2007.[1] John O'Connor, who married the Justice in 1952, was diagnosed with Alzheimer's disease in 1990. The Justice resigned from the Supreme Court in 2005 to move him to an assisted living facility, where he soon fell in love with another Alzheimer's patient.[2] Justice O'Connor's response to news of the romance was to be glad that her husband was happy, but many spouses and families are not so emotionally generous.[3] Other news stories report that families are horrified to find their elderly spouses or parents in new relationships and insistent that the romance be terminated. In one case, the son of an elderly man with dementia required the facility to keep his father's girlfriend away from him, and eventually moved his father to another facility, insisting that neither his father nor his girlfriend be told in advance of the change.[4] In another case, once the family learned that their seventy-two-year-old mother was having sex with a sixty-eight-year-old man, they became irate "and threatened to sue because they didn't picture their mom having sex while she had grandkids running around the nursing home."[5]

The human need for intimacy and physical contact has been well established in various studies, but until recently such research often ignored the elderly. Newer articles attempt to fill that gap, arguing that "life-long sexual function . . . [has come to be seen as] a primary compo-

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† Professor of Law, Pepperdine University School of Law; J.D., University of California, Davis, 1977. The Author wishes to thank research librarian Jennifer Allison, research assistants Genus Heidary, Nina Javan and Brianna Primozic, and the Dean's Summer Research Fund.

1. *Justice O'Connor's Husband Finds New Love: Retired Supreme Court Justice's Spouse Forms Romance with Fellow Alzheimer's Patient*, CBS NEWS, Nov. 13, 2007, http://www.cbsnews.com/stories/2007/11/13/national/mail3494982.shtml?source=search_story.

2. Suzanne McCarroll, *Sandra Day O'Connor Makes Alzheimer's Plea*, CBS4DENVER, May 14, 2008, http://cbs4denver.com/health/Sandra.Day.O.2.724461.html.

3. Kate Zernike, *STILL MANY SPLENDORED; Love In the Time of Dementia*, N.Y. TIMES, November 18, 2007, § 4, *available at* http://query.nytimes.com/gst/fullpage.html?res=9D01E2D91030F93BA25752C1A9619C8B63&scp=2&sq=LOVE%20IN%20THE%20TIME%20OF%20DEMENTIA&st=cse (quoting Dr. Thomas R. Cole, director of the McGovern Center for Health, Humanities and the Human Spirit at the University of Texas).

4. Melinda Henneberger, *An Affair to Remember*, SLATE, June 10, 2008, http://www.slate.com/id/2192178/ (last visited Jan. 3, 2009).

5. *Sex In Nursing Homes*, THE KENTUCKY POST, July 12, 2003, at A1, *available at* http://www.cincinnati.com/text/kypost/2003/07/12/sex071203.html.

nent of achieving successful ageing in general."[6] The need for intimate relationships, rather than disappearing as one grows older, may actually increase as one copes with loss: the loss of family members, declining health, dislocation from a long-time home, and other factors.[7] The benefits of intimacy have been well established, contributing to a better quality of life and health.[8] The United States Supreme Court has recognized the importance of intimate association by protecting individuals from government intrusion into their private lives. The term "freedom of intimate association" was first used by the Court in *Roberts v. United States Jaycees*, in which Justice Brennan spoke of a "line of decisions [in which] the Court has concluded that choices to enter into and maintain certain human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme."[9] More recently, the Court struck down a statute that forbade persons of the same sex from engaging in certain types of private sexual conduct.[10] "Liberty," declared Justice Kennedy, "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[11] This liberty goes beyond the right of a married couple to choose whether to use contraceptives[12] or to marry someone of another race;[13] it also protects unmarried individuals in exercising their personal rights.[14] While no law prohibits the elderly or residents of nursing homes from engaging in intimate conduct, and thus the freedom of intimate association is not directly involved, the practice at such facilities is to actively discourage such conduct. In doing so, facilities may be violating federal and state statutes enumerating patient rights.

For elderly living in their own homes, the freedom of intimate association may have gone to the opposite extreme. Eager to support an in-

6. Merryn Gott, *Sexual Health and the New Ageing*, 35 AGE & AGEING 106, 106 (2006), *available at* http://ageing.oxfordjournals.org/cgi/content/full/35/2/106 (citing Stephen Katz and Barbara Marshall, *New Sex For Old: Lifestyles, Consumerism, and the Ethics of Aging Well*, 17 J. AGING STUDIES 3, 12 (2003), *available at* http://www.trentu.ca/academic/sociology/faculty/documents/NewSexForOld_000.pdf, and Merryn Gott and Sharron Hinchliff, *How Important is Sex in Later Life? The Views of Older People*, 56 SOC. SCI. MED. 8, 1617, 1626 (2003)).

7. Jennifer Sisk, *Sexuality in Nursing Homes: Preserving Rights, Promoting Well-being*, AGING WELL, Sept. 2007, *available at* http://www.agingwellmag.com/septstory3.shtml.

8. *Id.*; Steven H. Miles & Kara Parker, *Sexuality in the Nursing Home: Iatrogenic Loneliness*, 23 GENERATIONS 36, 36 (1999).

9. Roberts v. U.S. Jaycees, 468 U.S. 609, 617-618 (1984). In contrast, the other line of decisions recognize "a right to associate for the purpose of engaging in those activities protected by the *First Amendment*—speech, assembly, petition for redress of grievances, and the exercise of religion." *Id.* at 618.

10. *See* Lawrence v. Texas, 539 U.S. 558, 578-79 (2003).

11. *Id.* at 562.

12. *See* Griswold v. Connecticut, 381 U.S. 479, 515-16 (1965).

13. *See* Loving v. Virginia, 388 U.S. 1, 12 (1967).

14. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (invalidating a statute prohibiting the distribution of contraceptives to unmarried persons); *see also* Carey v. Population Services Int'l, 431 U.S. 678, 693 (1977) (invalidating a New York law forbidding the distribution of contraceptives to persons under sixteen years of age).

dividual's right to marry, and loathe to allow any third person to interfere with that relationship, states have adopted policies and statutes that may leave some elderly persons vulnerable to fraud and abuse. Thus, elderly people who lack family to care for them at home face two tough choices. They can either stay in their homes and retain a great deal of freedom over their personal affairs, or they can go to a facility, where they may find their freedom severely restricted. Is there a solution between these two extremes?

The number of people facing this choice in the near future is potentially vast. The population of Americans sixty-five years and older doubled from seventeen million in 1960 to thirty-five million in 2000,[15] and is expected to double again to more than seventy million in 2030.[16] A recent study found that 48% of people over age sixty are sexually active.[17] Many people maintain sexual interest into their nineties.[18] Those in assisted living facilities or nursing homes may also be sexually active, as evidenced by articles in professional publications and the popular press.[19]

While the issue of freedom of intimate association is a problem for elderly people in general, it is especially acute for those with dementia. Over five million Americans have been diagnosed with Alzheimer's disease, and the number is expected to increase dramatically, with as many as sixteen million by 2050.[20] A recent study published in Neuroepidemiology estimated that 13.9% of Americans age seventy-one and over, or about 3.4 million people, have some form of dementia.[21] Alzheimer's disease accounted for over two-thirds (69.9%) of all dementia diagnoses.[22] Dementia does not end the need for intimacy; while sexual intimacy where one partner has Alzheimer's may decrease it can still be a valued aspect of the relationship.[23]

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15. John D. DeLamater & Morgan Sill, *Sexual Desire in Later Life*, 42 THE JOURNAL OF SEX RESEARCH, 138 (2005).

16. *Id.* at 125.

17. Janet K. Feldkamp, *Navigating the Uncertain Legal Waters of Resident Sexuality: Residents' Rights to Sexual Expression Can Create Complicated Issues for Facilities and Family Members*, NURSING HOMES, Feb. 2003, at 62.

18. Michael Bauer et al., *Sexuality, Health Care and the Older Person: An Overview of the Literature*, 2 INT'L J. OF OLDER PEOPLE NURSING, 63, 64 (2007); Stacy Lindau et al., *A Study of Sexuality and Health Among Older Adults in the United States*, 357 NEW ENG. J. MED. 762, 772 (2007).

19. *See, e.g.*, Sisk, *supra* note 7; Miles & Parker, *supra* note 8; *Sex In Nursing Homes*, *supra* note 5.

20. McCarroll, *supra* note 2.

21. Brenda Plassman et al., *Prevalence of Dementia in the United States: The Aging, Demographics, and Memory Study*, 29 NEUROEPIDEMOLOGY 125, 125 (2007).

22. *Id.* at 128. Vascular dementia, usually caused by a stroke, accounted for 17.4%; the remaining 12.7% of cases included "dementia, undetermined etiology," Parkinson's dementia, alcoholic dementia, and traumatic brain injury, among others. *Id.*

23. Christian Derousene et al., *Sexual Behavior and Changes in Alzheimer's Disease*, 10 ALZHEIMER'S DISEASE & RELATED DISORDERS 86, 92 (1996).

This article will explore two critical issues facing the elderly: the lack of personal freedom suffered by those who move into large assisted living facilities and nursing homes, versus the lack of social support for those who remain in their own homes. Part I discusses those in institutions, and contrasts the federal and state laws that attempt to secure personal privacy for the elderly with the actual practice in some facilities. In many cases, especially if the elderly person has some cognitive impairment, institutions assume that the person is incapable of consenting to physical contact, thus reversing traditional rape law. Part II compares these restrictions with the virtual absence of any oversight of elderly in their own homes, and the almost conclusive presumption that a marriage is valid. The result in some cases is that the elderly are being taken advantage of by unscrupulous caregivers, even in states that have legislation attempting to protect them. Part III looks at innovative solutions to these problems, including education, new legislation, better living conditions for seniors, and a more assertive role for the judiciary.

I. ASSISTED LIVING FACILITIES AND NURSING HOMES

In 1987 Congress enacted the Federal Nursing Home Reform Act as part of the Omnibus Budget Reconciliation Act, ensuring that residents of nursing facilities would have a right of privacy and immediate access by family and other visitors.[24] The Act requires the nursing home to give notice of a transfer and explain why it is necessary before moving the patient.[25] Federal law also grants residents of a Medicare or Medicaid certified nursing facility the right to privacy, including full visual and auditory privacy.[26]

Many states have enacted a Patient's or Nursing Home Bill of Rights purporting to give residents a right of privacy and a right to associate.[27] An Alaska law declares that "a resident of an assisted living home has the right to . . . close the door of the resident's room at any time, including during visits in the room with guests or other residents . . . ."[28] Arkansas and Florida laws give residents "the right to private and uncensored communication, including . . . visiting with any person of the resident's choice during visiting hours . . . ."[29] Statutes allow residents "to close room doors and to have facility personnel knock before entering the room, except in the case of an emergency or unless medically

24. Omnibus Budget Reconciliation Act of 1987, 42 U.S.C. § 1396r(c)(1)(A)(iii) (privacy), (c)(3) (access and visitation rights) (2008).

25. *Id.* § (c)(2)(B)(i)(I).

26. Feldkamp, *supra* note 17.

27. Jeffrey Spitzer-Resnick & Maya Krajcinovic, *Protecting the Rights of Nursing Home Residents: How Tort Liability Interacts with Statutory Protections*, 19 NOVA L. REV. 629, 633-34 (1995).

28. ALASKA STAT. § 47.33.300(a)(5) (2008).

29. ARK. CODE ANN. § 20-10-1204(a)(16)(A)(i) (2008); FLA. STAT. ANN. § 400.022(1)(b) (2008).

contraindicated."[30] New York has regulations to ensure that "[r]esident rooms shall be designed and equipped for adequate nursing care, comfort and privacy of residents."[31] California law requires each person admitted to a residential care facility for the elderly to sign a document that he or she has received a statement of "Personal Rights" including a right "to have his/her visitors . . . permitted to visit privately during reasonable hours and without prior notice, provided that the rights of other residents are not infringed upon."[32] A joint publication of AARP Tennessee and the Legal Aid Society of Middle Tennessee declares, "You have the right to visit in private with anyone during reasonable hours. The nursing home can keep you from having such visits only if: it would harm the health and safety of a resident or staff member; or it could harm the property of a resident, staff member, or the nursing home."[33]

The practice, however, is altogether different. Many nursing homes and assisted living facilities do not allow residents to lock their doors, and staff use a "knock and enter" policy without waiting for a response.[34] Many facilities have no private rooms, and use curtains to separate roommates, not walls. Sexual intimacy among residents is actively discouraged by staff; published studies indicate that married and single residents who wish to be intimate "have been deprived of privacy, have been restrained, have had clothes put on backwards, and have been put in zipperless jumpsuits, separated, or forced to resort to subterfuge such as locking themselves in bathrooms."[35] Many nursing homes have a framework of "supervised informed consent" in which nurses or social workers meet with the residents individually and together to discuss the sexual activity.[36] Nursing home staff may prohibit sexual activity directly, or discourage it indirectly by harassing and ridiculing residents about their relationships.[37] Even at facilities known for their progressive policies toward residents' intimate affairs, staff will notify the family as well as social workers and other staff when a relationship comes to their attention.[38]

If both parties are fully competent, there seems to be no legal or medical justification for an intervention by the nursing home or by the

30. FLA. STAT. ANN. § 400.022(1)(m) (2008).

31. N.Y. COMP. CODES R. & REGS. tit. 10, § 415.29(c) (2008).

32. CA. CODE OF REGS. tit. 22, § 87468(a)(11) (2008).

33. AARP TENNESSEE AND LEGAL AID SOCIETY OF MIDDLE TENNESSEE, YOU HAVE RIGHTS IN A NURSING HOME 10 (2001).

34. Madonna H. Meyer & Carrie Roseamelia, *Emerging Issues for Older Couples: Protecting Income and Assets, Right to Intimacy, and End-of-Life Decisions*, GENERATIONS, Fall 2007, at 66, 68.

35. Miles & Parker, *supra* note 8, at 39.

36. *Id.*

37. Meyer & Roseamelia, *supra* note 34, at 68.

38. Douglas J. Edwards, *Sex and Intimacy in the Nursing Home*, NURSING HOMES: LONG TERM CARE MANAGEMENT, Feb. 2003, at 18; Dirk Johnson & Julie Scelfo, *Sex, Love, and Nursing Homes*, NEWSWEEK, Jan. 19, 2004, *available at* http://www.newsweek.com/id/52779/output/print.

families, although such interventions regularly occur.[39] The issue becomes complicated when a resident has a cognitive impairment such as dementia. Does someone with advanced Alzheimer's disease have the requisite capacity to consent to sex? What if the resident mistakenly believes that her partner is her spouse, or does not understand that her spouse is still alive? Administrators may feel compelled to inform family members when their relative with dementia is involved with another person, and may agree to take steps to terminate the relationship.[40] Curiously, in none of the cited articles is there any indication that the elderly person was in distress or felt pressured to engage in the activity.[41] Instead, silence has somehow been interpreted as the equivalent of lack of consent. Even in cases where the couple is married, nursing homes have refused visitation rights to a spouse on the grounds that the resident is incapable of consent. In one case, Drake nursing home in Ohio refused a husband's request for an overnight visit with his wife, who had suffered a stroke which rendered her incompetent.[42] The nursing home explained that "if he were to molest his wife, she might later regain her competence and sue Drake."[43] Mr. Belinky sued the nursing home for permission to have overnight visits with his wife. The court determined that Mr. Belinky had no standing to sue on his own behalf, because the law only protected the rights of nursing home residents, but he could sue on behalf of his wife. Ohio law states that one member of a patient's family may visit the patient at any time, provided, however, the operator may make reasonable rules to insure that such visit will not unduly disturb other patients or residents or interfere with the operation of the home.[44] The court remanded on the question of whether the center had reasonable rules that precluded an overnight visit.[45] The fact that Mrs. Belinky may have lacked competence to consent to the visit was never discussed by the court.

Is it reasonable, or legal, for a nursing home to assume that an elderly patient is incapable of consenting to sex? The Ohio court in *Belinky* thought not, but many nursing home administrators, fearful of suits alleging sexual assault, believe otherwise, especially where one or both partners is not fully competent. American rape law has changed a great deal from its seventeenth-century origins, but perhaps this change goes too far. Early American law made rape a difficult crime to prove. Rape

39. Feldkamp, *supra* note 17; Johnson & Scelfo, *supra* note 38 (quoting a 65-year-old resident who "wanted some privacy with a lady friend: 'But we knew we'd be evicted from the facility if we got caught'").

40. *See, e.g.*, Henneberger, *supra* note 4.

41. *Id.*; *see also Sex In Nursing Homes*, *supra* note 5.

42. Belinky v. Drake Ctr., Inc., 690 N.E.2d 1302, 1305-06 (Ohio Ct. App. 1996).

43. *Id.* Mrs. Belinky would not be able to sue her husband, however, as Ohio exempts spouses from sexual battery. OHIO REV. CODE ANN. § 2907.03(A) (2008) ("No person shall engage in sexual conduct with another, not the spouse of the offender, when any of the following apply . . . .").

44. OHIO ADMIN. CODE 3701-17-09(d).

45. *Belinky*, 690 N.E.2d at 1309.

could not be committed by one's spouse.[46] Three theories once formed the bases of marital immunity: first, wives were characterized as the property of their husbands; second, the husband and wife were unified in marriage as one entity and thus one could not be charged with assaulting oneself; or third, by marrying, a woman gave her consent to sex with her husband. All three have been attacked as outdated and sexist.[47] While some jurisdictions still retain marital immunity in some form and thus presume consent to sexual activity, at least twenty-four states have abolished marital immunity to rape.[48]

In cases where rape charges could be brought, what evidence suffices to show lack of consent? In early American law, for parties not married to each other, the law presumed consent unless the victim earnestly or reasonably resisted, even questioning whether mere words were enough to overcome a presumption of consent.[49] Thus, at one time some states required "utmost resistance" to prove lack of consent.[50] Today most states have dropped the necessity of showing physical resistance by the victim, holding that words or conduct may be sufficient to show lack of consent.[51] Nursing home staff have now taken this a step further by presuming the complete inability of a patient with dementia to consent.[52] Staff may regard intimacy as something to be ridiculed or actively discouraged in residents, rather than as a part of healthy human behavior.[53] This assumption arguably violates the Patient's Bill of Rights and is far too broad. Even those with severe Alzheimer's may retain the ability to consent in certain circumstances.[54]

The most difficult problem may be the situation where one partner mistakenly believes the other is her spouse. The Model Penal Code defines the crime of "gross sexual imposition" as occurring when a man has sexual intercourse with a woman not his wife if "he knows that . . . she submits because she mistakenly supposes that he is her husband."[55] If the man is capable of recognizing her mistake, he may be committing a crime.

For those with no cognitive impairments, simply making them aware that they have the right to privacy and to sexual intimacy in the nursing home may be enough. Statutes like California's notification

46. Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1456 (2003).
47. *Id.* at 1478-84.
48. *Id.* at 1470-71.
49. WAYNE R. LAFAVE, 2 SUBST. CRIM. L. §17.4 (2d ed. 2008).
50. *Id.*
51. *Id.*
52. Johnson & Scelfo, *supra* note 38.
53. Miles & Parker, *supra* note 8, at 23, 38.
54. Daniel Kuhn, *Intimacy, Sexuality, and Residents with Dementia*, 3 ALZHEIMER'S CARE QUARTERLY 165, 167 (2002).
55. MODEL PENAL CODE § 213.1(2)(c) (1962).

law[56] are a start; articles in popular publications, and training for staff, may also help. For elderly with cognitive impairments, much more will be needed to reverse the current assumption that sex is nonconsensual and must always be prohibited.

II. ELDERLY WITH DEMENTIA AND IN-HOME CARE

Freedom of intimate association is not generally an issue for elderly who live alone. The problem may instead be too much freedom, which can leave them prey to unscrupulous persons. Realizing the vulnerability of some elderly, California and Idaho have enacted statutes raising a presumption of undue influence in cases where a caregiver is named in a will or other donative instrument.[57] Long-time friends of the elderly person who provide care without pay are included in the definition of "care custodians" in California;[58] Idaho includes those working in the testator's own home.[59] To receive the donative transfer, the caregiver must rebut the presumption of undue influence by clear and convincing evidence.[60] The California Supreme Court noted that California's statute was originally enacted in 1993 in response to reports that an Orange County attorney who represented a large number of Leisure World residents had drafted numerous wills and trusts under which he was a major or exclusive beneficiary, and had abused his position as trustee or conservator in many cases to benefit himself or his law partners.[61]

The law was amended in 1997 to add care custodians as presumptively prohibited transferees.[62] But the California statute continues to exempt spouses, relatives, and domestic partners of transferors,[63] thus leaving an opening exploited by unscrupulous caregivers. As long as the caregiver can marry the dependent elderly person, in most states it is almost impossible to invalidate the marriage, even in cases where the elderly person has no idea he or she is married.

Challenging the validity of a marriage has traditionally been difficult, given the presumption of ceremonial validity, a presumption of sanity, and restrictions on challenges to a marriage. At common law, a marriage to a person who lacked competence to understand that he or she was getting married was void and could be attacked after the incompe-

56. CAL. CODE REGS. 22, § 72527(a)(11) (West 2008).
57. CAL. PROB. CODE § 21350(a)(6) (West 2008); Idaho Code Ann. § 15-2-616 (2008).
58. Bernard v. Foley, 139 P.3d 1196, 1207-08 (2006).
59. IDAHO CODE ANN. § 15-2-616.
60. CAL. PROB. CODE § 21351(d). Another way to provide for the caregiver under California law is to have the instrument reviewed by an independent attorney who counsels the transferor and also executes a "Certificate of Independent Review." *Id.* § 21351(b). The Idaho statute simply says the presumption is "rebuttable by clear and convincing evidence." IDAHO CODE ANN. § 15-2-616.
61. Rice v. Clark, 47 P.3d 300, 304 (2002).
62. *Bernard*, 139 P.3d at 1205.
63. CAL. PROB. CODE § 21351(a) states that no presumption of undue influence is raised if "the transferor is related by blood or marriage to, is a cohabitant with, or is the registered domestic partner of the transferee," among other exceptions.

tent spouse's death, although attacks rarely succeeded.[64] Today, given the fundamental right to marry, states have proceeded cautiously in restricting the rights of incompetent people to marry, and are wary of allowing termination of the marriage by third parties, whether before or after the spouse's death. Even an insane person or one who has been declared incompetent may still have the capacity to marry.[65] As a North Dakota court stated, "the best accepted test as to whether there is a mental capacity sufficient to contract a valid marriage is whether there is a capacity to understand the nature of the contract and the duties and responsibilities which it creates,"[66] and thus "mere weakness or imbecility of mind is not sufficient, nor is eccentricity or partial dementia."[67] A recent Alaska case is illustrative of the difficulties of overcoming the presumption of sanity and the presumption of validity of the marriage. Lillie Rahm-Riddell already suffered from Alzheimer's disease from 1993 when she met Robert Riddell, a man thirty years her junior.[68] Her daughter petitioned for an appointment of a conservator in April 1995, but while that proceeding was pending, Lillie and Robert married.[69] A conservator was appointed for Lillie; a court also found that Robert had attacked Lillie and enjoined him from contacting her. Despite that, Robert removed Lillie from an assisted living home and moved her to Oregon, refusing to reveal Lillie's location even after a court order.[70] Lillie died in Oregon in 1997.[71] A court held that Lillie's 1997 will leaving her entire estate to Robert was invalid due to lack of testamentary capacity.[72] Still, the court found that the marriage was valid and thus Robert was entitled as a surviving spouse to receive his homestead allowance, family allowance, and elective share.[73] The Alaska Supreme Court refused to impose a constructive trust despite clear and convincing evidence of Robert's fraudulent conduct, his physical abuse, and his isolation of Lillie so that she was "utterly dependent on him for all her needs."[74] The fact that Robert spirited Lillie away while the conservancy petition was pending was not sufficient to establish that Lillie failed to understand that she was getting married. Courts generally have recognized that someone who needs a conservator might still be competent in certain matters, such as marriage. The Supreme Court of Illinois, for example, has held that the appointment of a guardian is not conclusive of the capacity to under-

64. In re Estate of Romano, 246 P. 2d 501, 505 (1952); Terry Turnipseed, *How Do I Love Thee, Let Me Count The Days: Deathbed Marriages in America*, 96 KY. L.J. 275, 287 (2007-2008).
65. Geitner v. Townsend, 312 S.E.2d 236, 238 (N.C. Ct. App. 1984).
66. Johnson v. Johnson, 104 N.W.2d 8, 14 (N.D. 1960).
67. Fischer v. Adams, 38 N.W.2d 337, 340 (Neb. 1949).
68. Riddell v. Edwards, 32 P.3d 4, 6, 16 (Alaska 2001).
69. *Id.* at 6.
70. *Id.*
71. *Id.*
72. *Id.* at 19.
73. Riddell v. Edwards, 76 P.3d 847, 853 (Alaska 2003).
74. *Id.* at 849.

stand the nature, effect, duties, and obligations of marriage, "although the former fact is strong evidence of the latter."[75]

A few states still follow the common law rule and allow a third party to challenge the marriage after one spouse's death. Courts in Alabama and Florida, for example, have voided marriages on grounds of lack of competence. For example, a daughter sued to annul her mother's marriage in Alabama on the grounds of insanity and intoxication at the time of the marriage that continued without interruption until the mother's death three months later.[76] While the allegation of intoxication, if proven, would render the marriage merely voidable, insanity would make the marriage invalid from the time it was entered.[77] Florida has allowed heirs of a woman who alleged that her marriage took place while she was insane and in a diabetic coma to challenge its validity after her death.[78]

Some states have codified the common law into statutes that declare a marriage of a person who lacks mental capacity is void.[79] Cases in a few of these states have allowed a challenge to the marriage after the death of one spouse. New Jersey has allowed such suits on the grounds of lack of capacity to consent, fraud, or simply based on a court's general powers in equity.[80] Similarly, Kentucky has held that a marriage of a mentally incompetent person is void and thus can be set aside after the incompetent's death; in contrast, a marriage procured by fraud or duress is voidable, and can only be annulled while the parties are alive.[81] A court in Pennsylvania invalidated the marriage of an Alzheimer's patient even though his family had not raised an objection to the validity of the marriage.[82]

Louisiana allows the suit to be brought after a spouse's death, despite language in the statute that appears to be to the contrary. Louisiana law states: "A marriage is relatively null when the consent of one of the parties to marry is not freely given. Such a marriage may be declared null upon application of the party whose consent was not free."[83] This right to nullify the marriage, a court held, may be brought by the succession representative, interpreting broad language giving the representative the right to sue to enforce a right of the deceased, whether the action is

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75. Pape v. Byrd, 582 N.E.2d 164, 168 (Ill. 1991).

76. Abel v. Waters, 373 So. 2d 1125, 1127 (Ala. Civ. App. 1979).

77. *Id.* at 1128.

78. Kuehmsted v. Turnwall, 103 Fla. 1180, 1184 (Fla. 1932).

79. KY. REV. STAT. ANN. § 402.020(1)(a)(2008); MO. ANN. STAT. § 451.020 (2008); NEB. REV. ST. § 42-103(2) (2008); N.J. STAT. ANN. § 2A:34-1(d) (2008); 23 PA. CON. STAT. ANN. § 3304(a)(3) (2008); R.I. GEN. LAWS 1956 § 15-1-5; TEX. PROB. CODE ANN. § 47A(a) (Vernon 2008).

80. *In re* Estate of Santolino, 895 A.2d 506, 514-17 (N.J. Super. Ct. Ch. Div. 2005).

81. Johnson v. Sands, 53 S.W.2d 929, 930 (Ky. 1932). The case was remanded for trial on the merits; in a subsequent decision, the court determined the husband was not in fact insane, and the marriage was valid. Johnson v. Sands, 276 Ky. 492 (1939).

82. *In re* Acker, 48 Pa. D. & C. 4th 489 (Pa. Ct. Com. Pl. 2000).

83. LA. CIV. CODE art. 95 (effective Jan. 1, 1988).

personal, real, or mixed.[84] Conversely, although a North Carolina statute appears to codify the common law,[85] case law in that state speaks of such marriages being voidable, rather than void.[86]

The Uniform Marriage and Divorce Act (UMDA) Section 208 changed the common law, and now the majority rule in the United States is that such a marriage is voidable, and thus cannot be challenged after the death of either spouse.[87] Commentary to the UMDA explains why the law was changed:

> The underlying policy reasons for this principle are clear: the traditional "void marriage" doctrine often imposed unwise and unfair penalties on innocent "spouses" in stable family situations long after the questioned marriage occurred. The penalties serve no effective deterrent purpose, but cause severe economic dislocations; a spouse may be denied . . . a share in a spouse's estate, after the marriage has been terminated by the death of the other spouse, despite the fact that the surviving spouse had no reason to suspect the invalidity of the marriage.[88]

Should we return to the common law and void the marriage of an incompetent elderly person? Alternatively, should courts be bolder in asserting their equitable powers? Consider the Washington case of *Estate of Romano*.[89] The decedent, age sixty-four, was nearly blind and in poor physical condition when he married his housekeeper Mary Alice Sauve.[90] The court found that, at the time of the wedding ceremony, "Romano was mentally incompetent. He did not realize what he was doing and was incapable of entering into a contract or consenting to marriage. The trip to Reno [for the wedding] and his participation in the marriage ceremony were procured by fraud and duress practiced by Mary Alice Sauve."[91] Sauve conceded that the marriage did not comply with the law of Nevada due to lack of capacity and fraud.[92] Still, the court held that the marriage could not be attacked after Romano's death absent "fraud of the grossest kind."[93] Such fraud was absent in this case be-

84. Succession of Ricks, 893 So. 2d 98, 100 (La. Ct. App. 2004) (citing LA. CODE CIV. PROC. art. 685 (2008) (enacted in 1960)).

85. N.C. GEN. STAT. § 51-3 (2008).

86. *See, e.g.*, Geitner v. Townsend, 312 S.E.2d 236, 238 (N.C Ct. App. 1984) ("a marriage of a person incapable of contracting for want of understanding is not void, but voidable," (citing Ivery v. Ivery, 258 N.C. 721, 730 (1963))).

87. Turnipseed, *supra* note 64, at 287-289. *See, e.g.*, ALASKA STAT. § 25.05.031; ARK. CODE ANN. § 9-12-201; Vance v. Hinch, 222 Ark. 494, 497(1953) (marriage which involves party lacking mental capacity is voidable but not absolutely void); CAL. FAM. CODE § 2210 (West 2008); Husted v. Husted, 35 Cal. Rptr. 698 (1963); COLO. REV. STAT. § 14-10-111(1)(a).

88. UNIFORM MARRIAGE AND DIVORCE ACT § 208 cmt. 1998 Main Volume (1970) (amended 1971 and 1973), 9A U.L.A. 188 (1998).

89. *In re* Estate of Romano, 246 P.2d 501 (Wash. 1952).

90. *Id.* at 502-03.

91. *Id.* at 503.

92. *Id.*

93. *Id.* at 506.

cause the incompetent spouse lived for almost two years after the marriage, giving ample time for a challenge to the validity of the marriage while Romano was alive.[94]

The New Hampshire Supreme Court wrote of a "Hobson's choice" in the Legislature's decision that marriage by an incompetent person is either void or voidable: "The former method [declaring that the marriage is void] may allow the heirs to step forward after death and claim the fruit of their own neglect. The latter method [declaring that the marriage is voidable] may allow a scheming suitor to marry for money."[95] Still, the court concluded that it was the Legislature's decision, not the court's, and the Legislature had declared marriage of an incompetent to be voidable, and thus impossible to attack after the death of one spouse.[96]

Even if a state is willing to annul the marriage, this may not eliminate the financial incentive. New York, for example, allows the marriage to be annulled after one party has died,[97] but the spouse who exercised undue influence or fraud is still entitled to his or her elective share.[98] Bigamy is treated differently in New York: not only can the marriage be declared void after one party's death, but the survivor is not treated as a spouse and thus gets no elective share.[99] If a person with dementia enters into a marriage ceremony with no understanding of its significance, shouldn't that marriage be treated the same as a bigamous marriage, and annulled?

In contrast, the Washington Supreme Court invalidated a marriage in *Estate of Lint* when it found that the wedding had not been properly solemnized and, as an alternative ground, that fraud of the grossest kind was practiced on the wife.[100] A woman seriously ill with cancer of the lung and brain was systematically isolated from her friends and family by a man, Christian Lint, eighteen years her junior.[101] A will making Christian the primary beneficiary of her estate was declared invalid by the trial court on the grounds that it was procured by fraud and undue influence.[102] Citing *Romano*, the court noted that ordinarily a marriage cannot be set aside after one spouse's death due to lack of capacity, but also held that, because the Washington statute does not include lack of solemnization or gross fraud as reasons to invalidate a marriage, "the

94. *Id.* at 507.
95. Patey v. Peaslee, 111 A.2d 194, 197 (N.H. 1955).
96. *Id.* at 196.
97. *See, e.g.*, Levine v. Dumbra, 604 N.Y.S.2d 207 (N.Y. App. Div. 1993).
98. *See, e.g.*, Parente v. Wenger, 464 N.Y.S.2d 341 (N.Y. Sup. Ct.1983); Bennett v. Thomas, 327 N.Y.S.2d 139 (N.Y. App. Div. 1971).
99. Estate of Dominguez, 2002 N.Y. Misc. LEXIS 1596, 26-27 (N.Y. Sur. Ct. Nov. 18, 2002).
100. *In re* Estate of Lint, 957 P.2d 755, 757 (Wash. 1998).
101. *Id.* at 757-58.
102. *Id.* at 765.

Legislature did not intend to entirely occupy the field."[103] Thus, a path was left open to the courts to annul the marriage.

Even while the incompetent spouse is alive, it may be difficult for others to end the marriage on his or her behalf. A majority of states have adopted the rule that, absent specific statutory authorization for a third party to sue for annulment on behalf of the incompetent, only the competent spouse may sue to end the marriage.[104] South Carolina, for example, has held that a person "who is mentally incompetent as to his property *and* his person . . . may not bring an action for divorce either on his own behalf or through a guardian."[105] The rationale often cited by such courts is that marriage is such a personal commitment that only a spouse can decide when to end it.[106] Other courts have adopted the minority view to allow a guardian to sue to terminate the marriage.[107] A few states have statutes specifically authorizing the spouse's representative to bring suit, but generally have a short statute of limitations and do not allow suit to be brought after the spouse's death.[108]

The statutes and the case law confound two very different issues. The first occurs when a valid marriage is entered into, but later one spouse becomes incompetent. Can a third party sue to end the marriage, either on behalf of the incompetent while he or she is alive, or on behalf of the heirs or family once the incompetent is dead? Courts are understandably reluctant to terminate such a marriage without evidence of what the incompetent spouse would have wanted. Our scenario is quite different: the spouse is unable to understand that he or she is entering into a marriage at the time of the ceremony. Should the same restrictions on terminating the marriage apply? Some courts are willing to declare such a marriage void on the grounds that the requirements for a valid marriage have not been met. Illinois, for example, requires solemnization of a marriage by going before a duly authorized officiate and consenting to marry.[109] David Crockett's children sought to annul the marriage after their father's death on the grounds that the decedent, suffering from an inoperable malignant brain tumor, did not say anything at the ceremony and thus failed to give his consent.[110] After investigating whether Illinois law allowed proxy marriages and concluding it did not, the court held

103. *Id.* at 766.

104. *See* J.A. Connelly, Annotation, *Power of Incompetent Spouse's Guardian, Committee, or Next Friend to Sue for Granting or Vacation of Divorce or Annulment of Marriage, or to Make a Compromise or Settlement in Such Suit*, 6 A.L.R.3d 681, § 5(a)-(b) (1966 & Supp. 1993).

105. Murray v. Murray, 426 S.E.2d 781, 784 (S.C. 1993).

106. Nelson v. Nelson, 878 P.2d 335, 338 (N.M. Ct. App. 1994); *Murray*, 426 S.E.2d at 784. Both *Nelson* and *Murray* involve a spouse who was competent at the time of the marriage but later became incompetent.

107. *See, e.g.*, *Nelson*, 878 P.2d at 338.

108. *See, e.g.*, COLO. REV. STAT. § 14-10-111(2)-(3) (2008) (six months); DEL. CODE ANN. tit. 13, § 1506(b) (2008) (ninety days).

109. *In re* Estate of Crockett, 728 N.E.2d 765, 767 (Ill. App. Ct. 2000).

110. *Id.* at 766.

that the children could challenge the validity of the marriage after the death of one of the parties.[111]

III. SOLUTIONS

Can we find a middle ground, where a person does not need to choose between giving up intimacy to enter a nursing home, or staying in his or her own home and thus forfeiting legal protection? Education of seniors and those who work with them is a good start, but legislation may be necessary as well. Finally, courts may need to exercise their equitable powers more frequently.

A. Education

For those in facilities who wish to have more privacy, informing them of the Patient's Bill of Rights and providing some mechanism for enforcement will help, at least for those with no cognitive impairments. Staff training is key to reversing widely held beliefs that residents of such facilities should not be sexually active,[112] and to help medical personnel understand that intimacy and close relationships are important for better health. An example of comprehensive staff training can be found in the video produced by the Hebrew Home in Riverdale, New York, "Freedom of Sexual Expression: Dementia and Resident Rights in Long-Term Care Facilities."[113] As for seniors in their own homes, training of those issuing marriage licenses and conducting marriage ceremonies may need to be improved, and existing laws enforced. Why would a clerk issue a marriage license to a person in a coma?[114] Several states have statutes declaring it a misdemeanor to knowingly join a couple who should not lawfully marry, or issue a license to them for a marriage ceremony, but no reported case describes an attempt to prosecute anyone under these statutes.[115]

B. Reconsider Void Versus Voidable Marriages

States are understandably reluctant to allow longstanding marriages to be attacked, especially when one spouse has died and thus is unavailable to testify, consent, or object to the proceedings. The legitimacy of children born to the couple should not be put into doubt years later, but

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111. *Id.* at 771-72. Other irregularities occurred in the marriage ceremony. For example, although Illinois law requires both parties to appear and sign in the presence of the county clerk—id. at 766 (citing 750 ILL. COMP. STAT. 5/203 (1996))—only Laverne Crockett was present at the clerk's office to obtain the license. The court did not seem to regard this as a reason to invalidate the marriage.

112. Hosam K. Kamel & Ramzi R. Hajjar, *Sexuality in the Nursing Home, Part 2: Managing Abnormal Behavior—Legal and Ethical Issues*, 4 J. AM. MED. DIR. ASSOC. 203, 205 (2003).

113. The Hebrew Home at Riverdale, http://www.hebrewhome.org/nursinghome.asp (last visited Dec. 18, 2008).

114. Kuehmsted v. Turnwall, 138 So. 775, 778 (Fla. 1932).

115. *See, e.g.*, TENN. CODE ANN. § 36-3-305 (2008); WIS. STAT. §§ 765.30(2)(b)-(c), (3)(a) (2008).

most states already have statutes declaring that such children are legitimate even if the marriage is later annulled.[116] Courts are likewise reluctant to inquire into the reasons for a marriage, which cases involving fraud or undue influence often require.

Treating the marriage of an incompetent person in the same way courts have long treated void marriages might be an effective solution. Even states that do not allow a marriage to be annulled after one spouse's death have recognized that a marriage can be declared null and void.[117] Thus, a Wisconsin court allowed a post-death challenge to a Texas marriage that violated Wisconsin law imposing a six-month waiting period after a divorce, and held that the Full Faith and Credit Clause did not require Wisconsin to recognize a Texas marriage just thirty days after the divorce decree.[118] A New York court invalidated a bigamous marriage and held that the husband was not a surviving spouse.[119] In our case, the family of the incompetent person could seek to have the marriage nullified. The family's best argument to void the marriage may be to establish that the technical requirements of the ceremony were not met: the incompetent person did not appear before the clerk, or did not indicate consent, as required.

Alternatively, states may want to rewrite their statutes of limitations to void a marriage. Some statutes give no recourse to the family, even where there is fraud or undue influence, because the incompetent person has died shortly after the wedding, and thus there was no realistic opportunity to challenge its validity. Delaware's statute of limitations is just ninety days,[120] Colorado's is six months,[121] and in neither state can the action be brought after the death of one spouse. Is it necessary to have such a short time period to sue, and for both spouses to be alive when the suit is brought? Legislatures must balance recognizing a marriage contracted by one who failed to understand that he or she was getting married, against unseemly challenges brought long after the incompetent spouse's death. One way to balance the two concerns is with a statute of limitations that survives the spouse's death. A statute could allow a suit to annul the marriage within a year of the ceremony or when the challenger discovered the marriage, for example, without regard to whether both spouses were still alive.

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116. *See, e.g.*, MONT. CODE ANN. § 40-1-402(4) ("Children born of a marriage declared invalid are legitimate."). The statute is based on the UNIFORM MARRIAGE AND DIVORCE ACT § 208.

117. *In re* Estate of Toutant, 633 N.W.2d 692, 697 (Wis. Ct. App. 2001).

118. *Id.* at 699-700.

119. Estate of Dominguez, 2002 N.Y. Misc. LEXIS 1596, 26-27 (N.Y. Sup. Ct., Nov. 18, 2002).

120. DEL. CODE ANN. tit. 13, § 1506(b)(1) (2008).

121. COLO. REV. STAT. § 14-10-111(2)(a) (2008).

C. Better Living Conditions for Seniors

Giving seniors a third option—other than large institutions or staying at home alone—may help obviate the need for lawsuits to secure the right to intimacy or to annul a marriage. Florida, for example, encourages the establishment of housing for a small number of seniors by subsidizing some of the costs.[122] Geriatrician Dr. William Thomas conceived Green Houses, facilities for eight to ten elderly people with private rooms and bathrooms in a home-like setting.[123] These communal housing arrangements can make seniors less isolated, and thus less vulnerable to an unscrupulous caregiver. At the same time, because the facilities are so small, they are more flexible in allowing privacy to the occupants. The Robert Wood Johnson Foundation is supporting the building of Green Houses across the country.[124] The U.S. Administration on Aging has encouraged the establishment of Naturally Occurring Retirement Communities, or NORCs, by first identifying neighborhoods or buildings in which a large proportion of the residents are elderly, and then working to organize resources in the community to help the elderly remain in their own homes.[125] AARP estimates that about five thousand NORCs now exist across the country, allowing people to stay in their own homes by providing health care, food, transportation, and other services.[126] In a few communities, elderly with substantial resources are designing their own community housing. The first such example of "elderhoods" was founded in Davis, California, by twelve residents who designed their own units and common areas, including a unit to rent to a nurse at below-market rates.[127] ElderSpirit works on a similar concept of allowing residents to design the development; ElderSpirit communities are planned in Virginia, Florida, Kansas, and other places in the United States.[128]

D. Equity

Finally, a court can use its equitable powers more often, especially in dealing with the marriage of someone who lacks understanding or competence. Courts have for a long time been willing to assess the equities in bigamous marriages; why not do so here? A spouse who believed

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122. *See* FLA. STAT. ANN. §§ 430.600-606 (West 2008).

123. Judith Rabig et al., *Radical Redesign of Nursing Homes: Applying the Green House Concept in Tupelo, Mississippi*, 46 GERONTOLOGIST 533, 533 (2006).

124. Alice Dembner, *'Green Houses' For Golden Years*, BOSTON GLOBE, Sept. 30, 2006, at A1.

125. Athan Bezaitis, *Changing Choices—Aging in Place in the 21st Century*, AGING WELL, Spring 2008, at 30, *available at* http://www.agingwellmag.com/071708p30.shtml. *See also* Nell Bernstein, *"Aging in Place" Communities Offer Seniors Independence and Support*, Caring.com, July 9, 2008, *available at* http://www.caring.com/articles/aging-in-place.

126. *Id.*

127. *Id.*; *see also* The Elder Cohousing Network, http://www.abrahampaiss.com/ElderCohousing/GlacierCircle.htm (last visited Dec. 18, 2008).

128. Patricia Leigh Brown, *Growing Old Together, in New Kind of Commune*, N.Y. TIMES, Feb. 27, 2006, at A1, *available at* http://www.nytimes.com/2006/02/27/national/27commune.html?adxnnl=1&pagewanted=print$adxnnlx=1222286447-bRdrFtmo2OqQN8jBGIDkPg.

his mate was competent to consent to their wedding would not be deprived of his statutory share. California, Louisiana, and Texas recognize the concept of "putative spouse" in bigamous marriages; a good faith spouse might still take a share.[129] In the case where a decedent is survived by more than one "spouse," the Uniform Marriage and Divorce Act allows courts to apportion property "as appropriate in the circumstances and in the interests of justice."[130] Courts could decline to treat a spouse acting in bad faith as entitled to a statutory share, on the grounds of unclean hands.[131] The bad faith spouse could be treated in the same way as the bigamist was treated at common law, and take nothing by operation of law.[132]

CONCLUSION

Current law and practice force seniors to make a difficult choice, especially for those with some cognitive impairments who lack family who can care for them. The senior can choose to live in a facility and give up much of his or her privacy, or can hire someone to provide in-home help. A number of surveys have found that most elderly want to stay in their own homes, but may feel compelled to move into a nursing home for health reasons.[133] Facilitating innovative solutions to allow seniors to live at home, such as NORCs, or to allow seniors to design housing that fits their needs, is an important step toward giving seniors more attractive living options. These new forms of housing, however, do not address the underlying problems for the many seniors who live in nursing homes, or who are isolated at home.

For elderly in nursing homes and assisted living facilities, two important shifts need to occur. One is a change in the attitude of family members and staff regarding the value and importance of relationships with others. Education and training will help. If both elderly parties are fully competent, there seems no reason to justify nursing home policies requiring that the families be informed of a new friendship with another

129. CAL. FAM. CODE § 2251 (West 2008); LA. CIV. CODE ANN. art.96 (2008); Lee v. Lee, 247 S.W. 828, 830 (Tex. Comm'n App. 1923).

130. UNIFORM MARRIAGE AND DIVORCE ACT § 209 (1970) (amended 1971 and 1973), 9A U.L.A. 192 (1998); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 2.2, cmt. e (2008).

131. *See, e.g.*, Estate of Hafner, 229 Cal. Rptr. 676, 681 (Cal. Ct. App. 1986) (stating that the status of the putative spouse "belongs only to the party or parties to a void marriage who the trial court finds to have believed in good faith in the validity of the void marriage").

132. A bigamist might still inherit under the putative spouse's will; courts carefully examine whether the testator bequest "was founded on her supposed legal relation with [her husband] and not primarily on their long and intimate association." *In re* Estate of Carson, 194 P. 5 (Cal. 1920).

133. Lucette Lagnado, *Foundation Places Big Bet on 'Green Houses' for Elderly*, PITTSBURGH POST-GAZETTE, June 29, 2008 at A-2 (citing a 2003 AARP survey that 1% of Americans over age fifty with a disability wanted to move to a nursing home); Bob Moos, *Boomer Home-Bodies: Wanting To Stay Put Isn't New—What's New is the 76 Million Baby Boomers Approaching Golden Pond*, DALLAS MORNING NEWS, Nov. 28, 2004, at 1H (citing an AARP survey that about 8 out of 10 elderly want to stay in their own homes).

resident. Second, existing federal and state laws need to be enforced. Both already require privacy and a right to associate, including the right to have visitors, but these laws are often ignored. For elderly living at home, existing laws may be the obstacle rather than the solution, at least in cases where an unscrupulous caregiver has tricked the elderly person into marriage. Short statutes of limitation to invalidate the marriage have allowed caregivers to inherit, even in cases where the elderly person had no idea a marriage had taken place. A more caring and creative society should provide much better alternatives.

GOVERNMENT LAWYER AS CAUSE LAWYER: A STUDY OF THREE HIGH PROFILE GOVERNMENT LAWSUITS

STEVEN K. BERENSON†

INTRODUCTION

Since at least the early part of the twentieth century, lawyers have attempted to use the law, litigation, and courts as tools to effectuate social change. The best-known early examples are the campaigns by the NAACP to end segregated schools and the ACLU for women's and reproductive rights. By the 1960s and 1970s, politically left-of-center lawyers were engaged with a wide range of community-based and other organizations, using both familiar and new tactics in an effort to extend the social change-through-law efforts of their predecessors. And, by the late 1980s and 1990s, activist lawyers situated politically on the right began to engage in similar activities, often mimicking overtly the tactics of their predecessors on the left. The result, at present, is an extremely broad and deep array of lawyers who use an equally vast array of approaches and tactics to achieve social and political goals across the ideological spectrum.

About a decade ago, legal sociologists Austin Sarat and Stuart Scheingold gave name to this broad group of lawyers who seek to use legal means in order to achieve social change. In a series of collections now numbering five, Sarat and Scheingold have demonstrated the impressive range of the work of what they refer to as "cause lawyers."[1] In keeping with that diversity, the editors, along with those who have contributed to their project, have avoided a rigid and all-purpose definition of "cause lawyering." Nonetheless, at least one observation can be made after briefly surveying the range of contributions to the cause lawyering

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† Associate Professor of Law, Thomas Jefferson School of Law. The author wishes to thank Eduardo Capulong, Elizabeth Cooper, Kate Kruse, Mary Helen McNeal, Eric Mitnick, Barry Moon, Ascanio Piomelli, Raja Raghunath, and Tim Tarvin,for helpful comments regarding an earlier draft, as well as Deanna Sampson for continuing support.

1. CAUSE LAWYERING AND THE STATE IN A GLOBAL ERA (Austin Sarat & Stuart Scheingold eds., 2001) [hereinafter Sarat & Scheingold, GLOBAL ERA]; CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat & Stuart Scheingold eds., 1998) [hereinafter Sarat & Scheingold, CAUSE LAWYERING]; CAUSE LAWYERS AND SOCIAL MOVEMENTS (Austin Sarat & Stuart A. Scheingold eds., 2006) [hereinafter Sarat & Scheingold, SOCIAL MOVEMENTS]; THE CULTURAL LIVES OF CAUSE LAWYERS (Austin Sarat & Stuart Scheingold eds., 2008) [hereinafter Sarat & Scheingold, CULTURAL LIVES]; THE WORLDS CAUSE LAWYERS MAKE: STRUCTURE AND AGENCY IN LEGAL PRACTICE (Austin Sarat & Stuart Scheingold eds., 2005) [hereinafter Sarat & Scheingold, STRUCTURE AND AGENCY]. The editors also offered their own mid-stream assessment of the cause lawyering project in STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM, AND CAUSE LAWYERING (2004) [hereinafter SCHEINGOLD & SARAT, SOMETHING TO BELIEVE].

series. While a small number of the contributions in the series focus on the work of government lawyers, these all involve the work of lawyers in "emerging democracies," or regimes in which the rule of law is not well established.[2] Indeed, none of the contributions to the series which focus on the work of lawyers in western democracies, where the rule of law is well established, focus directly on the role of government lawyers.[3] Thus, one of the two major questions addressed by this paper is whether it may be appropriate, in some circumstances, to treat government lawyers in regimes where the rule of law is well established, such as the United States, as cause lawyers.

At first blush, it would appear that the answer to this question should be no. After all, in some of their roles, government lawyers would appear to be the antithesis of cause lawyers. When they defend government officials and agencies charged with wrongdoing, or defend existing statutes and regulations against legal challenges, government lawyers would appear to be the ultimate defenders of the status quo. And government lawyers certainly lack the "outsider" status that appears to be a hallmark of many cause lawyers.

On the other hand, in other contexts, certain government lawyers do appear to invoke the law, litigation, and courts to achieve social change. First, where the government itself or its entities are engaged in pursuing a progressive social change agenda, government lawyers' defense of that agenda looks similar to the work of non-governmental cause lawyers who represent and defend activists who pursue social change outside of the government.[4] Additionally, government lawyers may invoke their public authority to initiate their own legal campaigns designed to alter some aspect of the social, economic, or political status quo. Indeed, in doing so, the work of these latter government lawyers often bears more than a faint resemblance to the work of the first generation of cause lawyers identified above. Thus, a closer look at the work of government lawyers who overtly use the law and their government positions to achieve social change is warranted.

The method used to achieve this goal will be familiar to those acquainted with the cause lawyering series: the case study. More particularly, Part I of this paper will begin with relatively detailed descriptions of three legal actions initiated by government lawyers which appear to

2. *See, e.g.*, Yoav Dotan, *The Global Language of Human Rights: Patterns of Cooperation Between State and Civil Rights Lawyers in Israel*, *in* Sarat & Scheingold, GLOBAL ERA, *supra* note 1, at 246 (discussing cooperation between Israeli civil rights lawyers and lawyers within Israel's Attorney General's office in an effort to protect the civil rights of Palestinians in the Occupied Territories); Lucie White, *Two Worlds of Ghanaian Cause Lawyers*, *in* Sarat & Scheingold, GLOBAL ERA, *supra* note 1, at 35 (discussing elite lawyers who work within government agencies on matters of economic development policies in an effort to raise Ghanaian standards of living).

3. *See* Thomas M. Hilbink, *You Know the Type . . . : Categories of Cause Lawyering*, 29 LAW & SOC. INQUIRY 657, 661 n.5 (2004) [hereinafter Hilbink, *Categories*] (noting the absence).

4. Thanks to my colleague Eric Mitnick for pointing this out to me.

have fairly transparent social change objectives.[5] The first case described will be Mississippi Attorney General Mike Moore's lawsuit against the tobacco industry.[6] The second case described will be the City of Chicago's lawsuit against the gun industry.[7] And the third case described will be then New York Attorney General Eliot Spitzer's legal action against financial services firm Merrill Lynch, relating to conflicts of interest regarding research analyst information provided by the company.[8]

Once these cases are presented, an effort will be made to situate these legal actions within the cause lawyering literature.[9] First, a general comparison between government lawyers and certain cause lawyers will be drawn.[10] Next, the paper will rely on political science Professor Thomas Hilbink's typology of cause lawyering,[11] as well as Sarat and Scheingold's own typology, offered in their mid-series synopsis regarding the cause lawyering project,[12] to further compare the government lawyers studied here and cause lawyers more generally. After conducting these comparisons, the conclusion will be reached that despite distinctions with paradigmatic cause lawyering efforts, the three government legal actions presented here may appropriately be considered a form of what Hilbink describes as "elite/vanguard" cause lawyering.[13]

This conclusion, however, raises a second major question for this paper to address. Even assuming that government lawyers, in some circumstances, may appropriately be categorized as cause lawyers, the question arises as to how effective they may be acting in that role. In a similarly broad and deep literature that overlaps with the cause lawyering project, commentators have questioned the effectiveness of cause lawyers generally in achieving their social change objectives. Perhaps the best-known work to raise this argument is Professor Gerald Rosenberg's *The Hollow Hope: Can Courts Achieve Social Change?*[14] In this volume, Rosenberg relies on large amounts of data to contend that some of the best known elite/vanguard cause lawyering campaigns, including

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5. *See infra* Part I.A.
6. *See infra* Part I.A.1.
7. *See infra* Part I.A.2.
8. *See infra* Part I.A.3.
9. *See infra* Part I.B.
10. *See infra* Part I.B.1.
11. *See infra* Part I.B.2; Hilbink, *Categories*, *supra* note 3, at 661.
12. *See infra* Part I.B.3; SCHEINGOLD & SARAT, SOMETHING TO BELIEVE, *supra* note 1, at 98, 101, 107.
13. *See infra* Part I.C; Hilbink, *Categories*, *supra* note 3, at 673.
14. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (1st ed. 1991) [hereinafter ROSENBERG, THE HOLLOW HOPE]. A second edition of the book was recently published. GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (2nd ed. 2008) [hereinafter ROSENBERG, THE HOLLOW HOPE 2]. The second edition differs from the first only in adding two new chapters dealing with the legal campaign to achieve same-sex marriage rights. *See id.* at xi. For that reason, references throughout the remainder of this paper will be to the first edition, unless otherwise stated.

some of those identified at the outset of this paper, failed to achieve their objectives.

By contrast, a number of other writers, including Sarat,[15] Scheingold,[16] and most frequently, University of Washington political science Professor Michael McCann,[17] have challenged Rosenberg's conclusions. They suggest that the aggregate and quantitative approach taken by Rosenberg fails to capture the entirety of the ways in which social change can come about through law, and suggest an alternative "cultural approach" in order to recognize what are often subtle and nuanced changes that can result from legal action.

In Part II, this paper will rely primarily on the work of Rosenberg and McCann to evaluate the effectiveness of the three government litigation actions described in the previous Part. After describing the work of these authors generally,[18] the three cases that are the focus here will be analyzed through the frames offered by these authors.[19] The primary question will be whether some of the factors that cause government lawyers to fit uneasily within the category of cause lawyers, might nonetheless allow such lawyers to transcend some of the limits described by Rosenberg and others on the effectiveness of cause lawyers in achieving their social change objectives.[20] The conclusion will be that while government lawyers may enjoy some advantages in achieving their social change objectives that other cause lawyers do not, nonetheless, such lawyers still face significant limitations in their ability to achieve broad social change objectives through litigation.[21]

By demonstrating that it is appropriate in some circumstances to think of government lawyers as cause lawyers, it is hoped that some social change oriented lawyers will be convinced to pursue their objectives through government service. On the other hand, the final part of this paper provides a caution to such lawyers that government service will not absolve them of making the difficult strategic judgments required of all successful cause lawyers.

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15. *See, e.g.*, Austin Sarat & Jonathan Simon, *Beyond Legal Realism?: Cultural Analysis, Cultural Studies, and the Situation of Legal Scholarship*, 13 YALE J.L. & HUMAN. (SPECIAL ISSUE) 3, 7, 11 & n.39 (2001).

16. *See, e.g.*, Stuart A. Scheingold, *Essay for the In-Print Symposium on the Myth of Moral Justice*, 4 CARDOZO PUB. L. POL'Y & ETHICS J. 47, 47 (2006) (reviewing THANE ROSENBAUM, THE MYTH OF MORAL JUSTICE: WHY OUR SYSTEM FAILS TO DO WHAT'S RIGHT (2004)).

17. Michael W. McCann, *Reform Litigation on Trial*, 17 LAW & SOC. INQUIRY 715, 716 (1992) [hereinafter McCann, *Reform Litigation*] (reviewing ROSENBERG, THE HOLLOW HOPE, *supra* note 14); Michael W. McCann, *Causal Versus Constitutive Explanations (or, on the Difficulty of Being So Positive . . .)*, 21 LAW & SOC. INQUIRY 457, 477-78 (1996); *see* Michael W. McCann, *Law and Political Struggles for Social Change: Puzzles, Paradoxes, and Promises in Future Research*, *in* LEVERAGING THE LAW: USING COURTS TO ACHIEVE SOCIAL CHANGE 319, 328-29 (David A. Schultz ed., 1998).

18. *See infra* Part II.A.1-2.

19. *See infra* Part II.B.

20. *See infra* Part II.C.

21. *See infra* CONCLUSION.

I. CAN GOVERNMENT LAWYERS BE CAUSE LAWYERS?

This Part of the paper begins by offering descriptions of three high-profile government litigation campaigns which arguably fall within the category of cause lawyering. Next, it compares government lawyering to cause lawyering more generally, and then analyzes the three cases under discussion in conjunction with the typologies of cause lawyering offered by scholars Thomas Hilbink, and Austin Sarat, and Stuart Scheingold. It ends by concluding that the three cases in question offer examples of government cause lawyering.

A. The Cases

This section of the paper offers presentations of three high-profile government legal campaigns, each of which appears to have been motivated by social change objectives. The cases presented are Mississippi Attorney General Mike Moore's lawsuit against the tobacco industry, the City of Chicago's lawsuit against the gun industry, and New York Attorney General Eliot Spitzer's actions against financial services firm Merrill Lynch, regarding conflicts of interest in the provision of research analyst information.

1. Michael Moore v. American Tobacco Company

On May 23, 1994, Mississippi Attorney General Mike Moore filed what became the first of many lawsuits by states against the tobacco industry.[22] For Moore, the lawsuit was clearly about social change. To him, the tobacco industry was to blame for a public health crisis caused by cigarette smoking.[23] Yet to date, the industry had gotten a free ride—avoiding all responsibility for the harm it had caused.[24] Moore also viewed the situation in personal terms. He was offended by what he saw as efforts by the tobacco companies to attract young children, like his own, to become smokers.[25] However, Moore was not interested in a high-profile public relations campaign against the industry, a new push for increased regulation, or other effort that might cause the industry to change its practices.[26] Rather, Moore turned to litigation and the courts

22. *See* CARRICK MOLLENKAMP, ADAM LEVY, JOSEPH MENN & JEFFREY ROTHFEDER, THE PEOPLE VS. BIG TOBACCO: HOW THE STATES TOOK ON THE CIGARETTE GIANTS 30 (spec. ed. 2006) [hereinafter MOLLENKAMP, THE PEOPLE]; DAN ZEGART, CIVIL WARRIORS: THE LEGAL SIEGE ON THE TOBACCO INDUSTRY 141 (2000) [hereinafter ZEGART, CIVIL WARRIORS]; Complaint, Moore v. Am. Tobacco Co., No. 94-1429 (Jackson County Ch. Ct. May 23, 1994), *available at* http://www.library.ucsf.edu/tobacco/litigation/ms/2moore.html (last visited Dec. 22, 2008).

23. *See* MOLLENKAMP, THE PEOPLE, *supra* note 22, at 30.

24. *See id.*

25. *See* ZEGART, CIVIL WARRIORS, *supra* note 22, at 140.

26. *See id.* at 141.

to force the tobacco companies to accept responsibility for their prior conduct and change their practices.[27]

Of course by this time, the tobacco industry was far from being new to litigation. For decades, individual and groups of smokers had sued tobacco companies on a variety of theories.[28] Such theories included negligence, breach of express and implied warranties, deceit, failure to warn, and strict liability.[29] However, prior to the filing of the Mississippi suit, no plaintiff was successful in having a jury verdict sustained against a tobacco company.[30] Early on, plaintiffs had difficulty proving a causal link between cigarette smoking and disease.[31] Later, cigarette companies contended that they could not reasonably have foreseen the harm that could be caused by cigarettes.[32] Though the Surgeon General's 1964 report linking cigarette smoking and cancer would greatly diminish these defenses,[33] the 1965 Federal Cigarette Labeling and Advertising Act,[34] which among other provisions, compelled placement of the well-known warning label on cigarette packages and advertisements,[35] preempted most failure-to-warn claims.[36] Perhaps the most successful defense offered by the cigarette manufacturers involved variations on the assumption of risk doctrine—the argument that smokers chose to smoke despite awareness of potential adverse health effects, and therefore were legally responsible for their own illnesses.[37]

Aside from the legal defenses asserted by the tobacco companies, their manner of litigating cases was perhaps an even greater impediment

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27. *See* MOLLENKAMP, THE PEOPLE, *supra* note 22, at 30 (demonstrating Moore's desire to see the tobacco companies pay what they owe); *see also* ZEGART, CIVIL WARRIORS, *supra* note 22, at 141 (challenging the other lawyers to see the litigation through to the end).

28. *See* Stephen D. Sugarman, *Comparing Tobacco & Gun Litigation*, *in* SUING THE GUN INDUSTRY 196, 215 (Timothy D. Lytton ed., 2005) [hereinafter SUING THE GUN INDUSTRY].

29. *See* Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV. 63, 71 (1997); Bryce A. Jensen, Note, *From Tobacco to Health Care and Beyond—A Critique of Lawsuits Targeting Unpopular Industries*, 86 CORNELL L. REV. 1334, 1338-40 (2001); John J. Zefutie, Jr., Comment, *From Butts to Big Macs—Can the Big Tobacco Litigation and Nation-Wide Settlement with States' Attorneys General Serve as a Model for Attacking the Fast Food Industry?*, 34 SETON HALL L. REV. 1383, 1387-88 (2004).

30. *See* Kelder & Daynard, *supra* note 29, at 76; Robert L. Rabin, Essay, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 854 & n.11 (1992).

31. Kelder & Daynard, *supra* note 29, at 71; Peter Pringle, Essay, *The Chronicles of Tobacco: An Account of the Forces that Brought the Tobacco Industry to the Negotiating Table*, 25 WM. MITCHELL L. REV. 387, 389 (1999); Zefutie, *supra* note 29, at 1387.

32. Jensen, *supra* note 29, at 1339 (discussing Lartigue v. R.J. Reynolds Tobacco Co., 317 F.2d 19 (5thCir. 1963)); Rabin, *supra* note 30, at 860-61 (discussing Lartigue, 317 F.2d 19).

33. *See* PUB. HEALTH SERV., U.S. DEP'T OF HEALTH, EDUC. & WELFARE, PUB. NO. 1103, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 229-32 (1964).

34. Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. No. 89-92, 79 Stat. 282 (1965).

35. Jensen, *supra* note 29, at 1340-41.

36. *See* Cipollone v. Liggett Group, Inc., 505 U.S. 504, 524 (1992); *see also* Jensen, *supra* note 29, at 1342-43 (discussing *Cipollone*).

37. Kelder & Daynard, *supra* note 29, at 71; Zefutie, *supra* note 29, at 1389.

to the ability of plaintiffs to recover from the companies. The tobacco companies resorted to a "scorched earth" style of litigation, in which they were able to exploit their vastly superior resources to those of the plaintiffs and the plaintiffs' lawyers who challenged them.[38] The tobacco lawyers filed every conceivable motion, contested every conceivable issue, took every imaginable deposition, and demanded every arguably relevant document.[39] The result was, in many cases, simply outlasting the plaintiffs and their lawyers. Indeed, in *Cipollone v. Liggett Group, Inc.*,[40] even after the U.S. Supreme Court allowed most of the plaintiffs' legal theories to go forward,[41] plaintiffs' attorneys abandoned the case,[42] nearly a decade after it had originally been filed,[43] and nearly $3 million worth of attorney and paralegal time and approximately $150,000 in out-of-pocket expenses had been advanced by plaintiffs' attorneys.[44]

Despite this history, Moore's case on behalf of Mississippi offered the potential to sidestep the challenges that had derailed previous lawsuits against the tobacco industry. First, the Mississippi lawsuit was based upon a novel theory of law involving a claim for reimbursement of the State's Medicaid program for funds expended treating Mississippi residents for smoking-related illnesses.[45] Journalists attribute the development of this theory to Mississippi personal injury lawyer Mike Lewis, who arrived at the theory after visiting the dying mother of a friend of his, who was suffering from cancer after a lifetime of heavy smoking.[46] Lewis noted the tremendous amount of money the State of Mississippi was paying, through its Medicaid program, to treat such smokers, who had exhausted their personal resources in battling their illnesses.[47] Though Lewis is credited with bringing the Medicaid reimbursement theory to his law school classmate Mike Moore's attention, Southern Illinois University law professor Donald Garner had advanced a similar theory in an obscure law review article published more than a decade and a half earlier.[48] Regardless of its origin, the genius of the Medicaid reimbursement theory was that it deprived the tobacco companies of their strongest defense—namely that the party suing them had chosen to

38. *See* Jensen, *supra* note 29, at 1339; Kelder & Daynard, *supra* note 29, at 71; Rabin, *supra* note 30, at 868.

39. *See* Kelder & Daynard, *supra* note 29, at 71.

40. 505 U.S. 504 (1992).

41. Jensen, *supra* note 29, at 1343.

42. Kelder & Daynard, *supra* note 29, at 72.

43. *See Cipollone*, 505 U.S. at 509; Kelder & Dayard, *supra* note 29, at 72.

44. Kelder & Daynard, *supra* note 29, at 72.

45. Jensen, *supra* note 29, at 1344; Kelder & Daynard, *supra* note 29, at 73; Zefutie, *supra* note 29, at 1392.

46. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 25; Pringle, *supra* note 31, at 392; ZEGART, CIVIL WARRIORS, *supra* note 22, at 92.

47. *See* MOLLENKAMP, THE PEOPLE, *supra* note 22, at 25; Pringle, *supra* note 31, at 392; ZEGART, CIVIL WARRIORS, *supra* note 22, at 92.

48. Pringle, *supra* note 31, at 393 (discussing Donald W. Garner, *Cigarettes and Welfare Reform*, 26 EMORY L.J. 269 (1977)).

smoke despite knowing of the related health risks.[49] While the individual smoker may have made a "choice" to smoke, the State of Mississippi, which was paying for the smoker's care, surely had not.[50] Additionally, the theory squared with Mike Moore's sense of the equities of the situation: the tobacco companies had caused the harm, but the State of Mississippi was paying the cost.[51]

Secondly, though the State of Mississippi would not be able to equal the resources the tobacco companies would bring to bear on the lawsuit, a state party could certainly come closer to matching the industry's resource advantage than the private litigants who had previously sued the industry. Further, in order to bolster the resources available to support Mississippi's lawsuit, Moore entered into contingent fee agreements with a number of private attorneys, who in turn agreed to front many of the out-of-pocket costs that would be needed to pursue the case.[52] Among the lawyers who worked on the tobacco litigation with Moore were Mississippi personal injury attorneys Don Barnett, Ron Motley, and Dickie Scruggs.[53] Each of these lawyers had been highly successful in lawsuits involving the asbestos industry, and was anxious to apply what he had learned from asbestos litigation to tobacco litigation.[54] Moreover, their successes in the asbestos suits provided these lawyers' firms with the resources they would need to take on big tobacco.[55]

Despite potentially having neutralized tobacco's strongest defense and its historical resource advantages, Moore nonetheless faced other daunting challenges in pursuing the tobacco companies. For example, the politics of a major lawsuit against the tobacco industry were complex for an elected official such as Moore. Though Mississippi was not a major tobacco growing state, it was a conservative southern state, and public opinion was favorable to the tobacco companies.[56] Despite Moore's status as a rising star on the political scene, he was a Democrat in an overwhelmingly Republican state. Indeed, the political fault lines implicated by Mississippi's tobacco suit were clearly exposed when Republican Governor Kirk Fordice sued Moore after the lawsuit was filed, challenging his authority to bring the suit on behalf of the State of Mississip-

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49. *See id.* at 393-94.
50. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 25, 29.
51. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 30.
52. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 28.
53. *See* ZEGART, CIVIL WARRIORS, *supra* note 22, at 88, 92-93.
54. *See id.* at 93; Pringle, *supra* note 31, at 389.
55. ZEGART, CIVIL WARRIORS, *supra* note 22, at 94; Pringle, *supra* note 31, at 389.
56. Indeed, in the fall of 1993, Dick Morris, who would later achieve notoriety as a political advisor to President Clinton, polled potential jurors in Pascagoula, Mississippi, and found that sixty percent supported the tobacco companies in a potential suit by the State. ZEGART, CIVIL WARRIORS, *supra* note 22, at 140. As a result, the case was eventually filed in Chancery Court, where jury trials were not available. *Id.*

pi.[57] In any event, it was doubtful that Moore's political star would survive a high profile, unpopular, expensive lawsuit, in the event it was unsuccessful.

On the other hand, at the national level, public opinion had turned strongly against the tobacco companies by the time Moore filed his suit. Already, numerous municipalities had passed ordinances limiting smoking in public places and placing other restrictions on tobacco use.[58] In February 1994, David Kessler, then chairman of the U.S. Food and Drug Administration (FDA), announced that he was considering changing decades of FDA policy and asserting the agency's jurisdiction to regulate tobacco as a drug.[59] Just a few days later, the ABC television news magazine show "Day One" aired a segment charging that cigarette manufacturer Phillip Morris had manipulated the level of nicotine in its cigarettes in order to make its product more addictive.[60] In April, the House of Representatives' Energy and Commerce Subcommittee on Health and the Environment held hearings regarding the tobacco industry.[61] During these hearings, each of the CEOs of the world's seven largest tobacco companies testified under oath that they did not believe that nicotine was addictive,[62] despite overwhelming scientific evidence to the contrary.[63] Indeed, documents produced through tobacco litigation and by whistleblowers from within the tobacco companies subsequently demonstrated both that the companies had long been aware of nicotine's addictive properties, and that they had taken extreme steps to obfuscate public awareness of that fact.[64]

Though Moore's suit on behalf of Mississippi was the first suit by a state against the tobacco companies, it was far from the last. In the end,

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57. *In re* Fordice, 691 So. 2d 429 (Miss. 1997). Fordice argued that as the executive branch official charged with responsibility for the State's Medicaid program, only he could sue on its behalf to recover money expended to treat tobacco-related illnesses. *Id.* at 430. However, the Mississippi Supreme Court declined to exercise its jurisdiction to issue an order preventing Moore from going forward with the tobacco case. *Id.* at 435.

58. Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex-Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1168 (1998); Jody Hodgdon, Notes/Comments, *Live Smoke Free or Die: The Battle for Smoke Free Restaurants in New Hampshire*, 3 PIERCE L. REV. 49, 51 (2004) (discussing municipal ordinances that prohibit smoking in restaurants); Jennifer McCullough, Note, *Lighting Up the Battle Against the Tobacco Industry: New Regulations Prohibiting Cigarette Sales to Minors*, 28 RUTGERS L.J. 709, 731-32 (1997) (discussing municipal ordinances in New Jersey regulating tobacco use).

59. *See* ZEGART, CIVIL WARRIORS, *supra* note 22, at 113; Pringle, *supra* note 31, at 394. The U.S. Supreme Court later ruled that the FDA lacks such authority. FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000).

60. ZEGART, CIVIL WARRIORS, *supra* note 22, at 116-18. Phillip Morris subsequently sued ABC for libel as a result of the allegation. *Id.* at 122. ABC settled the case by issuing a public apology to Phillip Morris for the charges. *Id.* at 180. However, later evidence would more than substantiate the allegation of nicotine manipulation. Kelder & Daynard, *supra* note 29, at 77.

61. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 50.

62. *Id.* at 50-51.

63. *E.g.*, U.S. DEP'T OF HEALTH AND HUMAN SERV., THE HEALTH CONSEQUENCES OF SMOKING: NICOTINE ADDICTION, A REPORT OF THE SURGEON GENERAL (1988).

64. Kelder & Daynard, *supra* note 29, at 76-77; Pringle, *supra* note 31, at 387-88.

a total of more than forty states brought actions against the tobacco companies.[65] Additionally, around the time the Mississippi case was filed, a new "wave" of private litigation was launched against the tobacco companies.[66] Leading the charge was flamboyant New Orleans personal injury lawyer Wendell Gauthier.[67] Gauthier was the lead attorney in the first nationwide class action lawsuit filed against the industry, *Castano v. American Tobacco Co.*[68] Though the substantive claims raised in the *Castano* case were similar to those that had been raised against tobacco companies previously,[69] the plaintiffs' lawyers believed that the recently uncovered documents and other evidence regarding the defendants' malfeasance might yield a different result.[70] Moreover, in order to neutralize the tobacco companies' resource advantage, Gauthier signed up sixty of the nation's top plaintiffs' personal injury firms to participate in the case, each of whom put up $100,000 to help finance the litigation.[71] Though the U.S. Court of Appeals for the Fifth Circuit eventually denied certification of the nationwide class,[72] the *Castano* lawyers would go on to file statewide class actions in numerous states following the Fifth Circuit's decision.[73]

The above-described shift in public opinion, the prospect of federal regulation, and the wave of new lawsuits that threatened to bankrupt the industry, achieved something never achieved before: it brought big tobacco to the negotiating table.[74] Mike Moore became the chief negotiator on behalf of a large coalition of tobacco's foes in pursuing the possibility of a "global settlement" with the industry.[75] Moore was squeezed from both sides in pursuing settlement talks. Public health advocates such as David Kessler, anti-smoking groups, and at least one State Attorney General were against settling, which they believed would let the de-

65. UNIV. OF CAL. SAN FRANCISCO, TOBACCO CONTROL ARCHIVES, LAWSUIT SUMMARY CHART, http://www.library.ucsf.edu/tobacco/litigation/summary.html (last visited Dec. 22, 2008).

66. *See* Jensen, *supra* note 29, at 1338-43; *see also* Kelder & Daynard, *supra* note 29, at 71-72 (identifying three "waves" of tobacco related lawsuits); Pringle, *supra* note 31, at 389; Zefutie, *supra* note 29, at 1387-92.

67. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 73; ZEGART, CIVIL WARRIORS, *supra* note 22, at 149-50.

68. 84 F.3d 734 (5th Cir. 1996); *see* MOLLENKAMP, THE PEOPLE, *supra* note 22, at 73-74. The named plaintiff was a friend of Gauthier's who had died from smoking related illness. *Id.* at 73.

69. *See Castano*, 84 F.3d at 737-38; MOLLENKAMP, THE PEOPLE, *supra* note 22, at 73.

70. *See* Pringle, *supra* note 31, at 388-89.

71. *Id.* at 391.

72. *See Castano*, 84 F.3d at 737.

73. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 74; ZEGART, CIVIL WARRIORS, *supra* note 22, at 201; Kelder & Daynard, *supra* note 29, at 72-73; Pringle, *supra* note 31, at 395; Zefutie, *supra* note 29, at 1391.

74. Pringle, *supra* note 31, at 387-88.

75. In March 1996, Liggett Group, one of the smaller tobacco companies, broke ranks with the rest of the industry and settled with Mississippi and four other states for approximately $26 million. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 57. Liggett was struggling financially and feared that judgments in the lawsuits or the terms of a global settlement would bankrupt it. *Id.* at 58.

fendant tobacco companies off too easily.[76] The companies, in turn, were demanding concessions the plaintiffs were not prepared to give, including immunity from all future lawsuits, whether by public or private parties.[77]

Eventually, after nearly a year of intense, behind-the-scenes negotiations, and merely weeks before the Mississippi case was scheduled to go to trial,[78] Moore announced that a settlement had been reached with the tobacco companies (hereinafter, Master Settlement Agreement or MSA).[79] The settlement called for a payment by the tobacco companies of the staggering sum of $386.5 billion in order to settle all existing tobacco litigation.[80] In addition to the cash payment, the settlement required numerous changes to the way the tobacco companies did business. Among the changes to be required were the following: banning all outdoor advertising including billboards; limiting magazine ads to black-and-white text in periodicals with no more than fifteen percent youth readership; prohibiting distribution of tobacco through vending machines and free samples; forbidding brand-name sponsorship of cultural and sporting events; prohibiting the industry from paying to place its products in movies or to be named in pop songs; empowering the FDA to regulate the manufacture and sale of tobacco products; and penalizing the industry further if teen smoking rates did not decline to meet specific targets.[81] In exchange for these concessions, in addition to settling existing lawsuits, the industry was to receive an elimination of class-action tobacco lawsuits, a ban on punitive damages awarded based on past actions by the tobacco companies, and a limit on the total amount of damages the industry could be liable for in future lawsuits by smokers to $5 billion annually.[82]

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76. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 72; ZEGART, CIVIL WARRIORS, *supra* note 22, at 271-72. Minnesota Attorney General Hubert "Skip" Humphrey, III was the most vociferous opponent of settlement within the AG camp. *See* MOLLENKAMP, THE PEOPLE, *supra* note 22 at 72; ZEGART, CIVIL WARRIORS, *supra* note 22, at 272. However, Humphrey eventually settled his State's suit against tobacco as well, though four months into trial. ZEGART, CIVIL WARRIORS, *supra* note 22, at 321.

77. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 105.

78. On the same day the Mississippi Supreme Court denied Governor Fordice's challenge to the Mississippi suit, the court rejected a similar challenge by the tobacco company defendants to Moore's authority to pursue the Medicaid reimbursement suit in chancery court. *See In re* Fordice, 691 So. 2d 429, 235 (Miss. 1997); *In re* Corr-Williams Tobacco Co., 691 So. 2d 424, 425-26 (Miss. 1997).

79. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 230-31; ZEGART, CIVIL WARRIORS, *supra* note 22, at 270. Actually, by the time the Master Settlement Agreement was reached, four states, Florida, Mississippi, Texas, and Minnesota, had reached separate settlements with the tobacco companies. *See* Steven A. Schroeder, *Tobacco Control in the Wake of the 1998 Master Settlement Agreement*, 350 NEW ENG. J. MED. 293, 294 (2004).

80. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 236. This amount was to be paid out over a twenty-five-year period. *See* Zefutie, *supra* note 29, at 1397.

81. MOLLENKAMP, THE PEOPLE, *supra* note 22, at 236-37.

82. *Id.* at 237. A complete copy of the MSA appears in *id.* at 267-317.

However, because federal law governed many of the areas that were addressed by the Master Settlement Agreement, Congressional approval would be required in order to implement the terms of the settlement. Though Senator John McCain sponsored legislation to implement the MSA, the legislation never made it through Congress, due to "lukewarm support by the Clinton administration, ambivalence on the part of the public health community, and vigorous opposition from the tobacco industry . . . ."[83] Eventually, in November 1998, the Attorneys General of the forty-six states that hadn't yet settled entered into a revised MSA with the tobacco companies.[84] The revised MSA avoided subjects that would require federal legislation, thereby sidestepping the issue of Congressional approval (such as FDA regulation of tobacco, advertising restrictions, etc.). The settlement provided for a sharply reduced payment of $206 billion to be paid to the states over twenty-five years.[85] It also provided for the dissolution of certain industry promoting entities such as the Tobacco Institute, and prohibited advertising targeted at young people (such as the infamous "Joe Camel" ads).[86]

2. Chicago v. Beretta, U.S.A

By 1998, after the tobacco MSA had been entered into, Wendell Gauthier and his colleagues who had collaborated on the *Castano* nationwide class action, the numerous mini-*Castano* suits filed in state courts following the Fifth Circuit's denial of certification of the nationwide class, and who had also played prominent roles as co-counsel in many of the Medicaid reimbursement suits brought by states, were looking for a new focus for their efforts.[87] The gun industry was a logical choice, as many of the theories pled in the *Castano* tobacco cases might be said to apply equally to the gun industry.[88] Though only about half of the firms who signed on for the tobacco litigation agreed to join the effort against the gun industry,[89] and at a considerably smaller financial stake than was put up in the prior effort,[90] Gauthier was nonetheless able to attract an impressive array of plaintiffs' firms to join the "Castano Safe Gun Litigation Group."[91]

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83. Schroeder, *supra* note 79 at 294.
84. *Id.*
85. *Id.*
86. *Id.*
87. *See* HOWARD M. ERICHSON, *Private Lawyers, Public Lawsuits: Plaintiffs' Attorneys in Municipal Gun Litigation, in* SUING THE GUN INDUSTRY, *supra* note 28, 129, at 129-30, 136.
88. *See id.* at 136.
89. *Id.*
90. Unlike the $100,000 bounty each firm was required to post to take on the tobacco companies, Bob Van Voris, *Gun Cases Use Tobacco Know-How: New Orleans, Chicago Lead the Charge. Is Alcohol Next?,* NAT'L L.J., Dec. 7, 1998, at A1, the gun litigation only required a pledge of $50,000, with an initial cash outlay of $2,500, ERICHSON, *supra* note 87, at 136.
91. ERICHSON, *supra* note 87, at 129-30.

The group wasted little time in filing suit against fifteen gun manufacturers on behalf of Gauthier's home city of New Orleans on Halloween 1998.[92] Eventually, members of the group would also file suits against the gun industry on behalf of the cities of Atlanta, Cleveland, Cincinnati, Newark, and Wilmington.[93] Nonetheless, the focus of the following discussion will not be on any of these cases, but rather on a different lawsuit brought against the gun industry by the City of Chicago and Cook County, Illinois. Unlike the cases brought on behalf of the cities mentioned above, the bulk of the work performed on the lawsuit brought on behalf of the City of Chicago was performed by lawyers within the City Attorney's office, rather than by outside attorneys working pursuant to contingent fee agreements with the various cities.[94] Thus, the Chicago case may present a "purer" example of government lawyers engaged in arguably social-change oriented litigation. Additionally, and perhaps because of the nature of the lawyers involved, the Chicago suit was based expressly on a legal theory that was only available to the plaintiffs by virtue of their status as public entities—namely, public nuisance.[95] By contrast, even when litigating on behalf of municipalities, the *Castano* lawyers nonetheless focused on the same product liability theories that they had focused on in the tobacco cases and had relied on for years in bringing cases on behalf of private parties.[96]

Of course, increases in gun violence had been a major concern for urban municipalities such as Chicago in the decade leading up to the lawsuits filed against the gun industry.[97] Indeed, Chicago had been particularly hard hit by the combination of gangs and guns.[98] In the year prior to the filing of its gun lawsuit, Chicago led the nation with 570 gun homicides.[99] This was despite the fact that Chicago had a significantly smaller population than other major cities.[100] As a result, Chicago's gruff Mayor Richard M. Daley decided that the City needed to pursue

92. *Id.* at 137.
93. *Id.* at 129.
94. *See id.* at 134.
95. *See id.* at 132.
96. *See id.* at 137.
97. More specifically, there was a dramatic increase in homicides in large cities between the years 1985 and 1993. *See, e.g.*, JAMES ALAN FOX & MARIANNE W. ZAWITZ, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES, http://www.ojp.usdoj.gov/bjs/pub/pdf/htius.pdf (last visited Dec. 22, 2008). Such deaths subsequently dropped significantly between 1993 and 2000, leveling off after that. *Id.* Most of the deaths recorded during the 1985-1993 "spike" were attributable to handgun violence. *See* JULIE SAMIA MAIR, STEPHEN TERET & SHANNON FRATTAROLI, *A Public Health Perspective on Gun Violence Prevention*, *in* SUING THE GUN INDUSTRY, *supra* note 28, 39, at 44-45.
98. *See* David Barstow, *A Chicago Story of Guns, Gangs and Self-Defense: To Destroy or Defend*, ST. PETERSBURG TIMES, Jan. 3, 1999, at 1.A.
99. *Id.*
100. For example, New York had more than three times Chicago's population, yet had fewer gun homicides. *Id.*

social change by taking action against the gun industry.[101] He turned to Deputy Chicago Corporation Counsel Lawrence Rosenthal to lead the effort.[102]

At first, Rosenthal and his colleagues in the Corporation Counsel's office focused on tort theories similar to those relied on by the *Castano* lawyers in the New Orleans case.[103] However, these theories had been no more successful in their prior uses against the gun industry than they had been in early efforts against tobacco companies.[104] Just as tobacco companies had been able to point to individual smokers' decisions to use tobacco products as negating the companies' liability for health harms to smokers, gun manufacturers had been able to point to the wrongful use of handguns by criminals as breaking the causal chain linking the harm to victims of gun violence back to the gun manufacturers.[105]

There were also other reasons to be more sanguine about the prospects for success of suits against the gun industry than for suits against the tobacco companies. First, while the harms resulting from cigarette smoking are uniformly dispersed geographically, as stated above, the brunt of the harms of gun violence are borne by urban areas.[106] Thus, it is no surprise that cities led the charge against the gun industry, rather than states, as was the case in the legal attack against the tobacco companies.[107] Indeed, not only are rural areas differentially impacted by gun violence, but many rural citizens are passionately attached to their firearms and were supporters rather than opponents of the gun industry.[108] This urban/rural split made the prospect of legislative support for a settlement with the gun industry, along the lines of what would have been required to implement the tobacco MSA, questionable at both the state and federal levels.[109] Second, the gun industry was not nearly as large or financially successful as the tobacco industry. While this may have meant less relentless and effective opposition to litigation against the industry, it also made the prospect of a large financial judgment bankrupting the industry a much more realistic prospect than in the case of the

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101. *Id. Accord* Fox Butterfield, *Chicago is Suing Over Guns From Suburbs,* N.Y. TIMES, Nov. 13, 1998, at A18; Linnet Myers, *Go Ahead . . . Make Her Day; With Her Direct Approach and Quiet Confidence, Chicago Lawyer Anne Kimball Gives Gunmakers a Powerful Weapon,* CHI. TRIB., May 2, 1999, at C12.

102. Barstow, *supra* note 98, at 1A; ERICHSON, *supra* note 87, at 134.

103. ERICHSON, *supra* note 87, at 134.

104. *See id.* at 132.

105. *See* Barstow, *supra* note 98, at 1A; Myers, *supra* note 101, at C12; Van Voris, *supra* note 90, at A1.

106. *See supra* text accompanying note 97.

107. *See* ERICHSON, *supra* note 87, at 149; Van Voris, *supra* note 90, at A1. Only New York Attorney General Eliot Spitzer brought a major lawsuit against the gun manufacturers on behalf of a State. *See* Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192 (N.Y. App. Div. 2003).

108. *See* ERICHSON, *supra* note 87, at 148.

109. The likely opposition of the powerful lobbying group the National Rifle Association (NRA) would have been another major impediment. *Id.* at 151.

tobacco industry.[110] Finally, and perhaps most importantly, it was clear that even when used in the manner for which they were intended, cigarettes caused harm to both smokers and bystanders (through passive exposure to cigarette smoke). However, guns, by contrast, were said to cause harm only when used improperly, for criminal purposes, rather than for their proper purposes of sporting use or self-defense.[111]

For all of these reasons, Rosenthal soured on the idea of bringing a traditional tort action on behalf of Chicago against the gun industry.[112] In order to find a more promising theory to advance, Rosenthal and his colleagues began scouring data kept by the Chicago police department regarding the more than 17,000 illegal guns it recovers every year.[113] It turned out that large numbers of these guns could be traced to a small number of gun shops located just outside the city's borders.[114] Multiple guns had been sold to "straw purchasers" who in turn provided the guns to gang members and other criminals.[115] The lawyers became convinced that gun manufacturers and distributors were deliberately oversupplying suburban gun shops with products that, given the lack of demand for them in the suburbs, would naturally end up in Chicago, in violation of the city's ordinance.[116] Rosenthal began to think of the excess supply of guns in terms of air pollution, floating from a smokestack located downwind from the city, but leaving its harmful residue within the city limits.[117] In such circumstances, public nuisance would be the appropriate legal claim to pursue. Once word got out that Chicago was pursuing the public nuisance theory in relation to the gun industry, Rosenthal received an offer of assistance from Temple University Law School professor David Kairys.[118] Kairys had been working with the City of Philadelphia in developing a similar theory on behalf of Philadelphia's efforts to address its growing gun violence problem.[119] Philadelphia had declined to file suit against the gun industry by the time Chicago filed its suit,[120] and

110. Butterfield, *supra* note 101, at A18; Sugarman, *supra* note 28, at 207; Van Voris, *supra* note 90, at A1.

111. Myers, *supra* note 101, at C12.

112. *Id.*

113. Barstow, *supra* note 98, at 1A. Since 1982, Chicago has had a city ordinance that virtually bans gun ownership in the City. *Id.; see* Butterfield, *supra* note 101, at A18.

114. Barstow, *supra* note 98, at 1A.

115. *Id.*

116. Butterfield, *supra* note 101, at A18; Van Voris, *supra* note 90, at 1A.

117. Barstow, *supra* note 98, at 1A; Butterfield, *supra* note 101, at A18.

118. ERICHSON, *supra* note 87, at 134.

119. *Id.* at 132-33. For an academic presentation of Kairys' version of the theory, *see* David Kairys, *The Governmental Handgun Cases and the Elements and Underlying Policies of Public Nuisance Law*, 32 CONN. L. REV. 1175 (2000).

120. Some have speculated that Philadelphia Mayor Ed Rendell backed down from suing the gun manufacturers due to his gubernatorial aspirations and fears that such a suit would alienate the rural and suburban voters whose support Rendell would need in order to be successful. ERICHSON, *supra* note 87, at 133. Rendell's successor would eventually file suit on behalf of the City against the gun industry. *See* City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 419 (3d Cir. 2002).

Kairys ended up working with Rosenthal in putting the Chicago case together.[121]

In order to support the city's public nuisance theory, Rosenthal made use of the City Police Department's investigative resources. City police officers launched an undercover investigation in which they posed as gang members and other criminals, and went to many of the suburban gun shops that had previously been identified to purchase guns for what the undercover officers expressly described to the sellers to be illegal purposes.[122] The undercover officers easily purchased the required firearms. Based on this data, the city filed suit, contending that gun manufacturers, distributors, and retailers engaged in sales, supply, and marketing practices pursuant to which they knowingly caused guns to be imported to and used illegally in Chicago for criminal purposes.[123]

Not surprisingly, the gun industry responded by moving to dismiss the city's complaint. First, the defendants argued that all of the gun sales identified by the city were legal in themselves—compliant with the very broad range of federal and state regulations governing the purchase and sale of guns.[124] As such, they contended, these activities could not properly be deemed a public nuisance. Additionally, the defendants contended that the intervening actions of criminals who improperly used their products broke the causal chain between the manufacture, distribution, and sale of the guns and the harm suffered by the plaintiff.[125] Finally, the defendants challenged the theories of economic recovery advanced by the city.[126]

In a judgment without a supporting opinion, the trial court granted the defendants' motions to dismiss the case.[127] The city and county appealed, and the Illinois Appellate Court reversed, finding that the second

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121. ERICHSON, *supra* note 87, at 134.

122. Barstow, *supra* note 98, at 1A; Butterfield, *supra* note 101, at A18; Myers, *supra* note 101, at C12; Van Voris, *supra* note 90, at A1.

123. Second Amended Complaint ¶ 1, City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2005) (98 CH 015596).

124. *See* The Sports Authority's Section 2-615 and 2-619 Motion to Dismiss Second Amended Complaint at II.B., City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2005) (98 CH 015596) [hereinafter Retailers Motion to Dismiss], 2000 WL 34611549; Manufacturer Defendants' Section 2-615 Motion to Dismiss Plaintiffs' Second Amended Complaint ¶ 2, City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2005) (98 CH 015596) [hereinafter Manufacturers' Motion to Dismiss], 2000 WL 34017053; Distributors' Consolidated Motion to Dismiss Counts I and II of the Second Amended Complaint Pursuant to § 2-615 of the Illinois Code of Civil Procedure, at II.1., City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2005) (98 CH 015596) [hereinafter Distributors' Motion to Dismiss], 2000 WL 34017038.

125. Retailers Motion to Dismiss, *supra* note 124, at II.D., F.; Manufacturers' Motion to Dismiss, *supra* note 124, ¶ 4; Distributors' Motion to Dismiss, *supra* note 124, at II.2.

126. Retailers Motion to Dismiss, *supra* note 124, at II.G.; Manufacturers' Motion to Dismiss, *supra* note 124, ¶ 4; Distributors' Motion to Dismiss, *supra* note 124, at II.3.

127. City of Chicago v. Beretta U.S.A. Corp., 2000 WL 35509506 (Ill. Cir.) (Sept. 15, 2000) (Trial Order).

amended complaint did state a cause of action for public nuisance.[128] The defendants, in turn, appealed to the Illinois Supreme Court. In a lengthy opinion, the court reversed the judgment of the appellate court, and affirmed the judgment of the trial court dismissing the case.[129] First, the court determined that in order to state a claim for public nuisance, the plaintiffs would have to show negligent conduct on the part of the defendants.[130] However, the court found the defendants were not negligent for a variety of reasons. First, the court found that the defendant manufacturers and distributors did not owe a duty of care to the public at large "to prevent their firearms from 'ending up in the hands of persons who use and possess them illegally.'"[131] Additionally, the court concluded that the conduct of the defendants should not be viewed as the proximate cause of the harm alleged by the plaintiffs, where their lawfully sold products were illegally taken into the city and used by persons not under the control of the defendants.[132] After addressing the negligence question, the court also rejected a number of the remedial claims advanced by the plaintiffs.[133] For example, the Court found that under the economic loss doctrine,[134] plaintiffs would not be permitted to recover on a public nuisance theory for purely economic losses of the type alleged in the complaint.[135] The Court also ruled that under the municipal cost recovery rule,[136] the plaintiffs would not be permitted to recover in tort for the public expenditures made in performance of governmental functions of the sort described above.[137] Thus, the City was left with few tangible results from its efforts against the gun industry.

Few of the other cities to file lawsuits against the gun industry were more successful in their efforts than Chicago was. The Ohio Supreme Court ruled that the City of Cincinnati could go forward with its public

128. City of Chicago v. Beretta U.S.A. Corp., 785 N.E.2d 16, 31 (Ill. App. Ct. 2003), *rev'd*, City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2004). The plaintiffs' had not appealed from the dismissal of their claim for negligent entrustment from the First Amended Complaint. *Id.* at 20.

129. City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1148 (Ill. 2004).

130. *Id.* at 1124.

131. *Id.* at 1126. The Court did not decide the question whether gun retailers owe such a duty to the public at large. *See id.* at 1126-27.

132. *Id.* at 1136.

133. *Id.* at 1143-44. The plaintiffs had claimed more than $433 million in operating expenses relating the alleged public nuisance created by the defendants during the years 1994-98. *Id.* at 1138. This amount included expenses for emergency communications and response, health care treatment provided to the victims of gun violence, police investigations, and the costs of prosecuting and defending those accused of gun crimes. *Id.* at 1138-39.

134. Under the economic loss doctrine, where a tortfeasor's negligence causes no harm to the person or property of the plaintiff, the plaintiff may not recover for purely economic losses. *See, e.g.*, 65 C.J.S. *Negligence* § 58 (2008).

135. *City of Chicago*, 821 N.E.2d at 1143.

136. Under the municipal cost recovery rule, a government cannot recover the costs of carrying out public services from a tortfeasor who caused the need to provide the services. *See, e.g.*, Barbara J. Van Arsdale, Annotation, *Construction and Application of "Municipal Cost Recovery Rule," or "Free Public Services Doctrine"*, 32 A.L.R. 6th 261 (2008).

137. *City of Chicago*, 821 N.E.2d at 1146-47.

nuisance claims against the gun industry.[138] Despite this fact, Cincinnati dropped its suit a short while later.[139] Similarly, the Indiana Supreme Court ruled that the City of Gary could go forward with its gun lawsuit on a public nuisance theory.[140] However, many courts applied reasoning similar to that of the Illinois Supreme Court and refused to recognize the public nuisance theory as applied to gun sales, marketing, and distribution.[141] New York Attorney General Eliot Spitzer was able to enter into a settlement with a single gun manufacturer, Smith and Wesson,[142] but the company faced a tremendous backlash from gun activists and other manufacturers, and no similar settlements were reached.[143] Additionally, approximately thirty states passed legislation designed to protect the gun industry from similar suits.[144] Then, in late 2005, Congress enacted federal legislation dismissing all pending claims of this type in both federal and state courts, and preempting future such claims.[145]

Though public nuisance claims against the gun industry were barred by the 2005 legislation, skirmishes between cities and the gun industry did not end at that point. Indeed, at the same time the District of Columbia courts were ruling on the District's legal challenge to the gun industry,[146] individual plaintiffs, supported by gun advocates, challenged the District's gun control laws in court.[147] In 2008, the U.S. Supreme Court struck down some of the D.C. laws for violating the Second Amendment, which it held confers an individual right to possess firearms as opposed merely to vesting such a right in state militias.[148]

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138. City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1142-44 (Ohio 2002).

139. *See* ERICHSON, *supra* note 87, at 140.

140. City of Gary v. Smith & Wesson Corp., 801 N.E.2d 1222, 1234 (Ind. 2003).

141. *See* City of Philadelphia v. Beretta U.S.A. Corp., 277 F.3d 415, 421-22 (3d Cir. 2002); Camden County Bd. of Chosen Freeholders v. Beretta, U.S.A. Corp., 273 F.3d 536, 539 (3d Cir. 2001); Ganim v. Smith & Wesson Corp., 780 A.2d 98, 132-33 (Conn. 2001); Penelas v. Arms Tech., Inc., 778 So. 2d 1042, 1045 (Fla. Dist. Ct. App. 2001); Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055, 1068 (N.Y. 2001); Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192, 195, 198-99 (N.Y. App. Div. 2003).

142. *See* ERICHSON, *supra* note 87, at 140.

143. *See, e.g.*, Richard A. Nagareda, *Gun Litigation in the Mass Tort Context, in* SUING THE GUN INDUSTRY, *supra* note 28, 176, 181 (Timothy D. Lytton ed., 2005).

144. *Recent Legislation, Tort Law—Civil Immunity—Congress Passes Prohibition of Qualified Civil Claims Against Gun Manufacturers and Distributors—Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (To Be Codified at 15 U.S.C. §§ 7901-7903, 18 U.S.C. §§ 922, 924)*, 119 HARV. L. REV. 1939, 1939, 1945 n.3 (2006).

145. *Id.* at 1940.

146. *See* District of Columbia v. Beretta, U.S.A., Corp., 872 A.2d 633, 637-38 (D.C. 2005) (rejecting plaintiffs' claims for negligence and public nuisance, but allowing claims to go forward based on D.C. statute imposing strict liability on manufacturers of certain types of guns for injuries caused by those guns).

147. Parker v. District of Columbia, 478 F.3d 370, 373, 401 (D.C. Cir. 2007) (striking down gun regulation legislation for violating the Second Amendment to the U.S. Constitution).

148. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2799-2800, 2821-22 (2008).

3. Spitzer v. Merrill Lynch

In late 2000, Eric Dinallo, the head of the investor protection bureau in the New York State Attorney General's office began to look into possible conflicts of interest within the financial services industry.[149] Dinallo's interest in the matter began nearly a year previously when, during a casual conversation, Dinallo's father posed the question of why so many Wall Street research analysts had continued to issue "buy" recommendations for technology and internet stocks whose prices had been falling through the floor.[150] In early 2001, Dinallo provided his boss, New York Attorney General Eliot Spitzer, with a memorandum outlining his bureau's priorities for the upcoming year.[151] "Investigation of abuses by investment advisors" was number two on the list.[152]

It is not surprising that Spitzer encouraged Dinallo to move forward with this particular investigation. First, both shared backgrounds as prosecutors in the prestigious Manhattan District Attorney's office.[153] Second, Spitzer assumed his role as Attorney General in 1998 with an ambitious vision for the office as an aggressive proponent of progressive legal reform advanced through both litigation and regulation.[154] Spitzer saw states as needing to step into the void created by the "new federalism" that had been advocated by conservatives in Washington in all three branches of government, and become vigorous enforcers of legal protections in a variety of areas including public health, the environment, antitrust, and public integrity.[155] Moreover, Spitzer already had a fairly dim view of the ethics of Wall Street practice,[156] and was reluctant to countenance what he saw as misconduct going on in his home turf.[157]

Dinallo's investigation got a boost during the summer, when he noticed an item in the Wall Street Journal indicating that Merrill Lynch, one of Wall Street's biggest and best known firms, had paid $400,000 to a doctor named Debasis Kanjilal to settle claims that Kanjilal had been defrauded into losing hundreds of thousands of dollars by buying and holding stock in an internet company called InfoSpace, which had been touted by Merrill Lynch's celebrity stock analyst Henry Blodget.[158] Kan-

149. *See* BROOKE A. MASTERS, SPOILING FOR A FIGHT: THE RISE OF ELIOT SPITZER 75-76 (2006); John Cassidy, *The Investigation: How Eliot Spitzer Humbled Wall Street*, THE NEW YORKER, April 7, 2003, at 54, 55 *available at* http://www.newyorker.com/archive/2003/04/07/030407fa_fact_cassidy. Dinallo presently serves as Superintendent of New York's State Insurance Department. *See* Eric. R. Dinallo-Biography, http://www.ins.state.ny.us/bios/bios_ed_sup.htm (last visited Dec. 22, 2008).

150. MASTERS, *supra* note 149, at 76-77; Cassidy, *supra* note 149, at 55.

151. MASTERS, *supra* note 149, at 77; Cassidy, *supra* note 149, at 55.

152. Cassidy, *supra* note 149, at 55; *see* MASTERS, *supra* note 149, at 77.

153. *See* MASTERS, *supra* note 149, at 11, 49; Cassidy, *supra* note 149, at 55, 59.

154. *See* MASTERS, *supra* note 149, at 53; Cassidy, *supra* note 149, at 55.

155. MASTERS, *supra* note 149, at 52-53.

156. *See* Cassidy, *supra* note 149, at 55.

157. *See id.* at 62-64.

158. MASTERS, *supra* note 149, at 78; Cassidy, *supra* note 149, at 56.

jilal alleged that Merrill had misled investors about InfoSpace's true economic circumstances because the firm was planning on purchasing another company, Go2Net, which was one of Merrill's investment banking clients.[159] Merrill stood to make fees of $17 million if the deal went through.[160]

Using the Attorney General's authority under New York's Martin Act, the office sent subpoenas both to Kanjilal's lawyer Jacob Zamansky, and to Merrill Lynch, asking the latter for a broad range of documents relating to the company's internet initial public offerings (IPOs), internet stock recommendations, and the compensation of internet stock analysts.[161] The Martin Act is a relatively unique statute[162] which played an integral role in this and Spitzer's future efforts to take on the financial services industry. The statute provides extremely broad authority to the State Attorney General to investigate and prosecute fraud or deception in connection with any security, commodity, or investment advice.[163] Despite its broad sweep, the statute had been little used as a tool to attack the securities industry, though New York Attorney General Louis Lefkowitz had made some use of the statute during the late 1970s.[164] However, Lefkowitz had passed on the results of his investigations to federal authorities, who were traditionally thought to be the primary enforcers with regard to securities violations.[165] Spitzer, on the other hand, used the statute to assert primary authority over securities companies where he believed federal authorities had been lax in protecting investors.[166]

The documents obtained by the Attorney General's office in response to the InfoSpace subpoena included private e-mails which suggested that research analysts such as Blodget were much less enthusiastic about InfoSpace behind the scenes than their public recommendations suggested.[167] For example, even at a time when Blodget had publicly

159. Cassidy, *supra* note 149, at 56.

160. MASTERS, *supra* note 149, at 78.

161. *See* MASTERS, *supra* note 149, at 78-79; Cassidy, *supra* note 149, at 56.

162. *See generally* N.Y. GEN. BUS. LAW §§ 352-359h (McKinney 2008). Subsequent to the Merrill Lynch case, a number of other states passed or considered legislation similar to the Martin Act that would expand these states' authority to regulate the securities industry. *See* Jonathan R. Macey, *Positive Political Theory and Federal Usurpation of the Regulation of Corporate Governance: The Coming Preemption of the Martin Act,* 80 NOTRE DAME L. REV. 951, 959-60 (2005).

163. *See* Macey, *supra* note 162, at 960 (citing N.Y. GEN. BUS. LAW § 352 (McKinney 2008)). The Act, which was passed in 1921, originally provided only for civil enforcement. However, in 1955, criminal penalties were added for fraud. Aaron M. Tidman, Note, *Securities Law Enforcement in the Twenty-First Century: Why States Are Better Equipped Than the Securities and Exchange Commission to Enforce Securities Law,* 57 SYRACUSE L. REV. 379, 389 (2007). Spitzer, nonetheless, relied solely on the statute's civil provisions in his pursuit of Merrill Lynch. *See* Cassidy, *supra* note 149, at 64.

164. MASTERS, *supra* note 149, at 57-58; Jonathan Mathiesen, Survey, *Dr. Spitzlove Or: How I Learned to Stop Worrying and Love "Balkanization,"* 2006 COLUM. BUS. L. REV. 311, 316 (2006); Tidman, *supra* note 163, at 392.

165. MASTERS, *supra* note 149, at 58.

166. *See* Macey, *supra* note 162, at 952.

167. *See* MASTERS, *supra* note 149, at 80.

given the stock Merrill's highest possible rating, he was referring to the stock in private e-mails as "a powder keg," and described the stock as having a "bad smell."[168] Yet Blodget did not downgrade the stock's rating until after the deal with Go2Net had been completed, even though by then the stock price had fallen from $122 per share, when Kanjilal bought,[169] to less than $10 per share.[170]

A couple of months after issuing the InfoSpace subpoena, the Attorney General's office issued another subpoena to Merrill Lynch under the Martin Act relating to a company called GoTo.com (no relation to Go2Net).[171] Blodget had made that company the subject of one of his rare downgrades in June 2001.[172] The Wall Street Journal had noted that the downgrade came just hours after GoTo.com had chosen Credit Suisse First Boston to handle its upcoming stock offering, rather than Merrill Lynch.[173] The e-mails that turned up in response to this subpoena suggested an even stronger connection between Merrill's banking business and its analysts than was the case regarding InfoSpace. For example, Merrill's initial decision to offer a rating to GoTo.com was based on a promise made by its bankers to arrange for such a rating if GoTo.com would use Merrill for a "private placement" in September 2000.[174] From there, the e-mail trail showed a consistent struggle between Merrill's bankers, who wanted better ratings for the company, and Merrill's analysts, who were uncomfortable issuing such ratings.[175] The results were often compromises between what the bankers wanted, and what the analysts thought was actually justified, based on the company's performance.[176] In any event, the company was not downgraded until after the Credit Suisse deal mentioned above.[177]

After the InfoSpace and GoTo.com subpoenas, the Attorney General's office served Merrill Lynch with yet another subpoena, this one demanding all of the e-mails from its research analysts' internet group.[178] Within the boxes of documents provided in response to the subpoena were additional e-mails suggesting that research analysts had fudged their recommendations in response to pressure from bankers within the company, including one e-mail in which Blodget expressly threatened to start "calling the stocks . . . like we see them" unless he received clearer instructions on how to reconcile "management's demands for down-

168. MASTERS, *supra* note 149, at 80-81.
169. Cassidy, *supra* note 149, at 56.
170. *Id.*
171. *Id.*
172. MASTERS, *supra* note 149, at 79; Cassidy, *supra* note 149, at 56.
173. MASTERS, *supra* note 149, at 79; Cassidy, *supra* note 149, at 56.
174. MASTERS, *supra* note 149, at 79; Cassidy, *supra* note 149, at 58.
175. MASTERS, *supra* note 149, at 79; Cassidy, *supra* note 149, at 58-59.
176. Cassidy, *supra* note 149, at 59; *see* MASTERS, *supra* note 149, at 80.
177. *See supra* note 173 and accompanying text.
178. Cassidy, *supra* note 149, at 60.

grades on falling stocks with the investment banking team's demands for good press for its clients."[179]

At this point, Spitzer's team finally believed it had enough evidence to sue Merrill Lynch under the Martin Act.[180] The team initiated discussions with Merrill Lynch in an effort to settle the matter prior to filing suit.[181] However, the negotiations did not go well.[182] A particular sticking point was whether the e-mails and other evidence uncovered through the Attorney General's investigation would become public, or would remain sealed, as was the desire of the company.[183] Spitzer's view, with regard to this and other matters, was that public disclosure was necessary to based legal reform.[184] Thus, confidentiality was off the table as far as he was concerned.[185]

On April 8, 2002, the Attorney General exercised his authority under Section 354 of the Martin Act,[186] to appear ex parte before a judge of New York's Supreme Court,[187] and seek an order for a public inquiry regarding alleged violations of the Act, as well as for injunctive relief in support of such an inquiry.[188] The statute appears to provide the Court no authority to refuse to grant such relief upon a showing by the Attorney General that "information and belief that the testimony" of persons alleged to have violated the Act's anti-fraud provisions is "material and necessary."[189] Thus, not surprisingly, Supreme Court Judge Martin Shoenfeld granted the order sought by the Attorney General.[190]

Following issuance of the judge's order, the Attorney General engaged in what would become a hallmark of his future high profile investigations: the outraged press conference.[191] At this, Spitzer referred to Merrill's transgressions regarding its research analyst information as "a shocking betrayal of trust."[192]

One thing that the New York government attorneys were not aware of was a little known provision of the Federal Investment Company Act

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179. MASTERS, *supra* note 149, at 84.
180. Cassidy, *supra* note 149, at 61.
181. MASTERS, *supra* note 149, at 85; *see* Cassidy, *supra* note 149, at 62.
182. MASTERS, *supra* note 149, at 88; Cassidy, *supra* note 149, at 61.
183. MASTERS, *supra* note 149, at 88-89; Cassidy, *supra* note 149, at 62.
184. MASTERS, *supra* note 149, at 89.
185. *Id.*
186. N.Y. GEN. BUS. L. § 354 (Mckinney 2008).
187. The Supreme Court is the trial court within the New York State Court system.
188. N.Y. GEN. BUS. L. § 354 (McKinney 2008).
189. *Id.*
190. MASTERS, *supra* note 149, at 92; Cassidy, *supra* note 149, at 62; Order Pursuant to General Business Law Section 354 (Apr. 8, 2002), http://www.oag.state.ny.us/media_center/2002/apr/apr08b_02_attach.pdf; Affidavit in Support of Application for an Order Pursuant to General Business Law Section 354 (Apr. 2002), http://www.oag.state.ny.us/media_center/2002/apr/MerrillL.pdf.
191. MASTERS, *supra* note 149, at 92; Cassidy, *supra* note 149, at 64.
192. MASTERS, *supra* note 149, at 92.

of 1940[193] that barred securities firms under court order from operating mutual funds.[194] A shutdown of Merrill's mutual fund business would have seriously jeopardized the company, and went far beyond the degree of pressure the Attorney General hoped to bring to bear against the company.[195] Thus, later that afternoon Spitzer sent Dinallo back into court and had him request (successfully) that the judge stay the injunctive part of his order so that Merrill could continue to operate its mutual fund business.[196]

Despite that fact, the adverse publicity from the court order caused serious harm to Merrill. The firm's own stock-market valuation fell more than $5 billion within a week.[197] Moreover, the SEC, embarrassed at having been beaten to the punch by Spitzer, launched its own investigation regarding research practices.[198] Unwilling to face the continuing public relations nightmare and the prospects of an SEC investigation, Merrill Lynch reached a settlement with Spitzer on May 21, 2002.[199] Among other provisions, the settlement called for Merrill to pay a fine of $100 million;[200] to provide certain disclosures on its research reports regarding income received from the subject of the report relating to banking activities;[201] to separate research analyst compensation from its investment banking business;[202] to set up a committee designed to safeguard the independence of its research recommendations;[203] and to limit the usage of research analysts or information in conjunction with soliciting banking business.[204]

Upon closure of the Merrill Lynch investigation, the New York Attorney General's office expanded its inquiry regarding research analyst independence to a number of other major Wall Street financial services firms. By the end of the year, Spitzer and other regulators had reached a "global settlement" with ten major Wall Street firms and other regulators.[205] In addition to implementing measures designed to promote research analyst independence, the settlement provided for $1.4 billion in

193. 15 U.S.C. § 80a-1.
194. MASTERS, *supra* note 149, at 93; Cassidy, *supra* note 149, at 64.
195. *See* MASTERS, *supra* note 149, at 93; Cassidy, *supra* note 149, at 64.
196. Cassidy, *supra* note 149, at 64.
197. *See* MASTERS, *supra* note 149, at 93; Cassidy, *supra* note 149, at 65.
198. Cassidy, *supra* note 149, at 65.
199. *See* Agreement Between the Attorney General of the State of New York and Merrill Lynch, Pierce, Fenner & Smith, Inc. (May 21, 2002) (hereinafter Merrill Lynch Settlement), www.oag.state.ny.us/bureaus/investor_protection/pdfs/merrill_agreement.pdf.
200. Merrill Lynch Settlement, *supra* note 199, ¶ 24.
201. Merrill Lynch Settlement, *supra* note 199, ¶ 5.
202. Merrill Lynch Settlement, *supra* note 199, ¶¶ 7-11.
203. Merrill Lynch Settlement, *supra* note 199, ¶¶ 12-13.
204. Merrill Lynch Settlement, *supra* note 199, ¶¶ 14-15.
205. Cassidy, *supra* note 149, at 72. The ten firms that joined the settlement were Bear Sterns, Credit Suisse First Boston, Deutsche Bank, Goldman Sachs, J.P. Morgan Chase; Lehman Brothers, Merrill Lynch, Morgan Stanley, Solomon Smith Barney, and U.B.S. *Id.*

fines, and a ban on the practice of "spinning,"[206] which Spitzer's office had also been investigating.[207]

The Merrill Lynch investigation would also form the template for a number of other high profile investigations that Spitzer would launch involving the financial services industry, prior to his election as Governor of New York in 2006, and his shocking resignation in 2008.[208] For example, Spitzer initiated investigations that led to major settlements involving "market timing," or late trading practices by mutual fund companies.[209] Spitzer also took on insurance industry giants Marsh & McLennan and AIG over allegations of steering clients to insurance companies that paid them kickbacks, and covering the practice up with false insurance bids and similar devices.[210]

B. Situating the Three Cases Within the Cause Lawyering Literature

This section of the paper attempts to situate the above case descriptions within the literature regarding cause lawyering. In order to do so, it will first draw a comparison between the government lawsuits and cause lawyering generally. Next, it will apply the typologies offered by Hilbink, Sarat, and Scheingold to the government litigation actions described here.

1. Cause Lawyering and Government Lawyers Generally

The idea of using law and the legal system to effectuate broad-based social change is not a new one. In America, the idea relates back to at least the early decades of the twentieth century, when the NAACP launched its campaign against segregated schools,[211] and the ACLU undertook a series of law reform suits in areas including women's rights, abortion, sexual privacy, free speech rights, prisoner's rights, military law, and amnesty.[212] Then, in the 1960s and 1970s, during this period of

206. *Id.* The practice of spinning involved reserving certain numbers of Initial Public Offering (IPO) shares for current or future investment banking customers. MASTERS, *supra* note 149, at 108. During the tech boom, when IPO shares frequently doubled or tripled in value shortly after issuance, distributing such shares was tantamount to handing out free money. *Id.* By contrast, ordinary investors found it increasingly difficult to obtain IPO shares during this period.

207. *See* Cassidy, *supra* note 149, at 68.

208. *See* Ellen Wulfhorst, *New York Governor Eliot Spitzer Resigns But More Woes Likely*, REUTERS UK, March 13, 2008, *available at* http://uk.reuters.com/article/worldNews/idUKN1216491420080313.

209. *See* Macey, *supra* note 162, at 965-66.

210. *See* MASTERS, *supra* note 149, at 201-219, 227-49.

211. *See* JACK GREENBERG, CRUSADERS IN THE COURTS: HOW A DEDICATED BAND OF LAWYERS FOUGHT FOR THE CIVIL RIGHTS REVOLUTION (1994); RICHARD KLUGER, SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY (1975); WARREN D. ST. JAMES, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE: A CASE STUDY IN PRESSURE GROUPS (1958); MARK V. TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION 1925-1950 (1987).

212. Robert L. Rabin, *Lawyers for Social Change: Perspectives on Public Interest Law*, 28 STAN. L. REV. 207, 213 (1976); *see* SAMUEL WALKER, IN DEFENSE OF AMERICAN LIBERTIES: A HISTORY OF THE ACLU (1990); Ruth B. Cowan, *Women's Rights Through Litigation: An Examina-*

broad liberal social ferment, left-of-center lawyers in such diverse settings as legal aid offices, law reform oriented "back up centers," and law school clinical programs, often modeling their efforts on the earlier work of the NAACP and ACLU, engaged in a range of efforts to use law and lawyering to bring about social change.[213] More recently, as the political winds have shifted rightward, conservative lawyers and interest groups have emerged that have begun to use law and legal work to achieve social change in a manner similar to that employed by their predecessors in each of the two periods mentioned above.[214]

Despite this history, the term "cause lawyering" has only recently received broad acceptance, largely due to an ongoing project of legal sociologists Austin Sarat[215] and Stuart G. Scheingold.[216] In an ongoing series, now numbering five volumes, Sarat, Scheingold, and their many contributors, have sought to map the terrain of what they have come to identify as cause lawyering.[217] Sarat and Scheingold acknowledge that the field they seek to describe defies easy identification and is subject to constant shifts in terrain.[218] As a common denominator however, cause lawyering is usually "directed at altering some aspect of the social, economic, and political status quo."[219] Given this broad parameter, a strong claim could be made that the cases discussed above represent examples of cause lawyering, as each was directed in large measure at altering some aspect of the social, economic, and/or political status quo.

On the other hand, there are a number of reasons why the government attorneys discussed above fit uneasily within the category of cause lawyers. First, while the examples discussed above may present instances in which the involved government lawyers took on the role of

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tion of the American Civil Liberties Union Women's Rights Project, 1971-1976, 8 COLUM. HUM. RTS. L. REV. 373 (1976).

213. *See* MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, 2-3 (1993) (describing different legal strategies for practicing poverty law through various organizations); Margaret Martin Barry, Jon C. Dubin, & Peter A. Joy, *Clinical Education for This Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 10 (2000) (discussing the history of student law clinics); Steven K. Berenson, *A Primer for New Civil Law Clinic Students*, 38 MCGEORGE L. REV. 603, 606-07, 613-14 (2007) (providing a brief history of legal aid in the twentieth century). *See generally* Deborah J. Cantrell, *A Short History of Poverty Lawyers in the United States*, 5 LOY. J. PUB. INT. L. 11 (2003); William P. Quigley, *The Demise of Law Reform and the Triumph of Legal Aid: Congress and the Legal Services Corporation from the 1960s to the 1990s*, 17 ST. LOUIS U. PUB. L. REV. 241 (1998).

214. *See, e.g.*, Ann Southworth, *Professional Identity and Political Commitment among Lawyers for Conservative Causes*, *in* Sarat & Scheingold, STRUCTURE AND AGENCY 83-85; Anthony Paik, Ann Southworth & John P. Heinz, *Lawyers of the Right: Networks and Organization*, 32 LAW & SOC. INQUIRY 883, 884-85 (2007); Ann Southworth, *Conservative Lawyers and the Contest over the Meaning of "Public Interest Law,"* 52 UCLA L. REV. 1223, 1224-27 (2005).

215. William Nelson Cromwell Professor of Jurisprudence and Political Science and Five College Fortieth Anniversary Professor, Amherst College.

216. Professor Emeritus of Political Science, University of Washington.

217. *See supra* note 1.

218. Sarat & Scheingold, CAUSE LAWYERING, *supra* note 1, at 5, 7; SCHEINGOLD & SARAT, SOMETHING TO BELIEVE, *supra* note 1, at 3.

219. Sarat & Scheingold, CAUSE LAWYERING, *supra* note 1, at 4.

cause lawyer, such lawyers play the role of conventional lawyer in many other instances. For example, in addition to having broad ranging authority to bring lawsuits in pursuit of the public interest, state attorneys general and city attorneys have statutory and common law responsibilities to defend government actors when they are sued in routine contract and tort matters.[220] Additionally, when such government lawyers are required to defend government entities in lawsuits challenging those entities' policies and procedures, the government lawyers frequently find themselves on the opposite side of cases from paradigmatic cause lawyers who have brought these cases for law reform or other similar objectives.[221] Nonetheless, within Sarat and Scheingold's framework, a lawyer need not act as a cause lawyer at all times, in all settings, in order to claim the characterization at certain times and in certain contexts. For example, two of the main settings that Sarat and Scheingold identify as loci of cause lawyering activity are large corporate law firms, which engage in cause lawyering as part of their pro bono activities,[222] and small private firms, which engage in a mix of cause lawyering and conventional lawyering, the latter often necessary to keep the firms afloat economically.[223] Thus, the mere fact that the government attorneys discussed above were not engaged in cause lawyering on a full time basis does not deprive the particular campaigns addressed above from being characterized as such.

It should be noted that though the range of examples of cause lawyering identified by the contributors to the Sarat and Scheingold series is extremely broad, none of the contributions focus on American government lawyers as cause lawyers.[224] In countries other than the United States, some of the cause lawyers identified do work within the government itself.[225] Perhaps this difference results from the different shape

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220. *See, e.g.*, Steven K. Berenson, *Hard Bargaining on Behalf of the Government Tortfeasor: A Study in Governmental Lawyer Ethics*, 56 CASE W. RES. L. REV. 345, 346 (2005) [hereinafter Berenson, *Hard Bargaining*].

221. *See, e.g.*, Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 536-39 (2001) (U.S. government lawyers defending restrictions on practice of legal services attorneys against challenge by a broad range of cause lawyers).

222. SCHEINGOLD AND SARAT, SOMETHING TO BELIEVE, *supra* note 1, at 74.

223. *Id.* at 88.

224. *See* Hilbink, *Categories*, *supra* note 3, at 661 n.5. Perhaps an exception to this might be the legal services lawyers and public defenders whose work is discussed extensively throughout the series. *See, e.g.*, SCHEINGOLD & SARAT, SOMETHING TO BELIEVE, *supra* note 1, at 80; Stuart A. Scheingold & Anne Bloom, *Transgressive Cause Lawyering: Practice Sites and the Politicization of the Professional*, 5 INT'L J. LEGAL PROF. 209, 229-236 (1998) [hereinafter Scheingold & Bloom, *Politicization*]. However, even though legal services lawyers and public defenders are government lawyers in the sense that their salaries are paid by the government, they are charged with representing individual litigants rather than the government itself. Indeed, such lawyers often represent their individual clients against government entities (that is always the case for public defenders, and frequently the case for legal services lawyers). Thus, for purposes of the following discussion, I do not include these lawyers within the category of government attorneys.

225. *See, e.g.*, Yoav Dotan, *The Global Village of Human Rights: Patterns of Cooperation between State and Civil Rights Lawyers in Israel*, *in* Sarat & Scheingold, GLOBAL ERA, *supra* note 1, at 248-52 (discussing cooperation between Israeli civil rights lawyers and lawyers within Israel's

that cause lawyering takes in established liberal democracies, where rule-of-law systems are relatively stable, and emerging democracies or authoritarian regimes, where such systems are not well established. In the latter case, cause lawyering often takes on a largely defensive role—attempting to protect individuals from arbitrary treatment and repression on the part of the state.[226] On the other hand, cause lawyers in liberal states can take a more proactive role vis-à-vis the state.[227] In any event, this absence of discussion of American government lawyers as cause lawyers should not be viewed as being determinative if, as will be contended below, the actions of such lawyers resemble those of paradigmatic cause lawyers in other respects.

Another tension in viewing ranking government lawyers of the type discussed here as cause lawyers has to do with the status such lawyers hold within the profession. As Sarat and Scheingold frequently point out, "cause lawyering is everywhere a deviant strain within the legal profession."[228] Indeed in large measure, cause lawyers operate at the margins of the legal profession.[229] It is true that the legal profession has reversed its initial overt hostility to cause lawyers.[230] However, the result has been, rather than a full embrace of cause lawyers, what Sarat and Scheingold characterize as a "fragile alliance" between cause lawyers and the broader profession.[231] Indeed, this fragile alliance may be mostly one of convenience, with the broader profession needing the "cover" cause lawyers provide for conventional lawyers' arguable failure to fully live up to the profession's stated ideals of providing broad access to justice and serving the good of the public as a whole as well as that of its individual clients.[232] In any event, while government lawyers as a whole occupy something of an intermediate status position within the profession between that of cause lawyers on the low end and corporate lawyers on the high end,[233] ranking government lawyers such as the state attorneys general and the city attorneys discussed above, do in fact enjoy a respected status within the profession. As will be discussed in the following Part of this paper, this status may allow such government lawyers to transcend some of the limitations that have plagued cause lawyers in terms of their effectiveness. But for present purposes, the status of rank-

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Attorney General's office in an effort to protect the civil rights of Palestinians in the Occupied Territories); Lucie White, *Two Worlds of Ghanian Cause Lawyers*, *in* Sarat & Scheingold, GLOBAL ERA, *supra* note 1, at 59-65 (discussing lawyers who work within government agencies on matters of economic development policies in an effort to raise Ghanian standards of living).

226. Sarat & Scheingold, CAUSE LAWYERING, *supra* note 1, at 5.

227. *Id.* at 5-6.

228. *Id.* at 3.

229. SCHEINGOLD & SARAT, SOMETHING TO BELIEVE, *supra* note 1, at 4.

230. *Id.* at 29.

231. *Id.* at 44.

232. *Id.* at 49.

233. *See, e.g.*, JOHN P. HEINZ, ROBERT R. NELSON, REBECCA L. SANDEFUR & EDWARD O. LAUMANN, URBAN LAWYERS: THE NEW SOCIAL STRUCTURE OF THE BAR 82-88 (2005).

ing government lawyers does create a tension regarding whether it is appropriate to categorize such lawyers as cause lawyers at all.

On the other hand, there are also strong reasons to place the legal campaigns discussed above within the category of cause lawyering. First and foremost is the overt social change orientation of each of the legal campaigns discussed above. Indeed, each of the government lawyers primarily responsible for initiating these legal campaigns expressly acknowledged and embraced a social change justification in initiating the legal action. For example, Mike Moore expressly saw himself as calling the tobacco industry to account for decades of harm caused to the health of Mississippians and the State's public fisc.[234] Lawrence Rosenthal similarly acted in conformity with his background in public law enforcement in turning to the courts to try to make the city streets of Chicago safer.[235] And Eliot Spitzer plainly viewed himself as policing a securities industry that had victimized ordinary investors while the federal regulators who were responsible for its oversight failed to live up to their responsibilities.[236]

Additionally, Sarat and Scheingold have pointed out that one of the distinguishing features of cause lawyering is the way it blurs what was traditionally considered to be a clear dividing line between legal and political activity.[237] Yet who better than an elected or an appointed state attorney general or city attorney illustrates the confluence between law and politics? Each of these individuals is at the same time a lawyer, legal practitioner, and member of the legal profession, as well as an elected or appointed public official, operating within the thoroughly political milieu of electoral politics.

Finally, Sarat and Scheingold have also focused on cause and conventional lawyers' differing stances toward the legal profession's non-accountability tenet as a critical distinction between them.[238] In short, this non-accountability principle holds that lawyers are not responsible for the ends sought by their clients, as long as the ends sought are legally permissible.[239] As stated in Rule 1.2(b) of the American Bar Association's Model Rules of Professional Conduct, "A lawyer's representation

234. *See supra* notes 22-27, 50-51 and accompanying text.

235. Barstow, *supra* note 98.

236. *See supra* notes 154-157 and accompanying text.

237. Sarat & Scheingold, STRUCTURE AND AGENCY, *supra* note 1, at 9.

238. Sarat & Scheingold, CAUSE LAWYERING, *supra* note 1, at 3; SCHEINGOLD & SARAT, SOMETHING TO BELIEVE, *supra* note 1, at 7.

239. David Luban, *The Adversary System Excuse*, *in* THE GOOD LAWYER: LAWYERS' ROLES AND LAWYERS' ETHICS 83, 90 (David Luban, ed. 1983); Steven K. Berenson, *Institutional Professionalism for Lawyers: Realizing the Virtues of Civic Professionalism*, 109 W. VA. L. REV. 67, 96 (2006); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673-74 (1978). Others commentators have described this as the legal profession's "neutrality" principle. *E.g.*, Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29, 36 (1978).

of a client . . . does not constitute an endorsement of the client's political, economic, social or moral views or activities."[240] Thus, the conventional lawyer should be equally at home representing either side in a particular legal dispute.[241] Because lawyers are not to be judged based upon the justice or lack thereof of the positions they advocate, the measure of lawyering effectiveness becomes an assessment of the technical quality of the legal services rendered on behalf of the client.[242]

In contrast to conventional lawyers, cause lawyers reject this non-accountability principle.[243] Not only do cause lawyers embrace the ends that their clients seek, but cause lawyers affirmatively seek out clients and causes with which they can identify in moral, political, and social terms.[244] Indeed, for many cause lawyers, the cause itself takes priority over any individual client.[245] This stance also brings cause lawyers into conflict with the fundamental tenet of the legal profession which demands that lawyers always place their clients' objectives ahead of any personal, financial, or political interests of the lawyers themselves.[246] However, to the extent that cause lawyers' rejection of non-accountability places them on a collision course with the core principles of the mainstream legal profession, cause lawyers embrace this conflict rather than avoid it.[247]

To the extent that government lawyers are engaged in defending government officials or government entities in lawsuits challenging these parties' actions, the government lawyers tend to embrace the profession's

240. MODEL RULES OF PROF'L CONDUCT R. 1.2(b) (2002).

241. Scheingold & Sarat hold out the example of renowned litigator David Boies, who in one case defended IBM against antitrust charges brought by the federal government, yet later represented the United States in its antitrust action against Microsoft. SCHEINGOLD & SARAT, SOMETHING TO BELIEVE, *supra* note 1, at 8.

242. *Id.*

243. *Id.* at 9.

244. *Id.*

245. *Id.*

246. In an oft quoted passage, Henry Lord Brougham described his representation of Queen Caroline to the British Parliament in 1820 as follows: "[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons . . . is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others." 2 TRIAL OF QUEEN CAROLINE, 8 (Joseph Nightingale ed., London, J. Robins and Co. Albion Press 1821). Though recent commentators have argued whether Brougham truly intended this statement to represent his assessment of the legal advocate's proper role, *compare* Fred C. Zacharias & Bruce A. Green, *"Anything Rather Than a Deliberate and Well Considered Opinion" – Henry Lord Brougham, Written By Himself*, 19 GEO. J. LEGAL ETHICS 1221 *passim* (2006), *with* Monroe H. Freedman, *Henry Lord Brougham and Zeal*, 34 HOFSTRA L. REV. 1319 *passim* (2006), there is little doubt that both the ethical rules governing lawyers and fiduciary principles require lawyers to place their clients' interests ahead of their own. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2002) ("a lawyer shall not represent a client . . . if there is a significant risk that the representation of [the] client[] will be materially limited . . . by a personal interest of the lawyer."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. b (2000).

247. SCHEINGOLD & SARAT, SOMETHING TO BELIEVE, *supra* note 1, at 9.

non-accountability principle.[248] However, in situations such as the cases discussed above, where the government lawyer pursues public protection actions in the name of a particular state, the United States, "the people" of a given state, or some other similar inchoate public entity, the applicability of the non-accountability principle becomes difficult. Of course, the ability of an entity client to articulate the ends its lawyer is to seek pursuant to the non-accountability doctrine is a difficult issue in all instances of entity representation, including conventional representation of corporate entities. However, corporate law establishes clear principles regarding which individuals have "speaking authority" on behalf of the organization, for purposes of giving instructions to its lawyers.[249] By contrast, there are no such clearly established principles for determining the ends a lawyer should pursue when the client is the state, the people, or the public interest.[250] At a minimum, it is clear that in such circumstances, the government lawyer plays a much greater role in shaping and identifying the ends to be sought by the client than is the case with regard to conventional lawyering.[251] And, in circumstances such as two of the three cases discussed above, where the government lawyer is authorized by law to bring an action in his or her own name,[252] the non-accountability principle no longer makes very much sense at all. Indeed, the manner in which government lawyers in these circumstances transcend the non-accountability principle is perhaps the most powerful reason why it may be appropriate to characterize such lawyers as cause lawyers.

2. Hilbink's Typology

In a thoughtful review essay focusing on the first two volumes in Sarat and Scheingold's cause lawyering project, University of Massachu-

248. *See supra* note 239. Indeed, in my first job in legal practice, I worked in the office of Massachusetts Attorney General Scott Harshbarger, a liberal Democrat. I worked in the division in the office that was responsible for defending State government agencies when they were sued regarding their programs and policies. Berenson, *Hard Bargaining*, *supra* note 220, at 345. At the time, Republican Governor William Weld was engaged in a draconian program of cutting social spending by the State in an effort to balance the State budget. This required our office to engage in numerous suits in which we defended the various budget cuts against claims by paradigmatic cause lawyers from within the legal services and broader advocacy communities on behalf of disadvantaged persons. General Harshbarger went to great pains to distance himself publicly from the Weld administration policies that his office was legally required to defend, while at the same time lauding the professionalism of the lawyers in his office who, for the most part, were successful in defending the Governor's policies.

249. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96 cmt. d (2000).

250. *See, e.g.*, Berenson, *Hard Bargaining*, *supra* note 220, at 362-365.

251. In this regard, the government lawyer acts similarly to the plaintiffs' lawyer in a class action suit, long a preferred vehicle of cause lawyers. *See, e.g.*, Bryant Garth, *Power and Legal Artifice: The Federal Class Action*, 26 LAW & SOC'Y REV. 237, 241 (1992).

252. *See supra* notes 22 and 186-88. Of course, in these cases the plaintiff was the government lawyer acting in his official, rather than his personal capacity. The Chicago gun case, by contrast, was brought in the name of the City of Chicago and the County of Cook. *See* Second Amended Complaint ¶ 1, City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2005) (98 CH 015596).

setts Professor Thomas M. Hilbink offers a useful typology for classifying the various forms of cause lawyering.[253] Hilbink classifies cause lawyers into three broad categories: 1) proceduralist; 2) elite/vanguard; and 3) grassroots.[254] The distinctions between these categories, in turn, are demarcated across three dimensions: a) the lawyers' vision of "the system" within which they live and work; b) the lawyers' vision of the cause for which they work; and c) the lawyers' vision of their job as lawyers.[255]

Hilbink's first category is proceduralist lawyering. Proceduralists view the legal and political systems within which they work as being basically just.[256] They view law and politics as being essentially separate, with the former believed to be neutral and objective, rational and predictable, and therefore superior to politics.[257] Because of their faith in legal systems, as the name implies, proceduralist lawyers focus on procedural, rather than substantive, justice.[258] As such, they are the cause lawyers whose practices most resemble those of conventional lawyers.[259] Not surprisingly, proceduralist lawyers' vision of their cause is similar to their vision of the system. That is, they view their cause in procedural terms.[260] For example, for many legal services advocates during the 1960s, the right to counsel was viewed as an end in itself, rather than a means to particular substantive goals.[261] Finally, with regard to the proceduralist lawyers' vision of their role, proceduralist lawyers accept a traditional conception of the lawyer-client relationship.[262] Thus, the lawyers' obligation to advance the particular interests of the client trump any broader political, social, or economic goals of the lawyer or the broader cause he or she may seek to serve.[263] Thus, proceduralist cause lawyers embrace the non-accountability principle discussed above.

A good example of proceduralist cause lawyering comes from lawyers working with the American Bar Association (ABA) to represent death row inmates.[264] Of course, the ABA is the most mainstream of

253. *See* Hilbink, *Categories*, *supra* note 3, at 657-61.
254. *Id.* at 664.
255. *Id.*
256. *Id.* at 665.
257. *Id.* (citing JUDITH N. SHKLAR, LEGALISM (1964)).
258. *Id.*
259. *Id.*
260. *Id.* at 667.
261. *Id.* at 667-68 (citing John Kilwein, *Still Trying: Cause Lawyering for the Poor and Disadvantaged in Pittsburgh, Pennsylvania*, *in* Sarat & Scheingold, CAUSE LAWYERING, *supra* note 1, at 183-84).
262. *Id.* at 672 & n.20.
263. *Id.* at 672. In some sense, as Hilbink points out, the broader cause of the proceduralist lawyer is service to the legal system, and to the profession itself. *Id.* at 668 & n.15, 670 (quoting Dotan, *supra* note 2, at 253).
264. *See* Austin Sarat, *State Transformation and the Struggle for Symbolic Capital: Cause Lawyers, the Organized Bar, and Capital Punishment in the United States*, *in* Sarat & Scheingold, GLOBAL ERA, *supra* note 1, at 189 [hereinafter Sarat, *Capital Punishment*].

organizations that represent lawyers in America. In this instance, rather than advancing substantive arguments as to the death penalty's invalidity on either moral or constitutional grounds, the lawyers involved focused on the procedural aspects of implementation of the death penalty in advancing their clients' interests, e.g., the availability of competent defense lawyers for capital defendants and the availability of adequate opportunities for habeas corpus review of death penalty convictions.[265] Though these lawyers undoubtedly served their clients' interests in avoiding execution, the proceduralist approach had the corollary effects of legitimating both the State's death penalty apparatus (if implemented properly) and the legal profession's paramount role in ensuring the legitimacy of the legal system.[266]

The next category of cause lawyering identified by Hilbink is elite/vanguard lawyering.[267] In terms of their vision of the system, elite/vanguard lawyers share proceduralist lawyers' vision of the legal system as fundamentally just, and elite/vanguard lawyers work within the context of the system rather than outside of it.[268] However, elite/vanguard lawyers reject proceduralist lawyers' sharp distinction between law and politics.[269] Rather, elite/vanguard lawyers view lawyering as a form of politics, albeit a superior one to other forms such as direct action.[270] Also in contrast to proceduralists, elite/vanguard lawyers are concerned about substantive, rather than procedural, justice.[271] What matters is the outcome, not the legal means by which it is achieved.[272]

In terms of their vision of the cause, elite/vanguard lawyers embrace the substance of the causes they represent.[273] "Their goal is not to support professional values or the legal system, but to 'change policy, law, and social systems in such a way that the status of marginalized groups' is improved."[274] Not surprisingly then, in terms of their vision of the lawyer's role, elite/vanguard lawyers reject the profession's non-accountability tenet,[275] in favor of a strong identification with the ends sought by the clients and causes they represent.[276] Additionally, the tra-

265. *Id.* at 194-96; *see also* Hilbink, *Categories*, *supra* note 3, at 667.
266. Sarat, *Capital Punishment*, *supra* note 264, at 194-95, 200.
267. Hilbink, *Categories*, *supra* note 3, at 673.
268. *Id.* at 676 (citing Stuart Scheingold, *Cause Lawyering and Democracy in Transnational Perspective*, *in* Sarat & Scheingold, GLOBAL ERA, *supra* note 1, and Ronen Shamir & Nita Ziv, *State-Oriented and Community-Oriented Lawyering for a Cause: A Tale of Two Strategies*, *in* GLOBAL ERA, *supra* note 1, at 298). The above description of "the system" includes legislative and administrative forums in addition solely to courts. *Id.* at 677.
269. *Id.* at 673.
270. *Id.*
271. *Id.*
272. *Id.* at 674.
273. *Id.* at 675.
274. *Id.* (quoting Kilwein, *supra* note 261, at 189).
275. *See supra* notes 238-52 and accompanying text.
276. Hilbink, *Categories*, *supra* note 3, at 679.

ditional agency relationship between attorney and client[277] is practically inverted in the case of elite/vanguard lawyering.[278] Rather than doing the bidding of clients who have sought out legal representation, elite/vanguard lawyers often seek out particular clients and causes for purposes of finding the litigants best situated to advance the goals sought by the lawyers.[279]

Given elite/vanguard lawyers' reliance on formal legal systems to effectuate social change, along with their view of lawyering as a type of politics of superior means, it is not surprising that such lawyers place a high value on the technical legal skills needed to achieve such results.[280] Thus, the name elite/vanguard lawyering was chosen at least in part to reflect the extraordinary skills of the lawyers who succeed through this approach. Given the primacy of the lawyers within this approach, it is not surprising that elite/vanguard lawyering reflects a "top down" approach, with lawyers often dictating appropriate strategies and tactics as well as the substantive goals to be pursued.[281]

The legal campaigns of the NAACP and ACLU that were mentioned previously,[282] are perhaps the paradigmatic examples of elite/vanguard lawyering. With regard to the NAACP's legal campaign to end segregated schools, lawyers pursued a campaign of litigation within the courts, rejecting direct action such as sit-ins and boycotts.[283] The NAACP lawyers recruited plaintiffs for their cases based on the parties' ability best to represent the legal claims the lawyers sought to advance.[284] The lawyers then litigated the cases in the manner the lawyers thought best for the broader cause of desegregation (which the lawyers, of course, wholeheartedly embraced), even where doing so may have been in tension with the individual interests of the clients being represented in a particular suit.[285] Of course, lead lawyers Thurgood Marshall, Charles Hamilton Houston, and others would become revered figures within the legal profession.

The final category of cause lawyering identified by Hilbink is grassroots lawyering.[286] Grassroots lawyers have a different vision of the legal system than lawyers in the previous two categories addressed. Grassroots lawyers reject the fundamental fairness of the legal system.

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277. *See supra* notes 262-63 and accompanying text.
278. Hilbink, *Categories*, *supra* note 3, at 679.
279. *Id.* at 679-80.
280. *Id.* at 678 (citing MICHAEL W. MCCANN, TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM 26 (1986)).
281. *Id.* at 677, 683.
282. *See supra* notes 211-12 and accompanying text.
283. Hilbink, *Categories*, *supra* note 3, at 676.
284. *Id.* at 681.
285. *Id.* at 680; *see also* Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 YALE L.J. 470, 471 (1976).
286. Hilbink, *Categories*, *supra* note 3, at 681.

Rather, they view the legal system as, at best, ineffective in terms of achieving justice for their clients, or, at worst, overtly hostile or corrupt with regard to their clients' interests.[287] Because of this view, grassroots lawyers often seek extra-legal means in order to advance their objectives.[288] In terms of their vision of the cause, grassroots lawyers do embrace the social change objectives of the clients they work with.[289] However, because legal approaches, such as litigation, are disfavored within grassroots lawyering, the particular skills of lawyers are less valuable and valued within this type of cause lawyering.[290] This fact has implications for grassroots lawyers' vision of the lawyer's role as well. Because lawyers' skills are less important to the approaches undertaken in grassroots lawyering, lawyers play less of a primary and more of a subordinate role in the representation. Rather than the "top down" style of lawyering prevalent in elite/vanguard representation, grassroots lawyering is "bottom up." Grassroots lawyers collaborate with and assist based movements working for social change, often playing a subordinate, rather than a directive role.

When one looks at the government lawyer campaigns discussed above in relation to Hilbink's typology, it becomes clear that these campaigns fit rather neatly into Hilbink's elite/vanguard lawyering category. First, not surprisingly, the elected and appointed government lawyers who initiated the legal campaigns view the legal system as fundamentally just and efficacious, and it is similarly not surprising that they targeted their reform efforts at the courts, rather than utilizing other means.[291] Second, it is also understandable why these individuals who at the same time served as lawyers and as public officials would reject a sharp distinction between law and politics. Indeed, these officials' professional existence is itself evidence of a blurred distinction between law and politics.

In terms of their view of the cause, the lawyers profiled above each embraced an explicit social change orientation with the campaigns they initiated. As stated above, the lead lawyers involved in each were at the very highest reaches of the legal profession in terms of status. While earlier this was offered as a tension with the outsider status of many cause lawyers,[292] it fits perfectly with Hilbink's description of the role of

287. *Id.*
288. *Id.* at 685.
289. *Id.* at 683.
290. *Id.* at 688 (citing Stuart Scheingold, *The Struggle to Politicize Legal Practice: Left-Activist Lawyering in Seattle, in* Sarat & Scheingold, CAUSE LAWYERING, *supra* note 1, at 125). In reality, cause lawyers divide less neatly than Hilbink's categories would suggest. For example, Scott Cummings contends that many grassroots lawyers are less reluctant to pursue legal remedies, particularly in conjunction with other approaches, than Hilbink argues. Scott L. Cummings, *Critical Legal Consciousness in Action,* 120 HARV. L. REV. F. 62 (2007).
291. *See supra* notes 27, 101, 154 and accompanying text.
292. *See supra* notes 228-33 and accompanying text.

lawyers within elite/vanguard lawyering. Additionally, with regard to the vision of the lawyer's role in the cases discussed above, given the amorphous nature of the "clients" represented in the government lawyer cases,[293] it seems clear that the campaigns took on a lawyer-centric approach similar to that of the classic elite/vanguard lawyering representations addressed here.[294]

3. Sarat and Scheingold's Typology

Similarly to Hilbink, Sarat and Scheingold have offered their own typology of the cause lawyering examples discussed in their collections.[295] Cause lawyers are broadly divided into those who work in support of liberal democracy,[296] and those who work against it.[297] Within the category of cause lawyers who work in support of liberal democracy, Sarat and Scheingold identify three subcategories: 1) neoliberal lawyers; 2) libertarian lawyers; and 3) left liberal lawyers.[298] Neoliberal lawyers primarily work "to defend and extend property rights in order to transfer 'power from government regulators to landowners and entrepreneurs.'"[299] They often work in the areas of tort reform, environmental regulation, and land use planning.[300] Well-known organizations that fall into this category include the Pacific Legal Foundation, the Manhattan Institute, and the Mountain States Legal Foundation.[301]

Libertarian lawyers, by contrast, "look beyond property rights and the protection of business interests to individual liberties in the social and cultural spheres."[302] Libertarian cause lawyers work in areas such as school choice, welfare reform, and interracial adoptions, while supporting decriminalization for "victimless" crimes such as drug use and pornography.[303]

Left liberal cause lawyers, in turn, seek to "defend the public, as well as the private, [first generation] rights of individuals."[304] Thus, such

293. *See supra* notes 262-63, 275-79, 287-89 and accompanying text.
294. *See supra* notes 275-79 and accompanying text.
295. SCHEINGOLD & SARAT, SOMETHING TO BELIEVE, *supra* note 1, at 101.
296. *Id.* at 107.
297. *Id.* at 113. Sarat and Scheingold identify liberal democracy in conjunction with representative government, the rule of law, individual rights, and an autonomous, open, and pluralistic civil society. *Id.* at 102. The individual rights recognized in such regimes are civil and political, of the type enshrined in the Bill of Rights to the U.S. Constitution, as opposed to the social and economic rights, which are recognized in social democratic alternatives to liberal democracy. *Id.* at 102-04. Sarat and Scheingold refer to the former category of rights as "first generation" rights, and the latter category as "second generation" rights. *Id. at* 102-103.
298. *Id.* at 102.
299. *Id.* at 108 (quoting John P. Heinz, Anthony Paik & Anne Southworth, *Lawyers for Conservative Causes: Clients, Ideology, and Social Distance*, 37 LAW & SOC'Y REV. 5 (2003)).
300. *Id.*
301. *Id.*
302. *Id.*
303. *Id.* at 109.
304. *Id.* at 110. *See supra* note 290 for a description of first generation and second generation rights.

lawyers seek to encourage "a robust and inclusive form of political and social citizenship," as opposed to a broad sphere of negative liberty from government interference, as is the case with regard to neoliberal and libertarian cause lawyers.[305] Of course, the ACLU is the paradigmatic left liberal cause law firm in America.[306] However, in addition to the sexual freedom, free speech, and electoral accountability cases that the ACLU is known for, other left liberal cause lawyers focus on issues such as immigration reform, the death penalty, police violence, employment discrimination, the right to die, tenants rights, and abortion rights.[307] The primary difference between these lawyers and lawyers on the left who work against liberal democracy, and who will be discussed below, is their basic stance toward "the system,"[308] to echo Hilbink's typology from above.[309] While these left liberal lawyers work to achieve social change within the bounds of the existing legal system, the lawyers discussed below work to change the system itself.[310]

Within the category of cause lawyers who work against liberal democracy, Sarat and Scheingold identify three additional subcategories: 1) evangelical democratic; 2) social democratic; and 3) emancipatory democratic.[311] Evangelical democratic cause lawyers work defensively to use first generation negative liberty rights to carve out a broad space for religious expression.[312] However, evangelical democratic lawyers also work "offensively" to seek a radical transformation of the liberal democratic society toward a theocratic society.[313] Social democratic cause lawyers, in turn, also seek to transform the liberal democratic state, this time in the direction of a more inclusive and egalitarian distribution of wealth, and an orientation toward equality of outcomes, rather than equality of opportunity, which is at least a formal hallmark of the liberal democratic state.[314] And while emancipatory democratic cause lawyers agree with the ends sought by social democratic cause lawyers, they differ as to the means that should be used to achieve those ends. For example, social democratic cause lawyers are more favorably inclined toward the state than their emancipatory counterparts, who mistrust the state and seek broad diffusion of power and political participation.[315]

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305. *Id.* (citing DANIEL C. KRAMER, PARTICIPATORY DEMOCRACY: DEVELOPING IDEALS OF THE POLITICAL LEFT (1972).
306. *Id.*
307. *Id.* (citing MICHAEL J. KELLY, LIVES OF LAWYERS: JOURNEYS IN THE ORGANIZATION OF PRACTICE 145-63 (1994).
308. *Id.* at 111 (quoting Scheingold & Bloom, *Politicization*, *supra* note 224, at 230).
309. *See supra* notes 253-294 and accompanying text.
310. SCHEINGOLD & SARAT, SOMETHING TO BELIEVE, *supra* note 1, at 111, 113.
311. *Id.* at 102.
312. *Id.* at 115.
313. *Id.* at 116.
314. *Id.* at 103, 113
315. *Id.* at 113, 121.

Naturally, within the major division between those cause lawyers who work in favor of liberal democracy and those who work against it, the government lawyers profiled above fall within the group working *for* liberal democracy. After all, these are elected and appointed officers of the state we are talking about.[316] Moreover, each of the cases discussed above falls on the left hand side of the political spectrum. Thus, it would appear that within Sarat and Scheingold's typology, the government lawyers discussed above would be characterized as left-liberal cause lawyers working in favor of liberal democracy.

Because Sarat and Scheingold's typology offers more categories than Hilbink's, it perhaps better reflects the complex realities of the world of practice than the latter. Nonetheless, this complexity limits the effectiveness of Sarat and Scheingold's typology as a heuristic device. Therefore, the balance of this paper will focus on Hilbink's typology, as opposed to that of Sarat and Scheingold.

C. Government Lawyer as Cause Lawyer—Conclusion

Based upon the foregoing discussion, the conclusion here is that the three government legal campaigns described above should be considered examples of cause lawyering. It is true that the lawyers involved in these cases did not always act in the role of cause lawyer and lacked the outsider status that is a hallmark of cause lawyers. Yet, as pointed out above, many cause lawyers do not operate as such at all times, and the high level of professional status enjoyed by the lawyers involved here is consistent with that attained by Hilbink's elite/vanguard lawyers, who have sometimes become icons within the legal profession as a result of their social change oriented lawyering. Also similar to Hilbink's elite/vanguard lawyers, the lawyers in the cases discussed here both blurred the line between law and politics and rejected the profession's non-accountability tenet in conjunction with these cases. Rather, the lawyers involved embraced as their own the substantive causes of tobacco and gun control or investment research analyst independence. Therefore, the three campaigns discussed above may appropriately be described as examples of elite/vanguard cause lawyering. Given this conclusion, it is this author's hope that some social change oriented lawyers will consider government service as an appropriate professional path to take in which to pursue their objectives.

316. Note however that Scheingold & Sarat characterize the private personal injury lawyers who worked as co-counsel in some of the above-described matter as social democratic transformative cause lawyers, given the manner in which they use the courts to attack the abuse of corporate and private power against the interests of individual citizens. *Id.* at 119-20; *see also* Tim Howard, *Cause Lawyers and Cracker Culture at the Constructive Edge: A "Band of Brothers" Defeats Big Tobacco*, *in* Sarat & Scheingold, CULTURAL LIVES, *supra* note 1, at 79.

II. CAN GOVERNMENT CAUSE LAWYERS TRANSCEND THE LIMITATIONS THAT CONSTRAIN THE EFFECTIVENESS OF OTHER CAUSE LAWYERS?

Having determined that the lawyers involved in the government legal campaigns addressed in Part I may appropriately be characterized as cause lawyers within that context, the next question to be addressed is whether such government lawyers can act effectively in that role.

A. Two Approaches to Evaluating Cause Lawyer Effectiveness

The following section summarizes two broad approaches to evaluating the effectiveness of cause lawyering efforts. The first, which is exemplified by Professor Gerald N. Rosenberg's book *The Hollow Hope: Can Courts Bring About Social Change?*,[317] is described here as the actuarial approach. The other, which is exemplified by the work of political science Professor Michael McCann, is described here as the cultural approach.

1. The Actuarial Approach: *The Hollow Hope*

The starting point for an assessment of the effectiveness of the legal campaigns discussed above should be Professor Gerald N. Rosenberg's seminal work, *The Hollow Hope: Can Courts Bring About Social Change?*[318] In *The Hollow Hope,* Rosenberg challenges conventional wisdom regarding the effectiveness of the type of litigation campaigns described by Hilbink as elite/vanguard lawyering.[319] For example, Rosenberg questions the effectiveness of the NAACP's legal challenge to segregated schools which resulted in the U.S. Supreme Court decision in *Brown v. Board of Education.*[320] He similarly questions the effectiveness of the campaign for abortion rights that led to the decision in *Roe v. Wade.*[321] And, in the recently-released second edition of the book,[322] Rosenberg challenges the effectiveness of the campaign for same-sex marriage rights that culminated in the Massachusetts Supreme Judicial Court decision in *Goodridge v. Department of Public Health.*[323]

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317. *Supra* note 14.

318. *Id.*

319. *See supra* notes 267-285 and accompanying text.

320. 349 U.S. 294 (1955); *see* ROSENBERG, THE HOLLOW HOPE, *supra* note 14, at 42-169; Gerald N. Rosenberg, *Courting Disaster: Looking for Change in All the Wrong Places*, 54 DRAKE L. REV. 795, 809 (2006) [hereinafter Rosenberg, *Courting Disaster*]; Gerald N. Rosenberg, *Substituting Symbol for Substance: What Did Brown Really Accomplish?*, 37 PS: POL. SCI. & POL. 205 (2004) [hereinafter Rosenberg, *Substituting Symbol*].

321. 410 U.S. 113 (1973); *see* ROSENBERG, THE HOLLOW HOPE, *supra* note 14, at 175-201; Rosenberg, *Courting Disaster*, *supra* note 320, at 810; Gerald N. Rosenberg, *The Real World of Constitutional Rights: The Supreme Court and the Implementation of the Abortion Decisions*, *in* CONTEMPLATING COURTS 390 (Lee Epstein ed., 1995).

322. *Supra* note 14.

323. 798 N.E.2d 941 (Mass. 2003); *see* ROSENBERG, THE HOLLOW HOPE 2, *supra* note 14, at 339-419; Rosenberg, *Courting Disaster*, *supra* note 320, at 812.

Rosenberg's methodology is largely quantitative—he analyzes large amounts of data of various types to try to measure the effect of these landmark court decisions. For example, with regard to *Brown*'s effectiveness, he points to data showing that even a decade after *Brown*, almost 99% of African-American children in the eleven states of the former confederacy still attended segregated schools.[324] And, with regard to *Roe*, Rosenberg points out that the rate of increase in abortions in America actually slowed following the Supreme Court's decision.[325]

Rosenberg's analysis may not be precisely on point for purposes of our discussion. Rosenberg's primary focus in the book is the inability of *courts*, acting on their own, to foster progressive social change, rather than the lawyers who appear before them.[326] Rosenberg explains this inability on a number of grounds. First, Rosenberg points out that throughout their history, with the possible exception of a couple of decades during the middle of the twentieth century, American courts have been opponents, rather than supporters, of progressive social change, and that courts have been defenders of, rather than challengers to, the economic, political, and social status quo.[327] Second, Rosenberg offers four explanations for why this is so. The federal judicial appointments process, particularly as it relates to Supreme Court Justices, requires broad acceptability on the part of judicial appointees.[328] Thus, progressive social reformers are unlikely to be appointed to the federal bench.[329] Next, the Constitution itself is a constraint on liberal social reform, with its recognition of first generation political and civil rights, to use Sarat and Scheingold's terminology discussed above,[330] and with its failure to recognize economic, social, and cultural rights,[331] which might alter the presently existing balance of wealth and power in society. Additionally, courts are constrained from pushing too far ahead of the other branches of government in introducing reforms, because courts need the assistance of the other branches to implement and enforce court decisions.[332] And finally, courts themselves lack the power to implement and enforce their own decisions.[333]

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324. Rosenberg, *Courting Disaster*, *supra* note 320, at 809 (citing Rosenberg, *Substituting Symbol*, *supra* note 320, at 205).

325. *Id.* at 810. To be fair, it is hard to image that the goal of abortion rights advocates was an increase in the number of abortions performed.

326. ROSENBERG, THE HOLLOW HOPE, *supra* note 14, at 1.

327. Rosenberg, *Courting Disaster*, *supra* note 320, at 797. Rosenberg discusses Supreme Court decisions in areas including civil rights, *id.*, civil liberties and dissident speech, *id.* at 802, and economic regulation, *id.* at 806, to illustrate his point.

328. *Id.* at 808.

329. *Id.*

330. *See supra* notes 295-316 and accompanying text.

331. Rosenberg, *Courting Disaster*, *supra* note 320, at 808.

332. *Id.*

333. *Id.*

Though courts may be the primary focus of Rosenberg's critique, he does not spare from his ire what he would describe as the naïve cause lawyers who over-rely on litigation as a means to achieve their goals. Not only are such lawyers misguided in their belief in litigation's ability to achieve social reforms, but they also, in his view, harm the very causes they champion by pursuing litigation as a means. First, resorting to the courts tends to replace the building of social movements and the kind of community support that Rosenberg believes is crucial to achieving and sustaining progressive social reform.[334] Second, court decisions in favor of progressive reformers may result in mobilization of opposition forces which can have the effect of preventing successful implementation of the court decision. For example, Rosenberg points to massive popular resistance in the South to forced desegregation following the *Brown* decision as hindering, rather than helping, the cause of desegregation.[335] And, Rosenberg similarly points to *Roe v. Wade* as leading to the rise of the "right to life" movement in the United States, which has so vigorously opposed abortion and abortion rights over the past three decades.[336] The fact that numerous states passed either statutes or constitutional amendments banning same-sex marriage in the immediate aftermath of *Goodridge* provides further support for Rosenberg's "backlash" thesis.[337] Note that Rosenberg suggests that conservative activists may have an easier time achieving success through social change oriented litigation than liberal or progressive activists.[338] That is because conservatives generally ask courts to preserve the status quo, or to dismantle precedents that were achieved during the brief reign of progressive judicial decision-making during the mid-twentieth century, each of which courts are more inclined to do than to effectuate liberal social change.[339] In any event, Rosenberg contends that progressive social reformers would do well to avoid resorting to courts alone and to seek other avenues to pursue their social change objectives.

2. The Cultural Approach: Michael McCann

Despite the force of his arguments, critics have contended that Rosenberg's analysis fails to apprehend at least some benefits that may be associated with social reform litigation. More particularly, these critics suggest that litigation may have impacts that go beyond the outcome of particular cases, and that Rosenberg's quantitative approach may miss

334. *Id.* at 796-97.
335. *Id.* at 809; Rosenberg, *Substituting Symbol*, *supra* note 320, at 207.
336. Rosenberg, *Courting Disaster*, *supra* note 320, at 811.
337. *Id.* at 812-13. Note that Rosenberg's writings regarding *Goodridge* predate the decision of the California Supreme Court similarly recognizing a right to same-sex marriage under the California Constitution. *See In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).
338. Rosenberg, *Courting Disaster*, *supra* note 320, at 814.
339. *Id.*

some of the qualitative impacts litigation may have in shaping social consciousness and social practices.[340]

Perhaps the most persistent of Rosenberg's critics has been Michael McCann, a professor of political science at the University of Washington.[341] McCann suggests that Rosenberg's court-centered, "top-down" view of social change through law fails to capture the entirety of what is provided by adding a de-centered,[342] "bottom-up" approach to analyzing social change through law. The latter approach recognizes that very few disputes are actually resolved by courts, and that very few actors who are influenced by, and implement, legal decisions are in fact bound by, or participants in, the actual case itself.[343] Thus, the interpretations communities attach to legal decisions become more important than the actual decisions themselves. As stated by McCann:

> [T]he decentered view emphasizes that judicially articulated legal norms take on a life of their own as they are deployed in practical social action. This points to what many analysts refer to as the *constitutive* capacity of law: Legal knowledge prefigures in part the symbolic terms of material relations *and* becomes a potential resource in ongoing struggles to refigure those relations.[344]

Thus, what appears on the face of a judicial decision to be a defeat for the legal reformers who brought the suit might turn out to be something entirely different in practice. A good example of this comes from McCann's own research regarding the pay equity movement.[345] McCann points out that many of the arguments advanced by pay equity advocates were not ultimately accepted by courts.[346] However, what appeared to be litigation defeats were utilized by pay equity advocates including unions and feminist groups to organize and mobilize grassroots support for their claims.[347] This support helped pave the way for legislation in support of pay equity.[348] Moreover, lawsuits were used to create leverage for collective bargaining and other agreements between unions, employees, and

340. *See, e.g.*, Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 394-95 (citing Paul Schiff Berman, *The Cultural Life of Capital Punishment: Surveying the Benefits of a Cultural Analysis of Law*, 102 COLUM. L. REV. 1129, 1140 (2002) and Austin D. Sarat, *Redirecting Legal Scholarship in Law Schools*, 12 YALE J.L. & HUMAN. 129, 134 (2000)).

341. *See supra* note 17.

342. McCann, *Reform Litigation*, *supra* note 17, at 730.

343. *Id.* at 730-33.

344. *Id.* at 733.

345. *See, e.g.*, MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994).

346. *See* SCHEINGOLD & SARAT, SOMETHING TO BELIEVE, *supra* note 1, at 119; McCann, *Reform Litigation*, *supra* note 17, at 737-38.

347. McCann, *Reform Litigation*, *supra* note 17, at 738.

348. *See id.* at 738-39.

employers that led to greater advances in pay equity than either the lawsuits or negotiations alone could have led to.[349]

McCann identifies four different axes along which his approach to analyzing the effectiveness of law reform tactics differs from that of Rosenberg's. The first has to do with the symbolic power of the law.[350] While Rosenberg essentially views legal arguments as either being successful or unsuccessful in court, McCann suggests that even an "unsuccessful" legal argument may have important symbolic value beyond its acceptance or non-acceptance in court.[351] The next difference has to do with causality and power.[352] Rosenberg views causality and power in a linear fashion, measuring for a direct link between judicial action and discernable impacts in the social world.[353] McCann, by contrast, views causality and power multi-directionally, with the impacts of judicial decisions flowing back and forth in many different directions, with many different, often difficult to discern effects.[354] The third axis of difference has to do with research methods.[355] While Rosenberg focuses on aggregate, quantifiable data, McCann focuses on more qualitative analysis, usually in the form of detailed case studies of narrowly targeted populations or institutional venues.[356] The final axis of difference has to do with the scholars' definitions of what constitutes "significant" social change.[357] Rosenberg views significant social change in terms of based, national, statistically measurable changes in official policies.[358] McCann, by contrast, contends that significant social change may be episodic, uneven, and difficult or impossible to measure.[359]

In fairness, both Rosenberg and McCann concede that their varying approaches may "argue past" each other, rather than colliding head-on.[360] As mentioned above, Rosenberg's focus is on nationally-based, large-scaled social reform movements that culminated with decisions from the United States or State Supreme Courts.[361] Given this broad lens, it makes sense that Rosenberg would focus on aggregate and quantifiable measures of litigation success. By contrast, McCann's focus is much narrower, on small-scaled and local efforts at social reform through law.[362] In such circumstances, it makes sense that the more qualitative

349. *Id.*
350. *Id.* at 741.
351. *See id.*
352. *Id.*
353. *Id.*
354. *Id.*
355. *Id.*
356. *Id.* at 741-42.
357. *Id.* at 742.
358. *Id.*
359. *Id.*
360. *See id.* at 720; Gerald N. Rosenberg, *Hollow Hopes and Other Aspirations: A Reply to Feely and McCann*, 17 L. & SOC. INQUIRY 761, 777 (1992).
361. *See supra* notes 320-25, 335-37 and accompanying text.
362. *See supra* notes 347-49, 356 and accompanying text.

measures of effectiveness advocated by McCann would do a better job of capturing complex realities than the approach advocated by Rosenberg.

Extending this analysis to our earlier discussion of typologies of cause lawyering, it may well be the case that Rosenberg's actuarial approach does a better job of measuring the effectiveness of the type of cause lawyering identified by Hilbink as elite/vanguard lawyering[363] than McCann's cultural approach, given the broad scale of most elite/vanguard lawyering campaigns. Because such campaigns aspire to nationally recognizable impacts, the broad and aggregate measures employed by Rosenberg may be the most accurate measures of the reformers' success or failure in achieving their broad goals. On the other hand, McCann's cultural approach may do a better job of capturing the effects of what Hilbink describes as grassroots lawyering,[364] or what Sarat and Scheingold describe as lawyering against liberal democracy,[365] than Rosenberg's broader-based, more quantitative approach. Because the goals of such grassroots legal reformers are local and small-scaled, the aggregate measures utilized by Rosenberg may fail to identify successes achieved by such reformers. By contrast, McCann's narrower focus and qualitative methods may identify such successes where Rosenberg's methods cannot. Indeed, Hilbink has insightfully pointed out that the very limitations Rosenberg has identified regarding the effectiveness of elite/vanguard lawyering have driven increasing numbers of cause lawyers to move in the direction of grassroots, rather than elite/vanguard, approaches.[366]

For present purposes, because the government legal campaigns that are the focus here fall within the category of elite/vanguard lawyering, it may well be the case that Rosenberg's aggregate approach offers a more promising avenue through which to assess the effectiveness of the campaigns than McCann's constitutive approach. Nonetheless, in the interests of thoroughness, the following section of the paper will attempt to evaluate the effectiveness of the three litigation campaigns under discussion here utilizing elements from both Rosenberg's actuarial approach and McCann's cultural one.

B. Evaluating the Government Cause Lawyer Cases Under the Two Different Approaches

The following section attempts briefly to evaluate each of the cases studied here utilizing both an actuarial and a cultural approach. We begin with an assessment of the Mississippi tobacco case from an actuarial perspective. Assuming a correlation could be proven, the most important

363. *See supra* notes 267-85 and accompanying text.
364. *See supra* notes 286-90 and accompanying text.
365. *See supra* notes 311-15 and accompanying text.
366. *See* Thomas Hilbink, *The Profession, The Grassroots, and the Elite*, *in* SARAT & SCHEINGOLD, SOCIAL MOVEMENTS, *supra* note 1, at 63.

positive impact of the Mississippi tobacco case would be a reduction in smoking rates. And indeed nationally, smoking rates among adults did decline significantly during the years immediately following execution of the MSA. In 1997, overall smoking prevalence in the United States among adults was 24.7%.[367] By 2004, that rate had declined to 20.9%.[368] The number has been relatively stable since then, measured at 20.8% in 2006.[369] The reduction in youth smoking, which was a major target of those who brought the suit,[370] was even more dramatic. Use of tobacco by high school students nationally declined from 36.4% to 23% from 1997 through 2005.[371] Within Mississippi itself, there was a similar decline in youth tobacco use during the relevant period.[372] On the other hand, adult tobacco use in Mississippi did not decline subsequent to execution of the MSA.[373] Of course, as will be discussed below, many factors beyond the tobacco lawsuit may have contributed to these figures.

Probably the most direct relationship that can be claimed between the litigation and the decline in smoking rates has to do with the economic impact of the settlement. Though this impact was significantly reduced given the eventual settlement of $206 billion as opposed to the original $368 billion agreed upon, the economic impact was nonetheless noticeable. Most experts attribute about a forty to forty-five cent per pack increase in the price of cigarettes to the MSA.[374] Given established figures relating to the price elasticity of cigarette sales,[375] it is possible to attribute most of the reduction in cigarette use to the price increase resulting from the MSA. Of course some of the money from the tobacco

367. Centers for Disease Control and Prevention, *Cigarette Smoking Among Adults—United States, 2006*, 56 MORBIDITY & MORTALITY WKLY. REP. 1157, 1160 (2007), *available at* http://www.cdc.gov/mmwr/PDF/wk/mm5644.pdf.

368. *Id.*

369. *Id.*

370. *See supra* notes 25, 81 and accompanying text.

371. Centers for Disease Control and Prevention, *Cigarette Use Among High School Students—United States, 1991-2005*, 55 MORBIDITY & MORTALITY WKLY. REP. 724, 725 (2006), *available at* http://www.cdc.gov/mmwr/PDF/wk/mm5526.pdf.

372. *See* OFFICE OF HEALTH DATA AND RESEARCH, MISS. STATE DEP'T OF HEALTH, TOBACCO USE TREND AMONG MISSISSIPPI YOUTH: FINDINGS FROM THE 1998 TO 2006 YOUTH TOBACCO SURVEY 1 (2008), *available at* http://www.health.ms.gov/msdhsite/index.cfm/31,2557,303,pdf/YTSTobaccoTrends1998-2006.pdf (current tobacco use among Mississippi high school students declined from 30.3% in 1998 to 18.7% in 2006).

373. The adult smoking rate in Mississippi in 1997 was 23.2%. Centers for Disease Control and Prevention, *State-Specific Prevalence Among Adults of Current Cigarette Smoking and Smokeless Tobacco Use and Per Capita Tax-Paid Sales of Cigarettes – United States, 1997*, 47 MORBIDITY & MORTALITY WKLY. REP. 922, 923 tbl.1 (1998), *available at* ftp://ftp.cdc.gov/pub/Publications/mmwr/wk/mm4743.pdf. In 2005, that figure was 25.1%. Centers for Disease Control and Prevention, *State-Specific Prevalence of Cigarette Smoking Among Adults and Quitting Among Persons Aged 18-35 Years—United States, 2006*, 56 MORBIDITY & MORTALITY WKLY. REP. 993, 994 tbl.1 (2007), *available at* http://www.cdc.gov/MMWR/PDF/wk/mm5638.pdf.

374. *See* Schroeder, *supra* note 79, at 295; *see also* F A Sloan, C A Matthews & J G Trogdon, *Impacts of the Master Settlement Agreement on the tobacco industry*, 13 TOBACCO CONTROL 356, 359 (2004) [hereinafter Sloan, *Impacts*] (citing W. KIP VISCUSI, SMOKE-FILLED ROOMS 18 (2002)).

375. Schroeder states that for every 10% increase in the price of cigarettes there is about a four percent decrease in demand. Schroeder, *supra* note 79, at 295.

settlement went to fund an unprecedented level of smoking cessation programs,[376] as well as to fund counter-advertisements by the American Legacy Foundation against tobacco use.[377] On the other hand, states have found it increasingly difficult to avoid the temptation of utilizing the tobacco settlement funds allocated to them for purposes other than tobacco control.[378] Also, while the main purpose of the initiators of the litigation was not necessarily to punish the tobacco companies, it at least seems incongruous that the tobacco parties to the settlement have flourished financially following the settlement.[379] This result is certainly not consistent with the rhetoric of the government attorneys during the course of the tobacco suits vilifying the tobacco defendants.

Next, we turn to an analysis of the results of the tobacco case from a cultural perspective. It would seem that the state tobacco lawsuits at least in some ways contributed to building the public narrative that developed around the time of the lawsuits demonizing the tobacco industry and isolating smokers within society. However, that narrative had been developing since at least the 1950s, with major contributions coming from the Surgeon General's landmark 1964 Report,[380] and a spate of local regulations banning smoking in public places and limiting the sale of cigarettes to minors.[381] Closer to the present, media coverage, including the Day One report discussed above,[382] contributed much to increase public awareness of nicotine addiction, as well as the lengths gone to by the tobacco industry to obfuscate both nicotine's addictiveness and the other health harms caused by smoking.[383] Many of the documents which demonstrate the industry's efforts to conceal the harmful effects of smoking were disclosed by whistleblowers independent of the states' lawsuits, though certainly some documents were brought to light through the litigation that would not otherwise have become available.[384] Further, it seems clear that it was the weight of the possibility of lawsuits brought by all fifty states that brought big tobacco to the negotiating table for the first time in its history.[385]

Critics of the tobacco settlement have suggested that it will have negative impacts of a qualitative nature that will far outweigh any posi-

376. A recently released study shows a positive correlation between expenditures on state anti-tobacco programs and declines in smoking prevalence. *See* Matthew C. Farrelly, Terry W. Pechacek, Kristin Y. Thomas & David Nelson, *The Impact of Tobacco Control Programs on Adult Smoking*, 98 AM. J. PUB. HEALTH 304, 304 (2008).

377. Sloan, *Impacts*, *supra* note 374, at 356; *see also* Schroeder, *supra* note 79, at 294. Funding for the American Legacy Foundation expired five years after the settlement. *Id.*

378. *Id.* at 294-95.

379. *See, e.g.*, Sloan, *Impacts*, *supra* note 374, at 356.

380. Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DePaul L. Rev. 331, 352 (2001) [hereinafter Rabin, *Tentative Assessment*].

381. *Id.* at 350.

382. *See supra* note 60 and accompanying text.

383. Rabin, *Tentative Assessment*, *supra* note 380, at 352-53

384. *Id.*

385. *See supra* note 74 and accompanying text.

tive ones. Some theorists have suggested that the MSA sets a dangerous precedent from a constitutional law perspective, violating core principles of separation of powers and amounting to "regulation through litigation."[386] Others have been particularly critical of the use of contingent fee arrangements with private attorneys in order to bring such large scale, social reform lawsuits.[387] While it is too early to determine whether such harms, which would likely only be discernable over long periods of time, have ensued, it is worth noting that the flood of "copycat" lawsuits anticipated by critics of the tobacco litigation, against industries ranging from fast food, to lead paint, to health care, have largely failed to materialize.[388]

It is also possible to evaluate the effectiveness of the Chicago gun case from an actuarial perspective. Looking at the Chicago gun case from a similar point of view as that applied to the tobacco case above, perhaps the best quantitative measure of success of the gun lawsuits would be a reduction in gun violence. As mentioned above, the number of gun homicides nationally declined in the two years immediately following the filing of the Chicago suit.[389] However, that was a continuation of a steep decline that had begun years prior to the filing of the Chicago suit, and that leveled off beginning in 2000.[390] In Chicago itself, gun homicides did decline in the year following the suit, but then began to creep back upwards.[391] In any event, it would be extremely hard to tie any decrease in handgun violence, either nationally, or in Chicago particularly, to a lawsuit that was wholly unsuccessful from a legal perspective. Indeed, the broad academic consensus seems to be that the gun lawsuits as a whole were similarly unsuccessful.[392]

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386. *E.g.*, W. Kip Viscusi, *Overview* to REGULATION THROUGH LITIGATION 1,7 (W. Kip Viscusi ed., 2002); Michael E. DeBow, *The State Tobacco Litigation and Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563, 563-65 (2001); Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments' Tobacco Litigation*, 33 CONN. L. REV. 1143, 1143-44 (2001); Jonathan Turley, *A Crisis of Faith: Tobacco and the Madisonian Democracy*, 37 HARV. J. ON LEGIS. 433, 449-50 (2000).

387. *E.g.*, John C. Coffee, Jr., *"When Smoke Gets in Your Eyes": Myth and Reality About the Synthesis of Private Counsel and Public Client*, 51 DEPAUL L. REV. 241, 252 (2001); David A. Dana, *Public Interest and Private Lawyers: Toward a Normative Evaluation of Parens Patriae Litigation by Contingent Fee*, 51 DEPAUL L. REV. 315, 323 (2001); Little, *supra* note 386, at 1183.

388. Indeed, on July 1, 2008, the Rhode Island Supreme Court reversed a jury verdict in favor of the State of Rhode Island against manufacturers of lead paint and dismissed the State's public nuisance case against the industry. *See* State v. Lead Indus. Ass'n, 951 A.2d 428, 434-35 (R.I. 2008).

389. *See supra* note 97 and accompanying text.

390. *See supra* note 97 and accompanying text.

391. In 1999, gun homicides in Chicago numbered 460, down from 569 in 1997 and 536 in 1998. RESEARCH & DEV. DIVISION, CHICAGO POLICE DEPT., CRIME SUMMARY—CHICAGO 2003, http://egov.cityofchicago.org/webportal/COCWebPortal/COC_EDITORIAL/03YEHomicide_1.pdf (last visited Jan. 12, 2009). However, in 2000, the number climbed to 472 and to 514 in 2001. *Id.*

392. *See* Allen Rostron, *Lawyers, Guns, & Money: The Rise and Fall of Tort Litigation Against the Firearms Industry*, 46 SANTA CLARA L. REV. 481, 486 & n.31, 487 (2006) (reviewing SUING THE GUN INDUSTRY, *supra* note 28) (citing authorities). However, Rostron himself chal-

Furthermore, the gun litigation seems to offer a vivid illustration of Rosenberg's backlash thesis.[393] The gun lawsuits appear to have brought together a new alliance between the NRA and the gun manufacturers themselves that had not previously existed.[394] The result was both state and federal legislation that dramatically reduced the likelihood of successful lawsuits against the gun industry in the future.[395] Additionally, the Supreme Court's ruling in *Heller*[396] seems likely to significantly inhibit further efforts of gun control advocates.

The gun cases were not much more successful from a cultural perspective than from an actuarial perspective. On the one hand, the cases did go a long way toward publicizing the marketing and distribution practices of gun manufacturers that seemed to increase the likelihood that guns would fall into the hands of those who would use them illegally.[397] However, gun control advocates seem to have had only limited success in leveraging the legal arguments rejected in the Chicago case into gains in other forums. Indeed, at least as much momentum for the cause of gun control came from highly publicized shootings such as those at Columbine High School,[398] and from their aftermath,[399] as from the gun litigation. In the end, the country remains deeply polarized over its views regarding firearms,[400] in sharp contrast to the emerging consensus against tobacco.[401]

In terms of actuarial measures of success, the results of the New York Attorney General's case against Merrill Lynch fall somewhere between those of the tobacco and gun cases. Though the $100 million penalty paid by Merrill is nothing to sneeze at, it was, of course, minute as compared to the tobacco settlement. It also amounted to little more than a slap on the wrist given the capitalization of Merrill Lynch, and critics have pointed out that none of the money went directly to reimburse investors who were harmed by Merrill's tainted research information.[402]

In addition to the monetary aspect of the Merrill Lynch settlement, the company did agree to a number of reforms that resulted in a separa-

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lenges this view, and attributes greater success to the lawsuits than most other commentators. *Id.* at 485.

393. *See supra* notes 335-37 and accompanying text.

394. *See* PETER HARRY BROWN & DANIEL G. ABEL, OUTGUNNED 48 (2003) [hereinafter BROWN & ABEL OUTGUNNED]. Prior to this round of suits, the NRA had viewed itself primarily as a representative of gun owners, rather than gun manufacturers. *Id.* at 32.

395. *See supra* notes 144-45 and accompanying text. Even champions of the gun lawsuits such as Rostron concede this point. Rostron, *supra* note 392, at 508.

396. *See supra* note 148 and accompanying text.

397. *See* Rostron, *supra* note 392, at 490-93.

398. *See, e.g.*, BROWN & ABEL, OUTGUNNED, *supra* note 394, at 81-103.

399. *See, e.g.*, BOWLING FOR COLUMBINE (Alliance Atlantis Communications 2002).

400. *See* Rostron, *supra* note 392, at 505-06.

401. *See supra* notes 58 and accompanying text.

402. MASTERS, *supra* note 149, at 101.

tion between Merrill's research and banking businesses.[403] Also, as discussed above, similar settlements were reached with ten additional brokerage firms,[404] essentially implementing these reforms industry wide. This must certainly be viewed as a success, at least in terms of achieving the objectives set by the government attorneys prior to initiating the lawsuit. On the other hand, one must question whether these measures have led to the ultimate consumer protection goals that Spitzer and his colleagues pursued. Though Rosenberg does not focus directly on this point, other critics of the use of litigation to achieve social reform have pointed out that the "law of unintended consequences" appears to apply with force to court orders obtained through litigation.[405] Thus, even where the specific measures desired are in fact realized through litigation, the results flowing from those measures may not be as predicted. Fordham Law School Professor Jill Fisch argues that this has been the case with regard to the research analyst settlements.[406] More particularly, Fisch contends that the economics of providing research information are such that it is not profitable for brokerage firms to provide this information independently from their banking businesses.[407] Thus, the result of the settlements has in fact been a net decrease in the amount of research analysis available to independent investors.[408] Other commentators have reached similar conclusions.[409]

The Merrill Lynch settlement remains a mixed bag from a cultural perspective as well. On the one hand, Spitzer seems appropriately to have raised consciousness that financial services firms are worthy targets of consumer protection advocates' concern. Prior to initiation of Spitzer's actions, few consumer advocates focused much attention on Wall Street.[410] On the other hand, many commentators have raised questions regarding the impact of Spitzer's actions on principles of federalism, and correspondingly, the health of the financial markets. As mentioned above, traditionally, regulation of the securities markets was handled at the federal level.[411] Critics have contended that if other state officials follow Spitzer's lead, the financial services industry will face the crippling prospect of having fifty separate sets of rules to comply with.[412]

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403. *See supra* notes 199-204 and accompanying text.

404. *See supra* note 205 and accompanying text.

405. *See, e.g.*, Little, *supra* note 386, at 1180.

406. Jill E. Fisch, *Does Analyst Independence Sell Investors Short?*, 55 UCLA L. REV. 39, 39 (2007).

407. *Id.* at 43.

408. *Id.* at 39. Fisch points out that the firms have continued to provide adequate levels of research information to their institutional clients, who are large enough to demand such information. *Id.* at 42.

409. *See, e.g.*, MASTERS, *supra* note 149, at 267.

410. Spitzer's actions seem particularly prescient in light of the economic collapse that effected Wall Street and the nation in the Fall of 2008.

411. *See supra* note 165 and accompanying text.

412. *See* MASTERS, *supra* note 149, at 268-69 (quoting University of Chicago Law Professor Richard Epstein and American Enterprise Institute Scholar Michael Greve); Christopher R. Lane,

Some commentators, in turn, have contended that "Spitzerist" interventions in the financial markets do not threaten "balkanization" or the health of the financial markets.[413] A middle ground position suggests that Spitzer's actions served a useful purpose in "awakening" the SEC and other federal regulators to assert their proper, primary enforcement role with regard to the financial services scandals of the early 2000s.[414] In any event, though the worst fears regarding "balkanization" appear not to have come to pass,[415] it remains to be seen whether "Spitzerism" can survive the shocking downfall of its namesake.[416]

C. *The Effectiveness of Government Cause Lawyering—Transcending Limitations*

Professor Rosenberg does not rule out entirely the possibility that litigation might form the basis for progressive social change. However, he does outline a stringent set of conditions that must be satisfied in order for elite/vanguard cause lawyers to achieve their objectives. First, there must be adequate support in legal precedent for the change sought by the reformers.[417] Second, there must be support for the change from legislative and executive officials.[418] Finally, there must be at least some citizen support for (or minimal citizen opposition to) the change sought,[419] along with satisfaction of at least one of the following four conditions: 1) positive incentives offered to induce compliance;[420] 2) costs imposed to induce compliance;[421] 3) court decisions allowing for market implementation;[422] or 4) non-judicial actors who are willing to use court orders as a tool for leveraging additional resources or for hiding behind when such persons decide to act.[423]

A quick comparison between the cases described above and Rosenberg's conditions for elite/vanguard lawyer success suggests that while

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Halting the March Toward Preemption: Resolving Conflicts Between State and Federal Securities Regulators, 39 NEW ENG. L. REV. 317, 339 (2005); Mindy Olson, Note, *The Securities Fraud Deterrence and Investor Restitution Act: More Effective Than Current Regulation?*, 30 J. CORP. L. 425, 441-42 (2005); Steve A. Radom, Note, *Balkanization of Securities Regulation: The Case for Federal Preemption*, 39 TEX. J. BUS. L. 295, 322-23 (2003); John C. Coffee, *Competitive Federalism: The Rise of the State Attorney General*, N.Y.L.J., Sept. 18, 2003, at 5; Michael G. Oxley, Letter to the Editor, *Who Should Police the Financial Markets?*, N.Y. TIMES, June 9, 2002, § 3, at 11.

413. *See* Jonathon Mathiesen, Survey, *Dr. Spitzlove or: How I Learned to Stop Worrying and Love "Balkanization,"* 2006 COLUM. BUS. L. REV. 311, 313-14 (2006); Tidman, *supra* note 163, at 399.

414. *See* Macey, *supra* note 162, at 957, 973.

415. Tidman, *supra* note 163, at 398.

416. *See supra* note 208 and accompanying text.

417. ROSENBERG, THE HOLLOW HOPE, *supra* note 14, at 31. This argues in favor of incrementalism, preferring small and gradual changes over dramatic ones. *Id.*

418. *Id.*

419. *Id.* at 31-32.

420. *Id.* at 32.

421. *Id.* at 33.

422. *Id.*

423. *Id.* at 33-35.

the governmental positions of the lawyers initiating the campaigns may be adequate in themselves to satisfy some of the conditions, nonetheless, other conditions will remain a challenge to social change oriented litigation campaigns initiated by government attorneys. For example, with regard to Rosenberg's second condition, legislative or executive support, that condition by definition will be satisfied when a government attorney initiates an elite/vanguard lawsuit. By the same token, it is likely that if a government lawyer is initiating an action, Rosenberg's third condition, at least a minimal degree of public support for the action, will be satisfied as well. After all, given the political nature of the positions of the attorneys involved in initiating such suits, it is hard to see them getting so far "out in front" of public opinion with regard to a particular issue as to fail to achieve the minimal level of support required by Rosenberg's fourth condition.

On the other hand, the governmental nature of the plaintiffs will not necessarily transcend Rosenberg's first condition, at least adequate precedential support for the change sought. Thus, the Chicago gun suit ultimately foundered on the Illinois Supreme Court's unwillingness to extend the tort of public nuisance to the gun distribution context.[424] On the other hand, the tobacco lawsuit was able to achieve considerable success with what many commentators described as a questionable legal theory.[425] Both the legitimacy of the Attorneys General who brought the suits, as well as the ample resources they were able to bring to the litigation, may well have made up for what was lacking in terms of the doctrinal strength of the claims. It is also worth noting that government litigants may have substantive claims available to them which are more favorable than those that are available to private litigants. For example, it is quite clear that the relaxed procedural and substantive standards under the Martin Act contributed mightily to the New York Attorney General's success against Merrill Lynch.[426]

Finally though, Rosenberg's last four conditions often are likely to be outside the control of the government actors initiating the elite/vanguard litigation. For example, the State Attorneys General initiating the tobacco lawsuits have not been able to prevent many state officials from "raiding" the tobacco settlement monies for purposes other than tobacco control.[427] And, market forces may have deprived the research analyst settlements from having their intended effect of improving the research offerings available to independent investors.[428]

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424. *See supra* notes 129-31 and accompanying text.

425. *E.g.*, Little, *supra* note 386, at 1159; *but see* Rabin, *Tobacco Litigation, supra* note 30, at 866 ("The second obstacle-finding an effective legal theory-appeared somewhat less formidable by the early 1980s, in light of the continuing evolution of products liability law.").

426. *See supra* notes 162-63, 166 and accompanying text.

427. *See supra* note 378 and accompanying text.

428. *See supra* notes 405-08 and accompanying text.

CONCLUSION

The foregoing analysis suggests that each of the government legal campaigns described above should be considered an example of cause lawyering. It is true that the government attorneys involved in these campaigns do not at all times act in the role of cause lawyer, and the prominent professional status of these lawyers is at odds with the outsider status of most cause lawyers. Nonetheless, the clear social change objectives that drove these lawyers in their resort to the courts provide an obvious connection to cause lawyering. Additionally, the very nature of the public offices held by these lawyers blurs the line between law and politics in a way that is a hallmark of cause lawyering. Similarly, the lawyers' obvious personal embrace of the social change objectives of their actions represents a clear rejection, in the circumstances of each case, of the profession's non-accountability tenet. Moreover, the lack of an easily identifiable client in each of the cases led to an inversion of the typical lawyer-client relationship, in a manner that is consistent with elite/vanguard cause lawyering.

Despite the factors that distinguish them from prototypical cause lawyers, the government attorneys involved in the cases discussed here were not able to transcend entirely the constraints that have traditionally limited elite/vanguard cause lawyers from achieving the full extent of their objectives. On the one hand, the high professional status of the government attorneys involved clearly lent a degree of legitimacy to their cases that increased their likelihood of success. Additionally, the cases benefited from the availability of certain legal claims that are only available to government litigants. On the other hand, each of the cases demonstrated the continuing existence of the above-mentioned traditional constraints.

For example, in the tobacco case, the full effects of the MSA originally agreed to by Attorney General Mike Moore were substantially limited by Congress's unwillingness to pass the federal legislation that would have been needed to implement the MSA in its entirety. And, Moore has been similarly unable to prevent certain state legislatures from "raiding" the proceeds of the tobacco settlement for use in balancing budgets and for additional purposes besides tobacco control. Likewise, the lawyers in the Chicago City Attorney's office were stymied by the Illinois Supreme Court's unwillingness to extend the legal doctrine of public nuisance to the context of gun distribution and sales. Moreover, the lobbying effectiveness of the NRA and other interests supporting rural gun owners resulted in legislation at both the state and federal levels that severely set back the objectives of the advocates of gun control. Finally, market forces have seriously limited the benefits to ordinary investors intended by New York Attorney General Eliot Spitzer's efforts to ensure research analyst independence in the financial services industry.

None of this should be read to contend that government attorneys ought to avoid entirely efforts to use the law and courts to effectuate social change. To the contrary, at least two of the cases discussed here were at least partially successful in achieving their objectives. The tobacco lawsuit likely did at least contribute to the nationwide decline in smoking rates that followed the MSA. And, Attorney General Spitzer did help bring about major reforms within the financial services industry that served to insulate research analysts from the influence of investment bankers. And, given the cultural perspective discussed above, it is likely that all three of the cases influenced legal consciousness and actors in ways that are difficult to measure but may well result in social change over the long term. On the other hand, given the limitations mentioned above, it behooves government attorneys to think carefully about the means they wish to pursue in seeking to bring about based social change, and to think hard about the constraints that have historically limited the effectiveness of elite/vanguard cause lawyering.

BAZE V. REES: LETHAL INJECTION AS A CONSTITUTIONAL METHOD OF EXECUTION

INTRODUCTION

In the realm of capital punishment, method-of-execution challenges have become more common.[1] In *Baze v. Rees*,[2] the United States Supreme Court considered whether Kentucky's lethal injection protocol satisfied the Eighth Amendment.[3] The Court held that the risk of pain from potential maladministration of such a humane method of execution, and Kentucky's refusal to adopt untested alternative methods, did not constitute cruel and unusual punishment.[4] The plurality developed a three-step process for determining when a method of execution violates the Eighth Amendment.[5] When there is a "substantial risk of serious harm" and "feasible, readily implemented" alternatives exist, a state violates the Eighth Amendment if it fails to adopt such alternatives, unless it has a "legitimate penological justification" for such failure.[6]

As this Comment presents, the plurality's approach solved some problems associated with method-of-execution challenges, but other troubles remain. By implementing a purposive test in the creation of its "substantial risk" standard, the Court eliminated some of the subjective problems associated with the "evolving standards of decency" test.[7] However, the Court did not perform a proper pain analysis, practically ignoring scientific testing and medical evidence surrounding lethal injection.[8] Without such an inquiry, there is no guarantee that the use of lethal injection will comport with the Eighth Amendment.[9]

Part I of this Comment reviews the history of methods of execution and the creation of lethal injection. Part II provides an overview of the plurality, concurring, and dissenting opinions. Part III analyzes lethal injection in light of the plurality opinion. Part III suggests that the plurality integrated a purposive test for constitutionality into the objective "evolving standards of decency" test, thus comporting with the penological goals of society and creating stronger precedent. Part III also argues,

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1. *See, e.g.*, Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 107 (2007).
2. 128 S. Ct. 1520 (2008).
3. *Id.* at 1529.
4. *Id.* at 1526.
5. *Id.* at 1532.
6. *Id.*
7. *Id.* at 1531; *see* William W. Berry III, *Following the Yellow Brick Road of Evolving Standards of Decency: The Ironic Consequences of "Death-is-Different" Jurisprudence*, 28 PACE L. REV. 15, 17-25 (2007).
8. *See Baze*, 128 S. Ct. at 1533.
9. *See* Denno, *supra* note 1, at 121.

however, that the Court should perform an extensive pain analysis, including both scientific testing and medical opinion evidence, in order to ensure that lethal injection complies with the Eighth Amendment. Finally, Part III concludes by proposing methods by which society can assure the constitutionality of lethal injection as the least severe method of execution.

I. BACKGROUND

A. A History of Methods of Execution and Oklahoma's Creation of Lethal Injection

The Eighth Amendment provides that "cruel and unusual punishments [shall not be] inflicted."[10] Capital punishment has not traditionally been considered cruel and unusual, provided that the methods of execution are not excessive and comport with "evolving standards of decency."[11]

As society's view of humane punishment has changed, so have its methods of execution.[12] Hanging was the principal form of punishment both before and after the enactment of the Eighth Amendment.[13] Occasionally, death sentences were intensified through the use of "superadded" punishments, but by the late eighteenth century such violent modes of execution were considered both cruel and unusual.[14] In 1888, New York became the first state to consider electrocution as a more humane form of punishment.[15] While some states used the firing squad and lethal gas as their methods of execution at one time, electrocution remained the predominant method for nearly a century.[16] Eventually, botched electrocutions gave rise to intense scrutiny of the execution method, and the public began to view lethal injection as a safer, more humane alternative.[17]

In 1977, Oklahoma became the first state to implement lethal injection.[18] Chief medical examiner A. Jay Chapman, while clear about his lack of expertise, nonetheless agreed to develop a lethal injection formula.[19] Chapman created a vague standard that originally provided for the injection of two drugs, sodium thiopental (still used in modern lethal

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10. U.S. CONST. amend. VIII.
11. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 173 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)).
12. *See Baze*, 128 S. Ct. at 1538.
13. *Id.* at 1556.
14. *Id.* at 1557-58.
15. *Id.* at 1526.
16. *Id.*
17. *See, e.g.*, Denno, *supra* note 1, at 62-64.
18. *Id.* at 65 ("At each step in the political process, concerns about cost, speed, aesthetics, and legislative marketability trumped any medical interest that the procedure would ensure a humane execution.").
19. *Id.* at 66.

injections) and chloral hydrate.[20] However, Chapman later modified the protocol to include a third drug, potassium chloride.[21] Concern about a lack of testing stalled the lethal injection bill during the legislative debate.[22] However, on March 2, 1977, Oklahoma voted to adopt lethal injection as the state's execution method.[23] In doing so, Oklahoma created a lethal injection template, which other states quickly implemented, usually without further analysis.[24]

B. United States Supreme Court Precedents Regarding Methods of Execution

The United States Supreme Court has issued three key opinions regarding methods of execution. In *Wilkerson v. Utah*,[25] the Court upheld the constitutionality of firing squads.[26] In *Wilkerson*, the Court held that only punishments involving "unnecessary cruelty" violated the Eighth Amendment.[27] These unnecessarily cruel punishments included exotic tortures such as emboweling alive or beheading.[28] The Court took a historical approach in its analysis, citing cases from England in which pain or terror were "superadded" to the punishment of death.[29] The Court stated that the Eighth Amendment prohibits punishments involving torture and any other unnecessarily cruel punishments.[30] However, the Court pointed out that this category did not include the firing squad as a method of execution.[31]

In *In re Kemmler*,[32] the Court carried the method of execution analysis further. Although the Court actually decided the case on a "question of jurisdiction," *Kemmler* allowed electrocution as a more humane method of execution.[33] In dicta, the Court stated that "punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel . . . . [A cruel punishment] implies there something inhuman and barbarous, something more than the mere extinguishment

20. *Id.* at 67.
21. *Id.* at 74.
22. *Id.* at 70.
23. *Id.*
24. *Id.* at 78-79.
25. 99 U.S. 130 (1878).
26. Julian Davis Mortenson, *Earning the Right to be Retributive: Execution Methods, Culpability Theory, and the Cruel and Unusual Punishment Clause*, 88 IOWA L. REV. 1099, 1108 (2003).
27. *Wilkerson*, 99 U.S. at 136.
28. *Id.* at 135.
29. *Id.* (stating that superadded punishments included public dissection, burning or emboweling alive, beheading, and quartering).
30. *Id.* at 136.
31. *Id.* at 134-135.
32. 136 U.S. 436 (1890).
33. Mortenson, *supra* note 26, at 1108.

of life."[34] The Supreme Court routinely cites this "negligible pain" standard in its application of the Eighth Amendment.[35]

In *Louisiana ex rel. Francis v. Resweber*,[36] a plurality of the Court upheld a second attempt to execute a prisoner after the first attempted electrocution failed due to a mechanical malfunction.[37] The Court concluded that a mere accident did not violate the Eighth Amendment because there was no "purpose to inflict unnecessary pain nor any unnecessary pain involved."[38] The Constitution only protected an inmate from cruelty inherent in the method of execution, not any suffering involved in death.[39]

In sum, method of execution challenges began with *Wilkerson*, in which the Court determined that "unnecessarily cruel" punishments violated the Eighth Amendment.[40] In *Kemmler*, the Court carried the analysis further. It developed the "negligible pain standard," determining that the punishment of death itself was not cruel, but that a method of execution cannot inflict unnecessary or wanton pain.[41] Finally, in *Resweber*, the Court decided that where there was no purpose to inflict pain, there was no Eighth Amendment violation; thus, a mere accident would comport with the Eighth Amendment.[42] Current Supreme Court method-of-execution jurisprudence uses these famous cases as its basis.[43]

II. *BAZE V. REES*[44]

A. Facts

Petitioners Ralph Baze and Thomas C. Bowling were each convicted of double homicide and sentenced to death in Kentucky.[45] Baze and Bowling sued, seeking to have Kentucky's lethal injection protocol declared unconstitutional under the Eighth Amendment.[46] While petitioners conceded that lethal injection, if applied as intended, would result in a humane death, they contended that Kentucky's lethal injection pro-

34. *Kemmler*, 136 U.S. at 447.
35. Mortenson, *supra* note 26, at 1108 (noting that the Supreme Court regularly looks to *Kemmler* for the proposition that capital punishment cannot "involve the unnecessary and wanton infliction of pain").
36. 329 U.S. 459 (1947).
37. Baze v. Rees, 128 S. Ct. 1520, 1531 (2008).
38. *Resweber*, 329 U.S. at 464.
39. *Id.*
40. Wilkerson v. Utah, 99 U.S. 130, 136 (1878).
41. *In re* Kemmler, 136 U.S. 436, 447 (1890).
42. *Resweber*, 329 U.S. at 464.
43. *See* Baze v. Rees, 128 S. Ct. 1520, 1530-31 (2008).
44. 128 S. Ct. 1520 (2008).
45. *Id.* at 1528-29.
46. *Id.* at 1529.

tocol was unconstitutional because of a risk of severe pain if the protocol was not properly followed.[47]

1. Objective Review of Kentucky's Lethal Injection Protocol

Kentucky's protocol consists of the injection of three drugs.[48] The first is sodium thiopental, a barbiturate anesthetic that induces unconsciousness, thus preventing the prisoner from feeling any pain.[49] The second drug is pancuronium bromide, which causes paralysis and stops respiration.[50] Kentucky specifies potassium chloride as the third and final drug.[51] Potassium chloride induces cardiac arrest, ultimately causing the prisoner's death.[52]

In addition to identifying the three drugs to be used in the execution, the Kentucky protocol also specifies the procedures to be followed.[53] It requires qualified personnel with at least one year of professional experience to insert the IV catheters, but only the warden and deputy warden remain in the execution chamber.[54] The execution team administers the drugs from the control room through five feet of IV tubing.[55] If visual inspection by the warden demonstrates that the prisoner is still conscious within sixty seconds of delivery of the sodium thiopental, another dose of the drug is administered.[56] A physician is present to attempt to revive the prisoner in the event of a stay of execution at the last minute.[57] An electrocardiogram verifies death.[58]

2. Challenges to Kentucky's Protocol

Petitioners raised several challenges to Kentucky's lethal injection protocol. First, petitioners alleged that there was a danger of unnecessary pain if the executioners used an inadequate dosage of sodium thiopental, the first drug.[59] If the execution team administered the sodium thiopental properly, the condemned prisoner would feel no pain when the pancuronium bromide and potassium chloride were added.[60] However, if the dosage of sodium thiopental was inadequate, the administration of the second and third drugs would cause the prisoner to slowly suffocate

47. *Id.* at 1526.
48. *Id.* at 1528.
49. *Id.* at 1527.
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 1528.
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.* at 1533.
60. *See id.* at 1536.

to death, thus experiencing excruciating pain.[61] Petitioners claimed that there was a risk of an improper dosage because Kentucky employed untrained executioners and because of potential problems with Kentucky's injection practices.[62]

Next, petitioners challenged the use of pancuronium bromide.[63] As a paralyzing agent, pancuronium bromide could prevent any indication that the prisoner was experiencing a painful death because he or she would be unable to move or cry out.[64] The drug would also mask any other visible signs of pain.[65] Petitioners argued that, in light of these dangers, the use of pancuronium bromide was unnecessary, because it served no therapeutic purpose while masking signs of possible distress.[66]

Potential problems also exist with the use of potassium chloride.[67] If administered to a conscious person, potassium chloride could cause an excruciating, burning pain.[68] Thus, if the execution team did not administer a proper dosage of sodium thiopental, the first drug, the inmate would die an extremely painful death.[69] However, petitioners' argument focused on the dangers associated with sodium thiopental and pancuronium bromide, ignoring the dangers of potassium chloride.[70]

Because of the potential problems associated with Kentucky's three-drug protocol, petitioners proposed a new one-drug protocol, which has never been tried or adopted by any state.[71] Petitioners' one-drug protocol consisted only of the injection of a barbiturate such as sodium thiopental.[72] They argued that such a protocol is regularly used by veterinarians during animal euthanasia, and that many states actually forbid veterinarians to use paralytic agents such as pancuronium bromide.[73]

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61. Teresa A. Zimmers & Leonidas G. Koniaris, *Peer-Reviewed Studies Identifying Problems in the Design and Implementation of Lethal Injection for Execution*, 35 FORDHAM URB. L.J. 919, 921 (2008).

62. *Baze*, 128 S. Ct. at 1533 (noting that these problems included possible difficulties with the IV lines, inadequate facilities and training, and the fact that Kentucky had no reliable way to monitor a prisoner's "anesthetic depth").

63. *Id.* at 1535.

64. Deborah W. Denno, *Introduction*, 35 FORDHAM URB. L.J. 701, 702 (2008). "Even a slight error in dosage or administration can leave a prisoner conscious but paralyzed while dying, a sentient witness of his or her own slow, lingering asphyxiation." Chaney v. Heckler, 718 F.2d 1174, 1191 (D.C. Cir. 1983).

65. The Honorable Fernando J. Gaitan, Jr., *Challenges Facing Society in the Implementation of the Death Penalty*, 35 FORDHAM URB. L.J. 763, 774 (2008).

66. *Baze*, 128 S. Ct. at 1535.

67. *See* Gaitan, *supra* note 65, at 774.

68. *Id.*

69. *Id.*

70. *Baze*, 128 S. Ct. at 1533-35.

71. *Id.* at 1526.

72. *Id.* at 1534.

73. *Id.* at 1535.

Finally, petitioners alleged that Kentucky's protocol lacked a method to monitor the "anesthetic depth" of the inmate.[74] They suggested that Kentucky use a variety of measures to verify that the prisoner was indeed unconscious before injecting the final two drugs.[75]

B. Procedural Posture

After extensive hearings, the Kentucky trial court recognized the absence of satisfactory methods of execution for those who oppose the death penalty but concluded nonetheless that Kentucky's protocol complied with the Eighth Amendment.[76] The Kentucky Supreme Court affirmed, holding that a method of execution violates the Eighth Amendment when it "creates a substantial risk of wanton and unnecessary infliction of pain, torture, and lingering death."[77] Kentucky's protocol did not violate this standard.[78]

C. Opinion

The United States Supreme Court granted certiorari to determine whether Kentucky's lethal injection protocol violated the Eighth Amendment.[79] The plurality opinion, written by Chief Justice Roberts and joined by Justices Kennedy and Alito, affirmed the Kentucky Supreme Court's decision.[80] The Court held that the risk of pain from the three-drug protocol, and Kentucky's failure to adopt the untested one-drug method, did not constitute cruel and unusual punishment under the Eighth Amendment.[81]

The plurality created a three-step test to determine whether a method of execution was cruel and unusual.[82] First, the plurality rejected both petitioners' "unnecessary risk" standard and the dissent's "untoward risk" standard, adopting instead a "substantial risk of serious harm" standard and describing such a risk as an "objectively intolerable risk of harm."[83] Under this standard, the mere possibility of pain would not establish a risk of harm that would qualify as cruel and unusual under the Eighth Amendment.[84] Second, it was not enough that the condemned prisoner suggested a slightly safer alternative.[85] Rather, any proffered alternative would have to be "feasible, readily implemented, and in fact

74. *Id.* at 1536.
75. *Id.*
76. *Id.* at 1526.
77. *Id.* at 1529.
78. *Id.*
79. *Id.*
80. *Id.* at 1526.
81. *Id.*
82. *Id.* at 1531-32.
83. *Id.*
84. *Id.* at 1531.
85. *Id.*

significantly reduce a substantial risk of severe pain."[86] Third, the state needed a legitimate penological justification for the refusal to adopt a feasible alternative.[87] If the state did not have a legitimate justification, its refusal to alter its method of execution violated the Eighth Amendment.[88]

In applying its newly-described standard, the plurality opinion rejected petitioners' claims.[89] First, lethal injection could not be "objectively intolerable" because a majority of the states and the federal government have adopted both the method of execution and the three-drug combination.[90] Second, petitioners did not show a substantial risk of an inadequate dose of sodium thiopental being administered, especially in light of the safeguards that Kentucky employed.[91] Kentucky required experience and training for the members of its execution team, mandated the presence of the warden and deputy warden in the execution chamber to monitor the inmate's consciousness, and established a backup line in case the primary injection failed.[92] Furthermore, as long as the team followed the manufacturer's instructions regarding the handling of sodium thiopental, there was minimal risk of improper application, even if a layperson injected the drug.[93] Thus, while petitioners argued that an improper dose of the drug would result in a substantial risk of suffocation from the pancuronium bromide and pain from the potassium chloride, they failed to show that the risk of an inadequate dose was substantial.[94]

Third, the plurality rejected the adoption of the untested one-drug protocol.[95] No other state has adopted such a method, and there was nothing to indicate that it was an equally effective method of lethal injection.[96] The plurality rejected petitioners' claims that pancuronium bromide served no therapeutic purpose and suppressed movements that might indicate consciousness.[97] According to the plurality, pancuronium bromide was necessary because it not only prevented involuntary spasms during unconsciousness once the potassium chloride was injected, thus ensuring that the procedure retained its dignity, but it also stopped respiration.[98] The Eighth Amendment, therefore, did not forbid Kentucky

86. *Id.* at 1532.
87. *Id.*
88. *Id.*
89. *Id.* at 1537-38.
90. *Id.* at 1532 (indicating that thirty-six states and the federal government had adopted lethal injection as their method of execution, while thirty states and the federal government employed the three-drug protocol used in Kentucky).
91. *Id.* at 1533.
92. *Id.* at 1533-34.
93. *Id.* at 1533.
94. *Id.*
95. *Id.* at 1535.
96. *Id.*
97. *Id.*
98. *Id.*

from using the drug in its execution procedure.[99] Additionally, although veterinary medicine guidelines prohibit veterinarians from using such a paralytic agent during animal euthanasia, the plurality pointed to the fact that the states have a legitimate interest in preserving the inmates' dignity that is not present in animal euthanasia.[100] Moreover, the Netherlands allows physician-assisted suicide, and that country recommends the use of such a drug in order to prevent an undignified death.[101]

Fourth, the Court rejected petitioners' argument that the Kentucky protocol lacked a method to monitor the "anesthetic depth" of the inmate.[102] The Court stated that, because a proper dosage of sodium thiopental would result in a satisfactory anesthetic depth, the risks of consciousness during the procedure were not substantial.[103] Furthermore, Kentucky implemented satisfactory safeguards in its protocol; consequently, the addition of further steps would still not be sufficient to entirely ensure a painless process.[104]

Finally, pointing to the fact that the three previous method-of-execution challenges were also rejected in *Wilkerson*, *Kemmler*, and *Resweber*, the plurality suggested that society has nonetheless moved toward more humane methods of execution, currently settling on lethal injection.[105] The plurality stated that its decision would not prevent the legislatures from taking any steps they deem necessary to ensure humane methods of execution, just as they had done in the past.[106]

D. Concurring Opinions

Five concurring opinions indicated the wide range of views surrounding method-of-execution challenges.[107] First, Justice Alito argued that because ethical guidelines prohibit medical professionals from participating in executions, requiring their participation in such a procedure could not be a "feasible" alternative under the plurality's standard.[108] Justice Alito then argued that proof of a well-established scientific consensus should accompany any method-of-execution challenge,[109] and he concluded by reminding the Court that the issue in this case was the constitutionality of a *method* of execution, not the death penalty itself.[110]

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99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.* at 1536.
103. *Id.*
104. *Id.*
105. *Id.* at 1538.
106. *Id.*
107. *Id.* at 1538, 1542, 1552, 1556, 1563.
108. *Id.* at 1540 (Alito, J., concurring).
109. *Id.*
110. *Id.* at 1542.

Justice Stevens lamented that the plurality's decision left open questions surrounding the constitutionality of the three-drug protocol and the justification for the death penalty itself.[111] First, Justice Stevens questioned each of the three rationales commonly cited in support of the death penalty.[112] Quickly rejecting both incapacitation and deterrence as justifications, Justice Stevens focused on the retributive rationale, arguing that this rationale is undermined by society's insistence on more humane forms of punishment that protect an inmate from suffering pain comparable to that which he inflicted on his victim.[113] Second, Justice Stevens relied on his own subjective experience to conclude that the imposition of the death penalty is excessive and thus violates the Eighth Amendment.[114] However, because stare decisis required him to adhere to precedent, Justice Stevens concurred in the plurality's judgment.[115]

Justice Scalia, joined by Justice Thomas, responded to Justice Stevens, basing his argument in favor of the death penalty on the text of the Presentment and Due Process Clauses of the Fifth Amendment.[116] Justice Scalia's strongest attack against Justice Stevens rested on the retributive rationale of the death penalty.[117] Justice Scalia pointed out the major flaw in Justice Stevens's reasoning: Justice Stevens proposed that any punishment that inflicts pain violates the Eighth Amendment, but punishment must inflict pain proportionate to that of the offender's crime in order to be properly retributive.[118] Justice Scalia concluded by accusing Justice Stevens of ruling by judicial fiat in taking his experience into account over, and indeed at the expense of, the experience of all others.[119]

Justice Thomas, joined by Justice Scalia, looked to history and Supreme Court precedent to suggest that a method of execution violates the Eighth Amendment only if it is "deliberately designed to inflict pain."[120] Justice Thomas argued that Kentucky did not intend to inflict pain but instead adopted its protocol in an effort to make its executions more humane.[121] Justice Thomas also disagreed with the plurality's formulation of the governing standard, worrying that the plurality's decision would require the Court to resolve controversies beyond its expertise.[122]

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111. *Id.* at 1542-43 (Stevens, J., concurring).
112. *Id.* at 1547.
113. *Id.* at 1547-48.
114. *Id.* at 1551.
115. *Id.* at 1552.
116. *Id.* (Scalia, J., concurring).
117. *Id.* at 1554.
118. *Id.*
119. *Id.* at 1555.
120. *Id.* at 1556 (Thomas, J., concurring).
121. *Id.* at 1563.
122. *Id.* at 1562.

Justice Breyer agreed with Justice Ginsburg's dissent regarding the proper standard.[123] However, after a review of the related literature, Justice Breyer concluded that the adoption of more thorough measures of consciousness would not make a noteworthy difference in the safety of lethal injection.[124] Thus, Justice Breyer concluded that Kentucky's protocol did not violate the Eighth Amendment because it did not create "a significant risk of unnecessary suffering."[125]

E. Dissenting Opinion

Justice Ginsburg, joined by Justice Souter, proposed "untoward, readily avoidable risk of inflicting severe and unnecessary pain" as the appropriate pain standard.[126] Justice Ginsburg would have inquired into whether Kentucky's omission of basic safeguards regarding unconsciousness violated this standard.[127] Citing a string of practices in other states, Justice Ginsburg proposed a variety of safeguards beyond mere visual inspection to ensure unconsciousness after the injection of the first drug.[128] These measures included calling the inmate's name, shaking him, brushing his eyelashes, or presenting him with a noxious stimulus.[129] Justice Ginsburg argued that the degree of risk, magnitude of pain, and availability of alternatives are interrelated factors, and a strong showing of one reduces the significance of the others.[130] Justice Ginsburg proposed that a state fails to adhere to "contemporary standards of decency" if it does not employ "readily available" method-of-execution alternatives that will decrease the potential for pain.[131] Finally, Justice Ginsburg would require Kentucky to conduct scientific studies and consult with medical professionals regarding lethal injection instead of merely falling "in line" behind Oklahoma.[132]

III. ANALYSIS

In *Baze v. Rees*, the Court attempted to redefine the test of constitutionality surrounding methods of execution. While it succeeded to some degree by integrating a purposive test into the objective aspects of the "evolving standards of decency" test, its analysis did not go far enough. Extensive scrutiny of the potential for pain caused by botched lethal injections, including an evaluation of scientific tests and medical opinion evidence, would more fully guarantee compliance with the Eighth

123. *Id.* at 1563 (Breyer, J., concurring).
124. *Id.* at 1566.
125. *Id.*
126. *Id.* at 1567 (Ginsburg, J., dissenting).
127. *Id.*
128. *Id.* at 1569-71 (including Oklahoma, Florida, California, Alabama, and Indiana).
129. *Id.* at 1569.
130. *Id.* at 1568.
131. *Id.* at 1569.
132. *Id.*

Amendment.[133] Furthermore, while beyond the scope of *Baze*, the use of a national litigation strategy accompanied by a constitutional tort and more transparent lethal injection protocols would help to ensure the constitutionality of lethal injection.[134]

A. Integration of a Purposive Test with the "Evolving Standards of Decency" Test

Courts use the "evolving standards of decency" doctrine to determine whether a punishment is "excessive."[135] Originally, any death penalty practice needed to comport with "evolving standards of decency" in order to comply with the Eighth Amendment.[136] However, the subjective aspect of the "evolving standards of decency" test presents several problems.[137] In an attempt to solve these problems, the Court in *Baze* integrated a "purposive" test into the "evolving standards of decency" analysis.[138] By focusing on the state's penological purpose, the purposive test corrects many of the problems associated with the subjective aspects of the "evolving standards of decency" test.[139]

1. The "Evolving Standards of Decency" Test

The Eighth Amendment's prohibition of cruel and unusual punishment includes the right to be free from excessive sanctions.[140] It thus incorporates the concept of proportionality, requiring that the degree of punishment for the offense fit the seriousness of the crime.[141] Considering that the death penalty is irreversible and extremely severe, the proportionality analysis has particular importance in death penalty cases.[142] In order to determine whether a punishment is disproportional and therefore excessive, the Court looks to currently prevailing societal norms and values rather than the standards in place when the Eighth Amendment was adopted.[143] Accordingly, the Eighth Amendment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society."[144]

In evaluating the Eighth Amendment in light of society's "evolving standards of decency," the Court looks to objective factors whenever

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133. *See* Denno, *supra* note 1, at 121.
134. *See* Mortenson, *supra* note 26, at 1162-63; *see also* Dwight Aarons, *The Abolitionist's Dilemma: Establishing the Standards for the Evolving Standards of Decency*, 6 PIERCE L. REV. 441, 466-67 (2008); Gaitan, *supra* note 65, at 784.
135. *See* Atkins v. Virginia, 536 U.S. 304, 311-312 (2002).
136. Aarons, *supra* note 134, at 444.
137. *See, e.g.*, Berry, *supra* note 7, at 22-24.
138. *See id.* at 19.
139. *See id.* at 31.
140. *Atkins*, 536 U.S. at 311.
141. *See* Weems v. United States, 217 U.S. 349, 367 (1910).
142. *See* Roper v. Simmons, 543 U.S. 551, 568 (2005).
143. Kennedy v. Louisiana, 128 S. Ct. 2641, 2649 (2008).
144. Trop v. Dulles, 356 U.S. 86, 100-01 (1958).

possible.[145] Originally, courts used six objective factors to determine the contemporary values indicative of "evolving standards of decency."[146] The most significant of these factors are: 1) statutes enacted by the nation's legislatures and 2) jury verdicts. These two factors are immensely important because they reflect public opinion on contemporary norms and values.[147] Courts will rarely have a better sense of the Nation's views on a particular topic than the members of the legislature, elected by the American people, or the members of a jury, comprised of the American people.[148]

In *Baze*, the plurality implemented this objective "evolving standards of decency" test by looking to four of the six objective factors.[149] The Court began its analysis with a review of the history of methods of execution.[150] It determined that because society has steadily moved toward more humane execution methods, ultimately settling on lethal injection, lethal injection must be consistent with society's standards of decency.[151] Next, the Court studied judicial precedent, concluding that the Court has never invalidated a chosen method of execution when challenges have arisen.[152] Third, the Court looked to the practice of state legislatures and the federal government to determine whether lethal injection was "objectively intolerable."[153] In light of the number of states using the three-drug combination in their protocols, and considering that no state had implemented a one-drug protocol, the Court determined that Kentucky's lethal injection protocol did not violate the Eighth Amendment.[154] Finally, the Court looked to international practices in order to rebut the claim that the states should implement a one-drug protocol.[155] The Court indicated that the Netherlands, a country that allows physician-assisted suicide, uses a muscle relaxant in addition to sodium thiopental in order to prevent an undignified and painful death.[156] Thus, in its analysis, the *Baze* Court implemented four of the six "evolving stan-

145. *See* Berry, *supra* note 7, at 21-22 (quoting *Atkins*, 536 U.S. at 312).

146. Aarons, *supra* note 134, at 445 (stating that the objective factors were: (1) history; (2) judicial precedent; (3) statutes; (4) jury verdicts; (5) penological goals; and (6) international and comparative law).

147. *Id.*

148. *Atkins*, 536 U.S. at 341 (Scalia, J., dissenting); *see also id.* at 323 (Rehnquist, J., dissenting).

149. *See infra* notes 150-56.

150. Baze v. Rees, 128 S. Ct. 1520, 1526-27 (2008).

151. *Id.* at 1538. "[I]n moving to lethal injection, the states were motivated by a desire to find a more humane alternative to then-existing methods." *Id.* at 1527 n 1.

152. *Id.* at 1530 (analyzing Wilkerson v. Utah, 99 U.S. 130 (1879) and *In re* Kemmler, 136 U.S. 436 (1890)).

153. *Baze*, 128 S. Ct. at 1532.

154. *Id.* "Of these 36 states [using lethal injection as their primary means of execution], at least 30 (including Kentucky) use the same combination of three drugs in their lethal injection protocols." *Id.* at 1527.

155. *Id.* at 1535.

156. *Id.*

dards of decency" factors to determine that Kentucky's lethal injection protocol did not violate the Eighth Amendment.[157]

2. The Subjective Element of "Evolving Standards of Decency" and Its Problems

While the objective factors are still important in the "evolving standards of decency" inquiry, recent Supreme Court decisions add a subjective element to that test.[158] Consequently, objective evidence is no longer entirely determinative of whether a death penalty practice is "excessive."[159] Instead, courts are now required to balance objective evidence of contemporary values with their own judgment in deciding whether the Eighth Amendment has been violated.[160]

The incorporation of subjective factors into the "evolving standards of decency" analysis is potentially problematic.[161] A court's use of its own subjective judgment in making Eighth Amendment decisions gives it the opportunity to override the views of the American people and their elected legislators regarding contemporary norms and values.[162] Eighth Amendment challenges are thus decided by the "*feelings* and *intuition*" of the justices rather than by the people themselves.[163] This poses a problem because the Eighth Amendment reflects society's "evolving standards of decency"; in order to determine those standards, the court must look to the legislatures, elected by the people, and to juries, representatives of the people, rather than prescribe the standards itself.[164] As Justice Scalia emphasized in his *Baze* concurrence, the subjective "evolving standards of decency" test opens the door to "rule by judicial fiat,"[165] creating a situation in which precedent might easily be overturned and in which the "evolving standards of decency" determination is no longer a reflection of the contemporary values of the American people.[166]

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157. *See supra* notes 150-56.

158. Aarons, *supra* note 134, at 448; *see also Roper*, 543 U.S. at 551; *Atkins*, 536 U.S. at 312 ("[I]n the end [the Justices'] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." (quoting Coker v. Georgia., 433 U.S. 584, 597 (1977))). *Atkins* looked to only three of the six objective factors in its decision, while *Roper* used only four.

159. *Atkins*, 536 U.S. at 312.

160. Roper v. Simmons, 543 U.S. 551, 605 (2005) (O'Connor, J., dissenting).

161. Berry, *supra* note 7, at 24 (stating that the use of subjective factors "creates the perception that the Court's interpretation of the objective standards is merely a pretext for the expression of their subjective views.").

162. *Atkins*, 536 U.S. at 313.

163. *Id.* at 348-49 (Scalia, J., dissenting).

164. *Roper*, 543 U.S. at 616 (Scalia, J., dissenting) ("By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?").

165. Baze v. Rees, 128 S. Ct. 1520, 1555 (2008) (Scalia, J., concurring).

166. *See* Aarons, *supra* note 134, at 452; *see also* Berry, *supra* note 7, at 28 ("[I]f the Court's imposition of restrictions on the use of the death penalty is tied to . . . the subjective views of its members, then its decisions are merely written in pencil, waiting to be rewritten."); Gregg v. Georgia., 428 U.S. 153, 175-76 (1976) ("In a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." (quoting Furman v. Georgia.,

3. To Correct These Problems with Subjectivity, *Baze* Adopts the Purposive Test[167]

A "purposive test of constitutionality" solves the problem presented by the subjective factors in the "evolving standards of decency" test.[168] Under the purposive test, as developed by William W. Berry III,[169] if a court finds a method of execution to be both "degrading in its severity" (cruel) and "wantonly imposed" (unusual), the burden will switch to the states to show that the same penological goal could not be achieved by a less severe punishment.[170] Originally, only methods of punishment similar to torture were considered "degrading in severity" and thus cruel.[171] However, the Court later expanded the phrase to prohibit any type of degradation, potentially even the "the cruelty of pain."[172] The Court interpreted the prohibition against "unusual" punishments to mean one of two things.[173] It can refer to either a method of punishment that is rare, or a method of punishment that is "arbitrary and discriminatory" ("wantonly imposed").[174] If the method of punishment is found to be both "degrading in its severity" and "wantonly imposed," the state has the burden of justifying the imposition and severity of the chosen method of execution.[175] If the state cannot justify the method it selected, it must implement a less severe method of execution in order to comply with the Eighth Amendment.[176]

Accordingly, the purposive test looks at the *purpose* of the state's method of execution.[177] The test focuses on the "potential abuse of state power" by assessing the state's intention in implementing its chosen execution method.[178] The test evaluates a method of execution by asking whether the state's purpose is to inflict pain as punishment, or whether the purpose is to inflict the least amount of pain necessary to execute.[179]

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408 U.S. 238, 383 (1972) (Burger, C. J., dissenting) (internal marks omitted))); *Roper*, 543 U.S. at 616 (Scalia, J., dissenting) ("Juries 'maintain a link between contemporary community values and the penal system' that this Court cannot claim for itself." (quoting Gregg, 428 U.S. at 181)).

167. *See* Berry, *supra* note 7, at 17-18.

168. *See id.*

169. *Id.*

170. *Id.* at 18-19.

171. *Id.* at 18; *see also* Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1785 (1970).

172. Weems v. United States, 217 U.S. 349, 366 (1910); *see also* Berry, *supra* note 7, at 18; Goldberg, *supra* note 171, at 1786.

173. Berry, *supra* note 7, at 19.

174. *Id.*; *see also* Goldberg, *supra* note 171, at 1790-91.

175. Goldberg, *supra* note 171, at 1784, 1794.

176. *Id.* at 1794.

177. *See* Jeffrey Waincymer, *Commentary: Reformulated Gasoline Under Reformulated WTO Dispute Settlement Procedures: Pulling Pandora Out of a Chapeau?*, 18 MICH. J. INT'L L. 141, 172 (1996) ("To speak of 'means' can be linguistically suggestive of a purposive test.").

178. *See* Lisa Kern Griffin, *Circling Around the Confrontation Clause: Redefined Reach but not a Robust Right*, 105 MICH. L. REV. FIRST IMPRESSIONS 16, 19 (2006), www.michiganlawreview.org/firstimpressions/vol105/griffin.pdf.

179. *See generally* Berry, *supra* note 7; *see also* Griffin, *supra* note 178. The purposive test is used in a wide variety of contexts (*see* Christian M. De Vos, *Mind the Gap: Purpose, Pain, and the*

The purposive test seeks to protect "the dignity of man," a concept inherent in the Eighth Amendment, by forbidding excessive punishment.[180] Although originally proposed in the context of the death penalty itself,[181] the test can also be applied to methods of execution. It is a systematic approach to analyzing whether a method of punishment is cruel and unusual.[182]

a. The Purpose of Lethal Injection is to Inflict the Least Amount of Pain Necessary to Execute

The issue of whether a state's purpose should be to inflict pain as punishment or to inflict the least amount of pain necessary to execute is highly contentious.[183] It is clear that the Constitution "does not require a pain free death, nor should it."[184] However, it is also clear that the Eighth Amendment prohibits the implementation of the "unnecessary and wanton infliction of pain."[185] Arguments are heated as to where the purpose of lethal injection fits between these two boundaries.[186]

Retributivists argue that a punishment involving too little pain undermines the retributive function of the death penalty.[187] They suggest that the most atrocious killers deserve to die an extremely painful death.[188] Supporters of this view claim that the ideas of "punishment" and "pain" cannot be separated, because in order for punishment to be punishment, it must be painful.[189] However, even extreme retributivists admit that while society inflicts pain on criminals because they deserve it, such pain may only be inflicted to an extent that is proportional to the crimes committed.[190] The problem with lethal injection under the retributivist view is that, by not distinguishing between the very violent and

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Difference Between Torture and Inhuman Treatment, 14 No. 2 HUM. RTS. BRIEF 4 (2007) (human rights); Eloise Scotford, *Trash or Treasure: Policy Tensions in EC Waste Regulation*, 19 J. ENVTL. L. 367 (2007) (environmental law); Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19 (2000) (employment law)), but at the time of publication there were no cases directly on point regarding use of the purposive test in this context.

180. Berry, *supra* note 7, at 17.

181. *Id.* at 18.

182. Goldberg & Dershowitz, *supra* note 171, at 1784.

183. *See* Robert Blecker, *Killing Them Softly: Meditations on a Painful Punishment of Death*, 35 FORDHAM URB. L.J. 969, 980-81 (2008) (indicating that, during oral argument in *Baze*, counsel for the condemned and Justice Scalia found common ground only in the idea that the "Constitution permitted a risk-free punishment of painless death, while it forbade the intentional infliction of painful death.").

184. Gaitan, *supra* note 65, at 787.

185. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

186. *See* Blecker, *supra* note 183, at 970-74 (revealing the two extremes of the debate by discussing retributivist and utilitarian views); *see also* Gaitan, *supra* note 65, at 764 (adopting a utilitarian view and focusing not on the condemned's crimes but on whether the sentence will comport with the Eighth Amendment).

187. *See* Denno, *supra* note 64, at 731.

188. Blecker, *supra* note 183, at 970.

189. *Id.* at 971-72.

190. *Id.* at 973 ("The Biblical 'eye for an eye,' originally understood as no more than an eye for an eye, exemplifies retribution as a restriction on pain as much as justification of punishment.").

barbarous murderers and those who inflicted relatively little pain on their victims, the states seem willing to arbitrarily expose *all* murderers to the excruciating pain inherent in a botched lethal injection.[191] Therefore, even retributivists occasionally condemn lethal injection, not because it has the potential to cause pain, but because it arbitrarily breaks the connection between crime and punishment that is necessary to avoid an Eighth Amendment violation.[192]

In contrast, utilitarians believe that physical pain can never be used as an "instrument of justice" if the punishment is to be humane, even if some degree of pain may be inherent in the punishment.[193] Pain cannot be inflicted for the "sake of the past"; rather, the purpose of punishment is to deter others.[194] Consequently, punishments should offer the strongest impressions in the minds of witnesses while subjecting the criminal to the least amount of pain possible.[195] Supporters of the utilitarian view argue that the mere act of killing inflicts enough pain on the condemned to "balance the scales" of justice.[196] While utilitarians acknowledge the potential for pain in any method of execution, they also urge that the process be as painless as possible.[197]

Supreme Court precedent developed in the direction of the utilitarian approach.[198] In *Kemmler*, the Court stated that the Eighth Amendment prohibits the "unnecessary and wanton infliction of pain."[199] In *Resweber*, the Court explained that the Constitution protects against punishments that are inherently cruel, not against any pain that may be involved in a humane execution method.[200] The contention in many method-of-execution challenges is that the "evolving standards of decency" test requires that executioners use a method of execution that brings "as little physical pain as possible to the condemned."[201] In other words, an execution should be so painless that the punishment is reduced to nothing more than death itself.[202] Similarly, Supreme Court precedent defines the states' purpose in executions as inflicting the least amount of pain necessary to execute rather than as inflicting pain as punishment in itself.[203]

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191. *Id.* at 997.
192. *Id.* at 998.
193. *Id.* at 993.
194. *Id.* at 972.
195. *Id.*
196. *Id.* at 970.
197. *Id.* Both retributivists and utilitarians agree, however, that "gratuitous pain and suffering" is never allowed under the Eighth Amendment. *Id.* at 974.
198. *See In re* Kemmler, 136 U.S. 436, 447 (1890); *see also* La. *ex rel.* Francis v. Resweber, 329 U.S. 459, 464 (1947).
199. *Kemmler*, 136 U.S. at 447.
200. *Resweber*, 329 U.S. at 464.
201. Aarons, *supra* note 134, at 461.
202. Mortenson, *supra* note 26, at 1137.
203. *See Kemmler*, 136 U.S. at 437; *see also Resweber*, 329 U.S. at 464.

To a certain degree, the *Baze* plurality followed precedent by implementing this utilitarian approach. While the Court indicated that some pain may be inherent in capital punishment, it also suggested that the state's purpose should be to inflict only an amount of pain that would not pose a "substantial risk" of harm.[204] The Court never discussed whether an appropriate punishment might actually *require* a painful death.[205] Instead, it focused on the fact that a method of execution could inflict some pain, as long as it did not present an "objectively intolerable risk of harm."[206] In fact, the Court offered the opportunity for a condemned inmate to show that an alternative method of execution existed that "reduce[d] a substantial risk of severe pain."[207] It could hardly be inferred that the Court would allow the state to purposely inflict pain; otherwise, it would not have presented the opportunity to develop a procedure that reduces the risk of pain. Accordingly, the *Baze* plurality indicated that the state's purpose was not to inflict pain for pain's sake, but rather to inflict *only* the amount of pain falling below a "substantial pain" threshold that would be sufficient to execute.[208] It developed its purposive standard in light of this purpose.

b. The Integration of the Purposive Test Solves Many of the Problems Inherent in the "Evolving Standards of Decency" Test

Perhaps in an attempt to rid itself of the problems associated with the subjective elements of the "evolving standards of decency" test, the *Baze* plurality implemented a purposive test. First, the Court's "substantial risk of serious pain" standard mirrored the "degrading severity" prong of the purposive test because it looked to whether the method of execution created such a substantial risk of pain that it is exceedingly cruel.[209] Second, the plurality incorporated the "wantonly imposed" prong of the purposive test in its requirement of a "legitimate penological justification" for the method of execution.[210] If there is no legitimate justification, the method of execution would be "wantonly imposed," or unusual.[211] Finally, the plurality's requirement of a "feasible and readily available" alternative method of execution was a reflection of the purposive test's analysis of whether the same penological goal could have been achieved by a less severe punishment.[212] If such an alternative existed, and the state refused to implement it without a "legitimate penological

204. *See* Baze v. Rees, 128 S. Ct. 1520, 1531 (2008).
205. Denno, *supra* note 63, at 731.
206. *Baze*, 128 S. Ct. at 1530-31.
207. *Id.* at 1531-32.
208. *See id.* at 1530-32.
209. *See id.* at 1531.
210. *See id.* at 1532.
211. *See id.*; *see also* Berry, *supra* note 7, at 19 (suggesting that "unusualness" included punishments that were "arbitrary and discriminatory").
212. *See Baze*, 128 S. Ct. at 1532; *see also* Berry, *supra* note 7, at 19.

justification," then the state's refusal could be a violation of the Eighth Amendment under the purposive test.[213]

By creating its "substantial risk" test as a purposive test, the *Baze* plurality avoided some of the problems associated with the subjective "evolving standards of decency" test. Under its new standard, the Court first looks to objective "evolving standards of decency" factors, as indicated above.[214] Then, the Court performs a subjective evaluation of the method of execution, using its newly-developed purposive test. Unlike the subjective element found in the "evolving standards of decency" test, however, the subjective evaluation of the purposive test "ties the use of the death penalty to the penological goals of the states."[215] Instead of merely subjecting method of execution challenges to the whims of the justices, the purposive test analyzes the method of execution's purpose in light of the state's penological goals.[216] Because those goals are often espoused by the state legislature, which is composed of representatives of the people, the purposive test is less subject to the whims and fancies of judges who may not be popularly elected.[217] By requiring the courts to consider the state's purpose for the method of execution, the purposive test promotes consistency in court decisions, eliminating the chances of decisions being overturned and more closely reflecting the values and norms of the people.[218]

However, while the *Baze* plurality determined that Kentucky's current lethal injection protocol withstands this purposive test,[219] the inquiry is not finished. While lethal injection itself is not unusual, it may very well be considered cruel under a proper pain analysis.[220] Furthermore, it is likely that the death penalty itself would be considered both cruel and unusual under the first two prongs of the purposive test.[221] Consequently, future challenges will likely focus on whether the lethal injection protocol is the least severe method by which a state can accomplish its penological objectives.[222] A proper pain analysis is the key to solving this issue. If lethal injection truly assures a painless death, then it might comport with the "dignity of man" and might be judged, not as the "wanton infliction of pain," but as a humane method of execution under the

213. *Baze*, 128 S. Ct. at 1532.
214. *See supra* Part III.A.1.
215. Berry, *supra* note 7, at 31.
216. *Id.*
217. *See id.* at 22. In fact, "penological goals" is considered an objective factor under the "evolving standards of decency" test. Aarons, *supra* note 133, at 445.
218. *See* Berry, *supra* note 7, at 31.
219. *See* Baze v. Rees, 128 S. Ct. 1520, 1526 (2008).
220. *See* Denno, *supra* note 1, at 102 (stating that problems concerning medical complications surrounding lethal injection have never been so pronounced); *see also* Mortenson, *supra* note 26, at 1161 ("Our system is constructed in such a way that it knowingly puts inmates through agony every year as they are killed.").
221. Berry, *supra* note 7, at 30.
222. *Id.*

purposive test.[223] However, a proper pain analysis is likely to indicate that lethal injection is by no means a truly humane option for execution, at least as it is currently implemented.[224]

B. *The Court Must Perform an Extensive Pain Analysis in Order to Ensure Compliance with the Eighth Amendment*

While the *Baze* plurality succeeded in implementing an improved test for analyzing methods-of-execution challenges, its proposed standard is not entirely flawless. In failing to perform an extensive pain analysis, the *Baze* plurality did not sufficiently adhere to *Kemmler*'s "negligible pain" standard in evaluating Kentucky's lethal injection protocol.[225] The *Kemmler* approach looks at the inmate's experience of death itself rather than the execution method as a whole.[226] Such an approach is appropriate because the Eighth Amendment focuses on the individual experience of pain during punishment rather than the tool used to punish.[227] However, the *Baze* plurality not only clearly stated that the potential for pain does not violate the Eighth Amendment, but it also almost entirely ignored the lack of testing and evaluation surrounding lethal injection.[228] In order for lethal injection to remain free from constitutional challenges, the Court must perform a more comprehensive pain analysis, focusing on the individual's experience of pain and including proper scientific testing and medical advice.

1. Conservative Versus Empirical Approaches to Methods of Execution

There are two schools of thought regarding a challenge to a method of execution: the conservative school and the empirical school.[229] The conservative school compares the challenged execution method to previous methodologies or other currently available methods.[230] However, this approach rarely takes into account the actual operation of the execu-

223. Zimmers & Koniaris, *supra* note 61, at 920.

224. *See* Mortenson, *supra* note 26, at 1104 (stating that even with advanced methods of execution, more than seven percent of executions continue to be botched, "inflicting . . . extraordinary pain on the condemned prisoners as they die."); *see also* Denno, *supra* note 1, at 51 (indicating that six of the eleven inmates lethally injected in California might have been conscious during the procedure, "potentially creating an 'unnecessary risk of unconstitutional pain or suffering' in violation of the Eighth Amendment.").

225. *See In re* Kemmler, 136 U.S. 436, 443 (1890).

226. Mortenson, *supra* note 26, at 1109.

227. *Id.* at 1138 ("The same paddle could be used to spank [a misbehaving] child in very different ways. A drunk . . . parent might genuinely hurt the child . . . in a way that would universally be considered cruel . . . . It makes more sense to describe the spanking (rather than the paddle) as cruel.").

228. Baze v. Rees, 128 S. Ct. 1520, 1529 (2008) ("Some risk of pain is inherent in any method of execution—no matter how humane—if only from the prospect of error in following the required procedure. It is clear, then, that the Constitution does not demand the avoidance of all risk of pain in carrying out executions.").

229. Mortenson, *supra* note 26, at 1107.

230. *Id.* at 1112.

tion method.[231] Thus, many conservative courts view pain as simply part of the death experience itself rather than looking at the individual experience of a "lingering" or "torturous" death.[232]

In contrast, the empirical approach looks first to scientific and medical evidence that indicates pain inherent in the execution method.[233] Only if such evidence is not sufficient for a finding of unconstitutionality does the Court consider legislative trends.[234] By reviewing legislative trends "as only one element of a more complex analysis" and by focusing instead on the infliction of pain, the empirical approach better complies with *Kemmler's* "negligible pain" principle.

In following the conservative approach, the *Baze* plurality performed a comparative analysis. It analyzed prior method-of-execution cases and took into account the consensus among the states and federal government surrounding lethal injection.[235] However, in order to adhere to *Kemmler*, the Court should have adopted the empirical approach. The Court first should have looked to evidence of pain in Kentucky's lethal injection protocol, as indicated by scientific and medical evidence. Only after such an analysis should it have turned its attention to legislative trends and prior cases. By performing a pain analysis, the Court would have been properly informed of both the dangers and the benefits of lethal injection.

2. Scientific Testing of Lethal Injection

Neither courts nor legislatures appear to place sufficient focus on scientific studies concerning the potential for pain involved in lethal injections. In developing its lethal injection protocol, Oklahoma virtually ignored the potential for pain.[236] Because most lethal injection states followed Oklahoma's lead in developing their own protocols, most now follow a procedure implemented over thirty years ago.[237] This procedure has not been significantly updated and was not properly based on scientific study.[238]

Because a relatively constant number of executions are botched annually, scientific analysis of the potential for pain in any lethal injection

231. *Id.*
232. *Id.* at 1110-11, 1116.
233. *Id.* at 1113.
234. *Id.* The Ninth Circuit has proposed a pain analysis under the empirical approach, consisting of the following steps: first, a review of "objective evidence of pain involved in the challenged method"; second, a determination of the length of time the condemned inmate will consciously suffer pain in a "typical" execution, free from botches or failures; and third, a determination of the risk that a botched execution will occur and cause pain worse than that in a "typical" case. *Id.* at 1113-14.
235. Baze v. Rees, 128 S. Ct. 1520, 1530-32 (2008).
236. Denno, *supra* note 1, at 65.
237. *Id.* at 78-79.
238. *Id.*

is important.[239] Lethal injection is constructed in such a way that it can create problems when performed incorrectly.[240] Even a slight error in dosage or administration of the first drug can leave an inmate conscious when the second and third drugs are administered, but paralyzed and thus prevented from giving any indication of pain.[241] Additionally, intense pain can result if the drugs are injected in the wrong direction in the veins or the muscle.[242] Although such painful executions are "inherently unjustified and inherently unjustifiable,"[243] executioners still use the same formula invented years ago because courts have not required extensive scientific studies on the potential for pain.[244]

The *Baze* Court did not appear concerned with performing a pain analysis. While Justice Ginsburg's dissent called for more extensive scientific studies regarding the potential pain inherent in lethal injection,[245] the plurality did not require further testing.[246] Instead, it proposed that an execution method is not cruel and unusual merely because it may result in pain.[247] However, because severe pain beyond that inherent in death itself is possible during any lethal injection, the Court must at least provide for more extensive scientific testing if it wishes to ensure that lethal injection protocols are in accord with the Eighth Amendment.[248]

3. Lethal Injection and the Medical Profession

"[M]edicine is the key to understanding the problems of lethal injection."[249] However, an unfortunate paradox exists: ethical guidelines prohibit participation by those who are the most qualified to ensure that the procedure is performed humanely and constitutionally.[250] The American Medical Association clearly forbids doctor participation in executions, worrying that lethal injection will come to be associated with the medical profession.[251]

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239. Mortenson, *supra* note 26, at 1104 (noting that seven percent of executions are botched each year); *see also* Denno, *supra* note 1, at 51 (noting that of the eleven inmates lethally injected in California, six may have been conscious and suffering severe pain).

240. Mortenson, *supra* note 26, at 1124.

241. *Id.*

242. *Id.* at 1124-25.

243. *Id.* at 1160.

244. *See* Denno, *supra* note 1, at 78-79.

245. *See* Baze v. Rees, 128 S. Ct. 1520, 1569 (2008) (Ginsburg, J., dissenting).

246. *See id.* at 1532-34 (plurality opinion).

247. *Id.* at 1531.

248. *See* Denno, *supra* note 1, at 120.

249. *Id.* at 55.

250. *Id.* at 53.

251. *Id.* at 80-81 (quoting Code of Ethics E-2.06 (Am. Med. Ass'n 2000)) (noting that the American Medical Association guidelines provide that "[a] physician, as a member of a profession dedicated to preserving life when there is hope of doing so, should not be a participant in a legally authorized execution.").

Yet, physician involvement in lethal injection could be a solution to the problems associated with the procedure.[252] Many execution team members are improperly prepared to perform lethal injections; they have no formal training or knowledge of the drugs used or the risks posed.[253] In contrast, medical professionals, especially anesthesiologists, have the expertise and knowledge to perform lethal injections safely and accurately.[254] There is evidence that a surprising number of physicians participate in executions despite the existence of ethics rules.[255] Some physicians do so because they want the condemned inmates to have the most competent and humane lethal injection possible; others believe that physicians are not deciding who gets the death penalty, but rather ensuring that the procedure is performed accurately and competently.[256]

Not only do many medical professionals participate in executions despite the ethical considerations put forth by the medical associations, but also the vast majority of lethal injection states include physician requirements in their statutes.[257] The presence of such statutory language illustrates that medical association requirements may not have had their desired effect.[258]

In light of the growing number of physicians who participate in lethal injections, it appears that medical opinions regarding lethal injection are changing.[259] Even the American Medical Association Ethics Council admitted that doctors can make executions more humane.[260] The presence of a medical professional at a lethal injection can eliminate the risk of severe pain, thus ensuring compliance with the Eighth Amendment.[261] Additionally, physician presence would eliminate the lack of training and knowledge that permeates nearly every lethal injection execution.[262] The incorporation of rules regarding physician presence at executions into lethal injection statutes is a step in the right direction; perhaps it is also time for medical association guidelines to change as well. This is not to suggest that physicians should be *required* to participate in executions, in light of the strong divergence in public opinion surrounding the death

252. *See id.* at 77.
253. *Id.* at 56.
254. *See id.* at 58.
255. *Id.* at 83-84, 86 (citing as evidence "Missouri's 'Dr. Doe,' who began performing lethal injections in the mid-1990s," and results from the Breach Report).
256. *Id.* at 86-87 ("Angel of mercy, not agent of harm, is the role inmates seek for the doctor. Palliative care from a doctor to prevent unnecessary suffering . . . is not unprofessional or unethical.").
257. *Id.* at 88. While Illinois' statute explicitly states that doctors cannot participate in executions, twenty states mention the presence of a doctor at a lethal injection execution, sixteen provide that a doctor should pronounce or certify death, and eight specifically provide that lethal injections are not the practice of medicine. *Id.* at 88-89.
258. *Id.* at 89.
259. *See id.* at 121-22.
260. *Id.* at 121.
261. *Id.*
262. *See id.* at 57.

penalty. However, if medical associations allowed their members to make their own decisions on whether or not to participate, the risks associated with lethal injection would decrease, and the method would be more likely to comply with the Eighth Amendment.[263]

C. Solutions to Ensure a Humane Lethal Injection

The past few years have seen an increase in lethal injection challenges.[264] A constitutional tort may be one way to offer a proper remedy to the petitioners in these challenges.[265] Such a tort would provide for "the fact that the government has intentionally created a system under which it knows, ex ante, that some proportion of executed inmates will suffer agonizing deaths."[266] The possibility of being liable in tort for botched or painful executions would create an incentive for the government either to develop safer and more reliable methods of execution or to improve the training and research involved in existing execution methods.[267] Additionally, it would serve as a formal admission of wrongdoing and would provide some measure of compensation to the inmates' families.[268]

However, a constitutional tort is not by itself a sufficient way to ensure the continuous prevention of excessively painful executions. To do so, attorneys and death penalty abolitionists should implement a national legal strategy that incorporates method-of-execution cases.[269] Under such a coordinated legal strategy, attorneys and abolitionists could work together to decide which cases and issues should be brought before the Court.[270] This approach would build on past successes and minimize adverse rulings, thus helping the courts properly define the pain standards necessary in lethal injections.[271] While *Baze* cemented the use of lethal injection as a method of execution,[272] if a proper pain analysis were performed, even lethal injection, the most "humane" method of execution, might be viewed as inflicting substantial pain. A coordinated legal strategy would assist the courts in this analysis.

Supreme Court decisions based on method-of-execution cases might also help prompt the legislative branches to take action. Supreme Court decisions have occasionally brought legislative and executive attention to the death penalty.[273] By coordinating a national litigation strategy fo-

263. *See id.* at 91.
264. *Id.* at 107.
265. *See* Mortenson, *supra* note 26, at 1121.
266. *Id.*
267. *Id.* at 1162.
268. *Id.* at 1105, 1163.
269. Aarons, *supra* note 134, at 464.
270. *See id.*
271. *Id.*
272. Baze v. Rees, 128 S. Ct. 1520, 1526 (2008).
273. Aarons, *supra* note 134, at 442.

cused on lethal injection cases, abolitionists and attorneys could prompt state legislatures to extensively review their protocols using valid and accurate scientific research, implement regulations requiring adequate training and knowledge, and allow physician participation. This legislation would help to create a humane lethal injection protocol that passes constitutional muster.

Furthermore, lethal injection protocols with greater transparency and oversight would help to ensure compliance with the Eighth Amendment.[274] In addition to challenges regarding the three-drug protocol, many lethal injection challenges have arisen regarding, *inter alia*, the method in which the drugs are prepared, the qualifications of execution personnel, facilities where the executions occur, and whether the execution team properly ensures unconsciousness before the injection of the second and third drugs.[275] Additionally, many lethal injection protocols are incomplete and filled with scientific inaccuracies.[276] They are written merely to reassure witnesses that the process is orderly and subject to controls.[277] Moreover, states have withdrawn their protocols from public scrutiny.[278] This likely occurred because public protocols expose the states' ignorance and incompetence.[279] This lack of public information surrounding the protocols makes it difficult to evaluate their constitutionality.[280] Additionally, because state lethal injection protocols are similar to one another, when a prisoner challenges one state's protocol, courts can point to the similar protocols of the other states to show that none have been held unconstitutional.[281]

In order to ensure that lethal injection comports with the Eighth Amendment, states must revise their protocols. A protocol should be in writing, and it should specify the conditions of the lethal injection procedure so that the prisoner can be properly monitored for consciousness.[282] Most importantly, the protocol should be public information.[283] By opening the state protocols to public viewing, the condemned inmates will know what to expect, and, most importantly, the public will be able to monitor the state's lethal injection process.[284] Consequently, the state will not be able to hide the inaccuracies and potential problems inherent in any improperly developed protocol. By developing a written and public protocol, the states will provide more transparency in their lethal in-

274. *See* Gaitan, *supra* note 65, at 784.
275. *Id.* at 774-75.
276. Denno, *supra* note 64, at 713-14.
277. *Id.* at 713.
278. Denno, *supra* note 1, at 95-96.
279. *Id.* at 95.
280. *Id.* at 96.
281. *Id.* at 101-02.
282. Gaitan, *supra* note 65, at 785-86.
283. *Id.* at 786.
284. *Id.*

jection process, helping to ensure compliance with the Eighth Amendment.[285]

CONCLUSION

The struggle confronting the courts regarding the constitutionality of lethal injection is clear after *Baze*. While *Baze* integrated a purposive test of constitutionality into the already-existing objective "evolving standards of decency" test, it did not incorporate scientific testing and medical evidence into its pain analysis. Until the Court performs an extensive pain analysis on the dangers of lethal injection, it cannot ensure that challenged lethal injection protocols comply with *Kemmler's* "negligible pain" standard and thus comport with the Eighth Amendment.[286]

Perhaps it is because of a fear of what they will discover that neither courts nor legislatures are willing to perform an extensive pain analysis regarding lethal injection. Lethal injection, rightly or wrongly, is considered the most humane method of execution.[287] If it is deemed unconstitutional due to its capacity to inflict severe pain, the courts would be presented with a challenge to the death penalty itself. This is a type of challenge they are not yet ready to consider.[288]

However, the fear of the unknown is no reason to ignore the problems associated with lethal injection. Scientific testing and medical opinions need to be taken seriously to determine the extent of pain a botched lethal injection might inflict.[289] Future debate will likely center on whether there is a less severe alternative to lethal injection. The Court will be well-prepared for these challenges if it has previously engaged in an extensive, objective pain analysis regarding lethal injection as a method of execution.

*Courtney Butler**

285. *See id.* at 786-87 ("In examining the evolving standards of decency, we cannot expect the public's standards to evolve if the public is unaware of what procedures are actually performed upon the condemned.").

286. *See* Mortenson, *supra* note 26, at 1108.

287. Denno, *supra* note 1, at 65.

288. *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 168-69 (1976); *see also* Baze v. Rees, 128 S. Ct. 1520, 1529 (2008).

289. *See* Denno, *supra* note 1, at 121; *see also* Mortenson, *supra* note 26, at 1119-20.

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CRAWFORD V. MARION COUNTY ELECTION BOARD: THE MISSED OPPORTUNITY TO REMEDY THE AMBIGUITY AND UNPREDICTABILITY OF *BURDICK*

INTRODUCTION

The right to vote has been described as the most precious of rights in a democratic society because it protects so many other rights.[1] The Supreme Court has long recognized the individual's right to vote as a fundamental right,[2] with states having the constitutional right to manage election procedures.[3] In earlier cases, the Court reviewed many election regulations using something akin to strict scrutiny analysis.[4] However, the Court realized the tenuous balance between the individual's right to vote and the state's right to manage elections.[5] Seeking to develop a standard that would adequately balance these competing rights, the Court developed a test to accomplish the goal.[6] This balancing test weighs the burden on the right to vote against the state interests in passing legislation that manages election procedures,[7] unfortunately, though, it has lead to differing interpretations producing unpredictable outcomes.[8]

The Court had the opportunity to resolve the ambiguity and unpredictability resulting from prior decisions when it granted certiorari to review the constitutionality of Indiana's Senate Enrolled Act No. 483 ("SEA 483")[9] in *Crawford v. Marion County Election Board.*[10] In a 6-3 decision, the Court held that SEA 483 was constitutional; however, the plurality opinions reached that conclusion by very different reasoning.[11] The Court's lack of unity did nothing to settle the confusion courts were experiencing when determining the correct application of prior precedent,[12] or to provide guidance on how to measure the severity of a

1. Demian A. Ordway, Note, *Disenfranchisement and the Constitution: Finding a Standard that Works*, 82 N.Y.U. L. REV. 1174 (2007) (quoting Reynolds v. Sims, 377 U.S. 533, 561–62 (1963)).

2. Burdick v. Takushi, 504 U.S. 428, 433 (1992); Anderson v. Celebrezze, 460 U.S. 780, 788 (1983); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966).

3. U.S. CONST. art. I, § 4, cl. 1.

4. *See Harper*, 383 U.S. at 666-68.

5. *Anderson*, 460 U.S. at 788.

6. *Id.* at 789.

7. *Id.*

8. *See* Ordway, *supra* note 1, at 1192.

9. S.B. 483, 114th Gen. Assemb., 1st Reg. Sess. (Ind. 2005).

10. 128 S. Ct. 1610 (2008).

11. *Id.* at 1624 (Scalia, J., concurring) (explaining that the majority opinion rests its decision on a balancing approach while the concurrence bases its decision on an "important regulatory interests" standard).

12. *Id.* at 1627 (Scalia, J., concurring).

burden on the right to vote.[13] The Court's plurality opinions demonstrate the need for a new rule to evaluate the constitutionality of election regulations.

Part I of this Comment explains the evolution of the standard the Court has used in its election law jurisprudence with three important cases—*Harper*, *Anderson*, and *Burdick*—and establishes the legal climate and precedent prior to *Crawford*. Part II discusses *Crawford* by starting with the facts and procedural history and then turning to the plurality opinions and dissents. Part III.A discusses the issues left unresolved by the *Crawford* decision—namely the ambiguity and unpredictability of the *Anderson* and *Burdick* standards. Part III.B suggests a new rule to resolve the limitations of the *Anderson* standard in reviewing election law challenges. The suggested rule would maintain the presumption of constitutionality for election laws. However, if there is evidence of political party entrenchment or the law disproportionately impacts an identifiable group that shares a particular political ideology, an intermediate level of scrutiny would be applied. Part III.C discusses the importance of facial challenges in light of *Crawford*. Part IV concludes that this new rule will remove the ambiguity and unpredictability from election law cases, protect against political party entrenchment and discriminatory effects, and maintain the state's ability to manage its elections.

I. BACKGROUND

The Constitution expressly grants the right to vote in federal elections;[14] however, no such right is expressly granted for voting in state elections.[15] Despite this omission, the Court has found the right to vote in state elections to exist implicitly in the First Amendment and to be incorporated through the Fourteenth Amendment, with challenges generally brought as a violation of the Equal Protection Clause.[16] The following three cases demonstrate the right to vote has remained fundamental, but the approach used in detecting unconstitutional infringements of the right has changed.

13. David Schultz, *Election Law: Less Than Fundamental: The Myth of Voter Fraud and the Coming of the Second Great Disenfranchisement*, 34 WM. MITCHELL L. REV. 483, 530 (2008).

14. U.S. CONST. art. I, § 2, cl. 1.

15. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966).

16. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) ("It must first consider the character and magnitude of the asserted injury to the rights protected by the *First* and *Fourteenth Amendments*."); *see also Harper*, 838 U.S. at 666 ("Our cases demonstrate that the *Equal Protection Clause of the Fourteenth Amendment* restrains the States from fixing voter qualifications which invidiously discriminate.").

A. Harper v. Virginia State Board of Elections[17]

In *Harper*, Virginia residents challenged the constitutionality of a section of the Virginia Constitution that required residents to pay a poll tax in order to register to vote.[18] The issue was whether a voter's affluence (i.e., the ability to pay the poll tax) was a valid qualification for voting.[19] In a 6-3 decision, the Court held the poll tax unconstitutional because a classification that makes voter wealth a qualification for exercising the right to vote was an invidious discrimination and invalid under the Equal Protection Clause of the Fourteenth Amendment.[20]

Although passing on the possible issue of racial discrimination,[21] the *Harper* Court did stress the fundamental importance of the right to vote in a democratic society because it protects and preserves all other rights guaranteed by the Constitution.[22] In fact, so important is the right to vote that the Court believed it was the driving force behind President Lincoln's philosophy of "government of the people, by the people, [and] for the people."[23] After identifying the right at stake, the Court then turned to the level of review required for its analysis.

The Court did not expressly state it was reviewing the poll tax under strict scrutiny but noted that when a classification infringes upon a fundamental right under equal protection, the classification "must be closely scrutinized and carefully confined."[24] Under this level of review, the Court found no relation between the ability to pay the poll tax and an individual's qualifications to exercise the right to vote.[25] The lack of relationship between economic status and voter qualifications placed an unnecessary burden on the right to vote, which would be an invidious discrimination in violation of the Equal Protection Clause.[26] The final sentence of the majority opinion simply stated that "the right to vote is too precious, too fundamental to be so burdened or conditioned."[27]

Harper provided no guidance on how election regulations would be reviewed in the future. Was the poll tax unconstitutional because it had no relation to voter qualifications, thus failing under any level of scrutiny? Or did the infringement on the fundamental right to vote trigger a

17. 383 U.S. 663 (1966).
18. *Id.* at 665 n.1 (discussing the various sections of the Virginia Constitution that authorize the poll tax). In 1965, one-year prior to *Harper*, the Virginia poll tax was declared a violation of the Twenty-Fourth Amendment as a prerequisite to voting in federal elections. Harman v. Forssenius, 380 U.S. 528, 544 (1965).
19. *See Harper*, 383 U.S. at 665-66.
20. *Id.* at 666-67.
21. *Id.* at 666 n.3.
22. *Id.* at 667 (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).
23. *Id.* (citing Reynolds v. Sims, 377 U.S. 533, 568 (1963) (alteration in original)).
24. *Id.* at 670.
25. *Id.* at 666.
26. *Id.* at 666-67.
27. *Id.* 670 (referring to conditioning the right to vote on affluence).

heightened level of scrutiny? If the latter is true, then nearly all election regulations would be declared unconstitutional, which would be contrary to an express provision of the Constitution.[28]

The Constitution expressly grants states the power to regulate the time, place, and manner for holding elections of senators and representatives to the United States Congress.[29] In order for elections to be fair, honest, and orderly there is a need for substantial regulation,[30] which necessarily burdens the right to vote.[31] The fear is that subjecting all election laws to strict scrutiny analysis, which *Harper* may suggest, would frustrate the state's ability to effectively manage elections and render its constitutional power a nullity.[32] In *Anderson*, the Court announced an approach in reviewing election laws that sought to protect the fundamental right to vote while respecting the state's right to regulate its elections.[33] The new approach was a noble effort, but the result would later prompt Justice Scalia to refer to it as "*Anderson*'s amorphous flexible standard."[34]

B. Anderson v. Celebrezze[35]

John Anderson sought to have his name included on the ballot as an independent candidate for President in the Ohio primary election but was denied because of Ohio's early candidacy registration requirements for independent candidates.[36] Although Anderson was denied access to the ballot, the issue became whether the early registration deadline was an unconstitutional infringement on the right to vote of Anderson's supporters.[37] Justice Stevens delivered the majority opinion,[38] holding the early registration deadline unconstitutional.[39] Justice Stevens concluded that

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28. *See* U.S. CONST. art. I, § 4, cl. 1.

29. *Id.*

30. Anderson v. Celebrezze, 460 U.S. 780, 788 (quoting Storer v. Brown, 415 U.S. 724, 730 (1974)).

31. *Id.*

32. Burdick v. Takushi, 504 U.S. 428, 433. *But see* Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VAND. L. REV. 793, 795 (2006) (discussing the myth "that strict scrutiny is an 'inflexible' rule that invalidates every (or nearly every) law to which it applies").

33. *Anderson*, 460 U.S. at 788 ("Although these rights of voters are fundamental, not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates.").

34. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1624 (2008) (Scalia, J., concurring) (internal quotation marks omitted).

35. 460 U.S. 780 (1983).

36. *Id.* at 783 n.1 (explaining the challenged Ohio statute).

37. *Id.* at 782.

38. Chief Justice Burger and Justices Blackmun, Brennan, and Marshall joined in the majority opinion. *Id.* at 781.

39. *Id.* at 805-06.

the deadline may substantially impact independent voters[40] and that this burden outweighed the state's minimal interest for the regulation.[41]

For purposes of analysis, the Court drew the parallel between the rights of the candidate and those of the voter because a burden on one is necessarily a burden on the other.[42] The Court also recognized the dichotomy between the individual's right to vote and the state's right to regulate elections, noting that "the [s]tate's *important* regulatory interests are *generally* sufficient to justify reasonable, nondiscriminatory restrictions."[43] The Court did not expand on what was meant by nondiscriminatory—either facially nondiscriminatory or a nondiscriminatory effect—but would later state that burdens falling on a particular voter segment would be hard to justify by the state.[44] The Court then announced the following approach to guide its analysis:

> [A court] must first consider the character and magnitude of the asserted injury to the rights protected by the . . . [Constitution] that the plaintiff seeks to vindicate. It must then identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. . . . [T]he Court must not only determine the legitimacy and strength of each of those interests; it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.[45]

In *Storer v. Brown*,[46] which seems to have borne the early parameters of this approach,[47] Justice White rather prophetically stated: "What the result of this process will be in any specific case may be very difficult to predict with great assurance."[48] The unpredictability stems from the ambiguity created by three possible interpretations of the *Anderson* standard. First, the standard may simply stand for a balancing test between the burden on the individual's right to vote and the interest of the state.[49] Second, the standard could suggest that identifying the magnitude of the

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40. *Id.* at 790.
41. *Id.* at 806.
42. *Id.* at 786.
43. *Id.* at 788 (first and second emphasis added). This quotation was cited in both *Burdick* and *Crawford*. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1616 (2008); Burdick v. Takushi, 504 U.S. 428, 434 (1992). Justice Scalia believed the statement, as used in *Burdick*, helped refine the *Anderson* approach into "an administrable rule." *Crawford*, 128 S. Ct. at 1624 (Scalia, J., concurring).
44. *Anderson*, 460 U.S. at 786, 792-93.
45. *Id.* at 789.
46. 415 U.S. 724 (1974).
47. *See id.* at 730.
48. *Id.*
49. This appears to be the interpretation the *Anderson* Court adopts, as it finds the state interests do not outweigh the burden on the right to vote. *Anderson*, 460 U.S. at 806.

burden on the right to vote triggers a set level of scrutiny by the Court.[50] Finally, the standard could also support the idea that the level of scrutiny is on a sliding-scale, where the level of scrutiny increases correspondingly with an increase of the burden on the right to vote.[51] The Court seemed to adopt the balancing test interpretation as it found the burden on the right to vote outweighed the state interest, but in doing so, it left few clues as to the proper application of this interpretation.

The Court found there to be a "particular" burden on the rights of an identifiable segment of Ohio voters.[52] The existence of this particularized burden prompted the Court to note that "it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status."[53] The previous passage suggests the Court viewed the burden on the right to vote to be sufficient enough to elevate the state's burden in showing that the deadline was necessary to protect its interests. However, the Court never defined the magnitude of the burden on the right to vote, which is troubling because under any interpretation of the standard the first step of the analysis is to identify the level of the burden.[54] Equally troubling, the Court did not provide any guidance on how to *measure* the magnitude of the burden on the right to vote.

The Court then closely reviewed—without announcing a level of scrutiny—the state's asserted interests of voter education, equal treatment of candidates, and political stability,[55] not only looking at the legitimacy of the interest, but also how well the early registration deadline served those interests.[56] After determining the state interests to be minor, and not advanced by the deadline,[57] the Court declared them insufficient to outweigh the burden on the right to vote.[58]

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50. This is the interpretation, although refined by *Burdick*, which Justice Scalia adopts. *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610 at 1624–25 (2008) (Scalia, J., plurality opinion).

51. This is the interpretation that the *Burdick* Court seemingly adopted. *See* Burdick v. Takushi, 504 U.S. 428, 434 (1992) ("Under this standard, the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens *First* and *Fourteenth Amendment* rights.").

52. *Anderson*, 460 U.S. at 790, 792 ("An early filing deadline may have a substantial impact on independent-minded voters"). This evidences that the Court has been willing to look at generalized burdens that impact voters differently—contrary to Justice Scalia's plurality opinion in *Crawford*, 128 S. Ct. at 1625 (Scalia, J., concurring).

53. *Anderson*, 460 U.S. at 793.

54. *Crawford*, 128 S. Ct. at 1624; *Anderson*, 460 U.S. at 806; *see Burdick*, 504 U.S. at 434.

55. *Anderson*, 460 U.S. at 796-802.

56. *Id.* at 797-98, 800-01.

57. *Id.* at 798, 801, 805.

58. *Id.* at 806.

Justice Rehnquist dissented[59] in *Anderson* because he believed the Court's precedent never required a state to narrowly tailor its election laws.[60] Instead, Justice Rehnquist stated it was the Court's duty to make sure the state was not attempting to freeze the "status quo."[61] If it was not, then the "State's laws will be upheld if they are tied to a particularized legitimate purpose, and are in no sense invidious or arbitrary."[62] Justice Rehnquist believed that the early registration deadline passed this test and would have found it constitutional.[63]

Anderson attempted to create an approach that would protect the rights of individuals and states, but the end result was an ambiguous standard with three possible interpretations. *Anderson* adopted the balancing test interpretation, but it did not provide guidance on how to measure the burden on the right to vote nor did it reveal the level of scrutiny to apply when reviewing the state interest. The ambiguity of the *Anderson* standard and the Court's lack of guidance in its application lead to unpredictable outcomes. In *Burdick*, the Court followed the sliding-scale interpretation of the *Anderson* standard instead of the balancing test, evidencing the ambiguity.[64] Further, the majority and dissenting opinions reached different conclusions as to the magnitude of the burden, evidencing the unpredictability.[65]

Another factor that may have played a role in choosing a different interpretation of *Anderson* is that the composition of the Court changed during the time between the *Anderson* and *Burdick* decisions. Justices Stevens, Blackmun, Rehnquist, White, and O'Connor were the only justices to hear both cases. In *Anderson*, Justices Stevens and Blackmun were in the majority, whereas Justices Rehnquist, White, and O'Connor dissented. In *Burdick*, Chief Justice Rehnquist and Justices White and O'Connor were in the majority, whereas Justices Stevens and Blackmun dissented.

C. Burdick v. Takushi[66]

At issue in *Burdick* was whether Hawaii's ban on write-in voting was a violation of the First and Fourteenth Amendments.[67] Alan Burdick was a registered voter in Hawaii claiming he would cast a write-in vote for a person who was not on the ballot and, among other things, had the

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59. *Id.* (Rehnquist, J., dissenting) (Justices White, Powell, and O'Connor joined in Justice Rehnquist's dissent).
60. *Id.*
61. *Id.* at 817 (citing Jenness v. Fortson, 403 U.S. 431, 439 (1971)).
62. *Id.* (quoting Rosario v. Rockefeller, 410 U.S. 752, 762 (1973) (internal quotation marks and brackets omitted)).
63. *Id.* at 818, 823.
64. *See* discussion *infra* Part I.C.
65. *See* discussion *infra* Part I.C.
66. 504 U.S. 428 (1992).
67. *Id.* at 430.

right to cast a write-in "protest vote for Donald Duck" or anyone else he chose.[68] Burdick argued that any infringement on this right was unconstitutional.[69] Justice White, delivering the opinion of the Court, acknowledged that the right to vote is fundamental[70] but, as in *Anderson*, qualified the right as non-absolute.[71] In holding Hawaii's ban on write-in voting constitutional, the Court rejected the argument that all voting regulations should be subjected to strict scrutiny analysis[72] and applied *Anderson's* "more flexible standard."[73]

As the Court began its analysis, it seemingly used the sliding-scale interpretation of the *Anderson* approach by declaring that the rigorousness of its inquiry was dependent on the magnitude of the burden on the right to vote.[74] The first step of the analysis found a "very limited" burden on the right to vote.[75] Hawaii had three mechanisms through which a candidate could gain access to the ballot at least sixty days prior to the primary election[76] and the Court believed these mechanisms reduced the burden on the right to vote.[77]

However, after finding the burden limited,[78] the Court noted, "the State need not establish a compelling interest to tip the constitutional scales in its direction."[79] This would suggest that the Court viewed the *Anderson* standard as triggering a set level of scrutiny depending on the magnitude of the burden on the right to vote.[80] A possible explanation is that the Court was merely referencing an earlier quotation from *Norman v. Reed*,[81] stating that a state would have to show a compelling interest in order to justify a severe burden on the right to vote.[82] In *Norman*, however, the statement was an example of a sufficiently weighty corresponding interest as opposed to saying that a severe burden triggers strict scrutiny.[83]

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68. *Id.* at 430, 438 (internal quotation marks omitted).
69. *Id.* at 438.
70. *Id.* at 433 (quoting Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979)).
71. *Id.* at 433 (citing Munro v. Socialist Workers Party, 479 U.S. 189, 193 (1986)).
72. *Id.* at 432.
73. *Id.* at 434.
74. *Id.*
75. *Id.* at 437. The majority opinion also characterized the burden as "limited" and "slight." *Id.* at 438-39.
76. *Id.* at 435-36 (explaining that the three mechanisms to gain ballot access were filing through a party petition, an established political party, or a designated non-partisan ballot).
77. *Id.* at 436-37.
78. *Id.* at 439.
79. *Id.*
80. *See supra* note 49 and accompanying text.
81. 502 U.S. 279 (1992).
82. *Burdick*, 504 U.S. at 434 (citing *Norman*, 502 U.S. at 289).
83. *Norman*, 502 U.S. at 288-89 ("To the degree that a State would thwart this interest by limiting the access of new parties to the ballot, we have called for the demonstration of a corresponding interest sufficiently weighty to justify the limitation, and we have accordingly required any

The Court quickly analyzed the asserted state interests of avoiding unrestrained factionalism and party raiding[84] and came to the conclusion that the legitimate state interests *outweighed* the burden on the right to vote.[85] The use of the word "outweighed" suggests the Court was using the balancing test interpretation of the *Anderson* standard. However, this may just be a result of the sliding-scale analysis as there inevitably must be a comparison between the burden on the right to vote and the state interest.

Justice Kennedy, joined by Justices Stevens and Blackmun, dissented in *Burdick*.[86] Justice Kennedy agreed with the majority opinion that *Anderson* was the correct standard, but seemed to follow the balancing test interpretation. Justice Kennedy believed the record showed that the write-in ban placed a significant burden on the right to vote[87] and was unnecessary to advance the state interests.[88] Justice Kennedy, therefore, would have declared the write-in ban unconstitutional as the state's asserted interests were insufficient "under any standard" to justify the limitation on the right to vote.[89]

Criticizing the majority opinion, Justice Kennedy stated: "The majority's analysis ignores the inevitable and significant burden a write-in ban imposes upon *some individual voters* by preventing them from exercising their right to vote in a meaningful manner."[90] This line of reasoning is also consistent with *Anderson*'s statement that a state would have a difficult time justifying a regulation that disproportionately burdened certain groups.[91] It is also significant to recognize the Court's cognizance of how election regulations can affect voters that fall within identifiable groups of the voting population at large.

Burdick further muddied the already murky *Anderson* water by injecting new language into the analysis. The *Burdick* Court replaced the *Anderson* requirement of looking at the legitimacy and strength of the state's interests with looking at the state's precise interests.[92] The Court did not define what "precise" interest means, which adds to the ambiguity of the *Anderson* standard. Further, the Court added that the state interests would have to be compelling and narrowly tailored to justify a

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severe restriction to be narrowly drawn to advance a state interest of compelling importance.") (internal citations omitted).

84. *Burdick*, 504 U.S. at 439-40.
85. *Id.* at 440.
86. *Id.* at 442 (Kennedy, J., dissenting).
87. *Id.*
88. *Id.* at 448.
89. *Id.* at 450.
90. *Id.* at 448 (emphasis added).
91. *See* Anderson v. Celebrezze, 460 U.S. 780, 793 (1983).
92. *Compare Anderson*, 460 U.S. at 789, *with Burdick*, 504 U.S. at 434. This alteration may be an import from Justice Rehnquist's dissent in *Anderson*. *See Anderson*, 460 U.S. at 817 (Rehnquist, J., dissenting).

severe burden on the right to vote.[93] Unfortunately, the Court did not announce how to measure the severity of a burden. Taken as a whole, the Court's language could be read as adopting either the sliding-scale or trigger interpretation of *Anderson*. The *Burdick* Court failed to relieve the interpretation ambiguity of *Anderson*, to announce a test to measure the severity of the burden on the right to vote, or to provide an answer as to what a precise state interest is.

Prior to the Supreme Court's decision in *Crawford*, five lower court cases decided the constitutionality of voter photo ID laws.[94] Three of these cases upheld the voter photo ID law, while the other two found the law unconstitutional.[95] The courts upholding the voter photo ID laws applied the flexible standard of *Burdick*[96] in determining the laws were not a severe burden on the right to vote.[97] However, in the cases holding the law unconstitutional, the District Court of New Mexico used the *Burdick* test and applied a level of scrutiny similar to that in *Anderson*, and the Supreme Court of Missouri rejected the *Burdick* test and used state constitutional law in declaring the law unconstitutional.[98] With courts following different interpretations of *Burdick*, measuring the burden on the right to vote differently, or being unwilling to follow *Burdick*, combined with the recent national prominence of voting rights,[99] the Supreme Court noted the importance of voter photo ID cases and granted certiorari to hear *Crawford*.[100]

II. *CRAWFORD V. MARION COUNTY ELECTION BOARD*[101]

Following the problems stemming from the 2000 Presidential Election, voter rights became an issue of national prominence. Congress passed legislation, such as the Help America Vote Act ("HAVA"), seeking to alleviate some of the issues faced in the 2000 election.[102] Former President Jimmy Carter and James A. Baker III co-chaired a commission that issued a report with recommendations on how to restore voter confi-

93. *Burdick*, 504 U.S. at 434 (citing Norman v. Reed, 502 U.S. 279, 289 (1992)).

94. *See* Schultz, *supra* note 13, at 503-22 (discussing Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008); Gonzalez v. Arizona, 485 F.3d 1041 (9th Cir. 2007); ACLU of N.M. v. Santillanes, 506 F. Supp. 2d 598 (D.N.M. 2007); Common Cause/Ga. v. Billups, 504 F. Supp. 2d 1333 (N.D. Ga. 2005); *In re* Request for Advisory Opinion Regarding Constitutionality of 2005 PA 71, 740 N.W.2d 444 (Mich. 2007); Weinshenck v. Missouri, 203 S.W.3d 201 (Mo. 2006)).

95. *Id.* at 521.

96. *Id.* By this time courts were referring to the *Anderson* standard as the "*Burdick* test." *See id.*

97. *Id.*

98. *Id.* at 522.

99. *See* Ordway, *supra* note 1, at 1174 ("Since the presidential election of 2000, a host of new claims has arisen alleging unlawful denial of the right to vote. Litigants have challenged the use of error-prone voting machines, misleading registration forms, and the highly controversial photo identification requirements for in-person voting.").

100. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1615 (2008).

101. 128 S. Ct. 1610 (2008).

102. *See* 42 U.S.C.A. § 15301(b)(1) (West 2008); *see also Crawford*, 128 S. Ct. at 1614 n.3, 1617-18 (discussing the requirements of HAVA).

dence and improve election procedures.[103] HAVA had a provision requiring voters to present identification at the time of voting with photo ID being one valid form of identification.[104] Similarly, the Carter-Baker Report suggested that photo IDs were necessary to combat in-person voter fraud.[105] Several states passed legislation to comply with HAVA, including Indiana.[106]

A. Facts

In 2005 Indiana enacted Senate Enrolled Act No. 483 ("SEA 483"),[107] requiring voters to present a valid, government-issued photo ID in order to cast an in-person vote at general and primary elections.[108] If a voter did not have the valid photo ID at the time of casting the vote, the voter could later bring the identification to the county clerk's office in order to have the vote counted.[109] The photo ID requirement was not applicable to mail-in absentee ballots.[110] SEA 483 excluded residents of state-licensed facilities from the requirement.[111] Impoverished voters or religious objectors could cast a provisional ballot that would be counted provided they executed an affidavit with the clerk of the circuit court within ten days after the election.[112] SEA 483 did not require a voter to present a photo ID in registering to vote but did require the voter to comply with the requirements of HAVA.[113]

B. Procedural History

Almost immediately after its enactment, multiple parties filed two suits seeking to enjoin enforcement[114] of SEA 483 as a violation of the First and Fourteenth Amendments, the Voting Rights Act,[115] and provisions of the Indiana Constitution.[116] After consolidating the suits in the Federal District Court for the Southern District of Indiana, Indiana inter-

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103. COMM'N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM 4 (2005), *available at* http://www.american.edu/ia/cfer/report/full_report.pdf [hereinafter CARTER-BAKER REPORT].

104. 42 U.S.C.A. § 15483(b)(2)(A)(i)(I) (West 2008).

105. *See* CARTER-BAKER REPORT, *supra* note 103, § 2.5.

106. Schultz, *supra* note 13, at 485-86.

107. S.B. 483, 114th Gen. Assemb., 1st Reg. Sess. (Ind. 2005).

108. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1613 (2008).

109. *Id.* at 1614 (citing IND. CODE ANN. § 3–11.7–5-2.5(b) (West 2006)).

110. *Id.* at 1613 (citing IND. CODE ANN. § 3–11–8-25.1(e) (West Supp. 2007)).

111. *Id.*

112. *Id.* at 1613-14 (citing IND. CODE ANN. § 3–11.7–5-2.5(c) (West 2006)).

113. *Id.* at 1614 n.3, 1617–18 (discussing the requirements of HAVA); *see also* 42 U.S.C.A. § 15483(b)(2)(A)(i)(II) (West 2008) (stating that HAVA did require a voter to include in her registration application some form of identification, e.g., bank statement, utility bill, paycheck, etc., for verification purposes).

114. *Crawford*, 128 S. Ct. at 1614.

115. 42 U.S.C.A. § 1971 (West 2008).

116. IND. CONST. art II, §§ 1, 2.

vened to defend the statute.[117] The District Court granted Indiana's motion for summary judgment because the plaintiffs failed to provide sufficient proof that SEA 483 would prevent any citizens from voting or would unduly burden their right to vote.[118]

On appeal, the Seventh Circuit rejected the petitioner's argument that the heightened scrutiny of *Harper* should apply.[119] In affirming the District Court's ruling, the Court of Appeals reasoned that the burden on the right to vote was offset by the state's interest in preventing voter fraud.[120]

The Court granted certiorari after four judges on the Seventh Circuit voted to rehear the case en banc.[121] In a plurality opinion, six justices agreed SEA 483 did not unduly burden the right to vote and affirmed the decision of the Seventh Circuit.

C. Plurality Opinions

The issue before the Court was whether the requirement of having to present a photo ID prior to casting an in-person vote or an early vote at the circuit court clerk's office is a violation of the Fourteenth Amendment.[122] The majority of the Court agreed SEA 483 was constitutional; however, the plurality opinions both purported to use the *Burdick* test but disagreed as to the interpretation of what the test was.[123]

1. Justice Stevens's Opinion

Chief Justice Roberts and Justice Kennedy joined Justice Stevens in his plurality opinion.[124] Justice Stevens discussed *Harper* to the extent that regulations that invidiously discriminate are unconstitutional but "'evenhanded restrictions that protect the integrity and reliability of the electoral process itself' are not invidious and satisfy the standard set forth in *Harper*."[125] Justice Stevens acknowledged there was no test in place to measure the severity of the burden a state election regulation places on the right to vote;[126] however, the state must still have legitimate interests to justify the burden no matter how slight the burden is.[127]

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117. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 782–83 (S.D. Ind. 2006), *aff'd sub nom.* Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007), *aff'd* 128 S. Ct. 1610 (2008); *see also Crawford*, 128 S. Ct. at 1614.

118. *Crawford*, 128 S. Ct. at 1614 (quoting *Ind. Democratic Party*, 458 F. Supp. 2d at 783).

119. *Id.* at 1615 (citing *Crawford*, 472 F.3d at 952 (7th Cir. 2007)).

120. *Id.*

121. *Id.*

122. *Id.* at 1613-14.

123. *Id.* at 1616 n.8; *see also id.* at 1624-25.

124. *Id.* at 1613.

125. *Id.* at 1616 (quoting Anderson v. Celebrezze, 460 U.S. 780, 788 n.9 (1983)).

126. *Id.* at 1616.

127. *Id.*

Justice Stevens then started his analysis by testing the legitimacy of the asserted state interests of preventing voter fraud, modernizing election procedures, and maintaining voter confidence.[128] Finding these interests legitimate, Justice Stevens turned to the burden on the right to vote, but noted that because of the facial challenge of SEA 483, the petitioners had a heavy burden of proof.[129] Justice Stevens found there to be little or no burden on the right to vote, thus the state's legitimate interests were sufficient to justify the requirements of SEA 483.[130]

Although claiming to follow *Anderson* and *Burdick*,[131] Justice Stevens's approach does not seem to fit any of the three possible interpretations. All three interpretations call for identifying the burden first and then analyzing the state interests. Justice Stevens's analysis began by verifying the state's legitimate interests, and when compared to no evidence of a burden on the right to vote, the state law was constitutional. Comparing the two interest may suggest he was using the balancing test interpretation. However, Justice Stevens's approach did not provide a test to measure the burden on the right to vote, which the balancing test interpretation of *Anderson* and *Burdick* requires.

2. Justice Scalia's Opinion

Justices Thomas and Alito joined Justice Scalia in his plurality opinion.[132] Justice Scalia believed the other plurality opinion misinterpreted *Burdick* as simply adopting the flexible *Anderson* standard.[133] Justice Scalia interpreted *Burdick* to reshape *Anderson* into a more rigid, two-tier analysis.[134] One tier of the analysis would allow for a deferential standard of review when a regulation is non-severe and nondiscriminatory.[135] The second tier of the analysis would require strict scrutiny for regulations producing severe burdens on the right to vote.[136] However, Justice Scalia was unclear as to what constitutes a severe burden, in one instance saying a severe burden goes "beyond the merely inconvenient," and in another saying a severe burden is "so burdensome as to be virtually impossible to satisfy."[137]

Justice Scalia believed it was of no importance that SEA 483 would burden some voters more than others.[138] Justice Scalia stressed that the regulation created a burden for all voters but just impacted voters diffe-

128. *Id.* at 1617-20.
129. *Id.* at 1621.
130. *Id.* at 1624.
131. *Id.* at 1616 n.8.
132. *Id.* at 1624 (Scalia, J., plurality opinion).
133. *Id.*
134. *Id.*
135. *Id.* (calling this tier a "deferential important regulatory interests standard") (internal quotation marks omitted).
136. *Id.*
137. *Id.* at 1625 (internal quotation marks omitted).
138. *Id.* at 1626.

rently.[139] Therefore, a law that applied to all voters would not violate the Equal Protection Clause and addressing these individual impacts would "effectively turn back decades of equal-protection jurisprudence."[140] Justice Scalia was unwilling to look at discriminatory effects; therefore, his definition of nondiscriminatory would only include facially non-discriminatory laws. Combining the first tier of Justice Scalia's analysis with an indifference to discriminatory effects would allow political party entrenchment to go unchecked, as many laws can be passed that produce a non-severe burden on the total population and are not discriminatory on their face.

Justice Scalia also believed a flood of litigation would occur if the courts were to review the impact of a regulation on individual voters, a task the Constitution relegated to the states.[141] Further, the uncertainty created by the plurality opinion "will embolden litigants who surmise that our precedents have been abandoned."[142] Although Justice Scalia's interpretation of *Burdick* would make great strides in eliminating the ambiguity and unpredictability of *Anderson* and *Burdick*, the plurality in *Crawford* does not provide guidance as to what interpretation the Court will apply in the future.

D. Dissenting Opinions

1. Justice Souter's Dissent

Justice Ginsburg joined in Justice Souter's dissent.[143] Justice Souter would have declared SEA 483 unconstitutional and remanded the case for further proceedings.[144] He agreed that the *Burdick* test guided the analysis but further qualified it by stating the state "must make a particular, factual showing that threats to its interests outweigh the particular impediments it has imposed."[145] He believed that Indiana had not made the requisite showing.[146]

Justice Souter started his analysis by identifying the "character and magnitude" of the burdens placed on the right to vote, which were the travel and costs associated with obtaining the required documentation or casting a provisional ballot.[147] In Justice Souter's opinion, the magnitude equated to how many voters would have to shoulder the burden. Using the district court's findings as an acceptable estimate[148] and adjusting that

139. *Id.* at 1625.
140. *Id.* at 1626.
141. *Id.* at 1626-27.
142. *Id.* at 1627.
143. *Id.* (Souter, J., dissenting).
144. *Id.* at 1643.
145. *Id.* at 1627.
146. *Id.* at 1643.
147. *Id.* at 1628.
148. *Id.* at 1632 (accepting estimate "that 43,000 voting-age residents lack the kind of identification card required by Indiana's law").

number downward for several factors, Justice Souter determined that tens of thousands of eligible voters would still be without a photo ID, many of whom would be in poor financial shape.[149] Finding that a significant number of residents would be discouraged or disabled from voting due to the burdens in place,[150] Justice Souter subjected the state interests to "more than a cursory examination."[151]

Justice Souter believed the asserted state interest should be shaved down to the precise interest and discounted to the extent the regulation is necessary to protect that interest.[152] Probing the state interests more deeply, Justice Souter found them insufficient to justify the burden on the right to vote.[153]

Justice Souter's approach follows the sliding-scale interpretation of *Anderson* and *Burdick*. His analysis is very similar to that of the *Anderson* Court in reviewing the necessity of the regulation and taking a close look at the state interests. Further, Justice Souter made an attempt to define how to measure the burden on the right to vote by stating that the quantity of voters that are burdened is determinative. However, this does not speak to the severity of a burden because it does not define what constitutes a severe burden. Does a severe burden mean a voter must be denied the right to vote or just have a very difficult time in casting a vote? In addition, how many people must a regulation affect before the burden moves into the severe category? Ultimately, Justice Souter's dissent will do little to clear up the ambiguity of *Anderson* and *Burdick* as he subscribed to a different interpretation than either of the plurality opinions. Justice Souter's attempt to define what a burden is also will do little to create a predictable measure.

2. Justice Breyer's Dissent

Justice Breyer applied the standard he articulated in *Nixon v. Shrink Missouri Government PAC*,[154] which he described as similar to the standard used by Justice Stevens and Justice Souter.[155] Under this standard, Justice Breyer would:

> [B]alance the voting-related interests that the statute affects, asking whether the statute burdens any one such interest in a manner out of proportion to the statute's salutary effects upon the others (perhaps,

149. *Id.* at 1634.
150. *Id.*
151. *Id.*; *see also id.* at 1635 ("But having found the Voter ID Law burdens far from trivial, I have to make a rigorous assessment of the precise interests put forward by the State . . . .") (internal quotation marks omitted).
152. *Id.* at 1636.
153. *Id.* at 1642-43.
154. 528 U.S. 377, 402 (2000) (Breyer, J., concurring).
155. *Crawford*, 128 S. Ct. at 1643 (Breyer, J., dissenting).

but not necessarily, because of the existence of a clearly superior, less restrictive alternative).[156]

Justice Breyer acknowledged that the Carter-Baker Report recommended states require photo ID but noted that the recommendation was conditional on the IDs being free to voters and the regulations "phased in over two federal election cycles."[157] Considering Justices Stevens and Souter's analyses of the state interests in conjunction with the findings of the Carter-Baker Report, Justice Breyer believed that SEA 483 created a disproportionate burden on voters who did not have a government-issued photo ID.[158]

Justice Breyer, like Justice Souter, believed that SEA 483 imposed a "significantly harsher, unjustified burden"[159] on the poor, elderly, and disabled due mainly to costs involved in obtaining the documentation required to get a photo ID.[160] The cost of obtaining a copy of a birth certificate could be as much as $12, a passport up to $100, and some people may not even know how to go about obtaining these documents.[161] Furthermore, the exception for not presenting a photo ID at the polling place added the additional burden of making more than one trip in order to execute a vote by provisional ballot.[162] Justice Breyer believed this additional burden was particularly problematic in those Indiana counties that lacked public transportation.[163]

Finally, Justice Breyer believed there were less restrictive alternatives to SEA 483.[164] He cited Georgia and Florida as examples of states that had passed voter photo ID laws but had requirements less restrictive than those of SEA 483.[165] Additionally, Indiana made the regulations effective immediately without the phase-in period suggested by the Carter-Baker Report.[166]

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156. *Id.* (internal quotation marks omitted).

157. *Id.* at 1644; Carter-Baker Report, *supra* note 103, §§ 2.5, 2.5.3.

158. *Crawford*, 128 S. Ct. at 1645.

159. *Id.*

160. *Id.* at 1644.

161. *Id.* Justice Breyer noted, by way of comparison, that the $1.50 poll tax—declared unconstitutional in *Harper*—would be less than $10 today.

162. *Id.* (citing *Crawford*, 128 S. Ct. at 1616-17 (Souter, J., dissenting)).

163. *Id.* (citing Justice Souter's dissent, which stated 21 of Indiana's 92 counties have no public transportation and an additional 32 counties only regional county service).

164. *Id.* at 1643 (quoting Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 402 (2000)).

165. *Id.* at 1644–45; *see* FLA. STAT. ANN. §§ 101.043(1)–(2), 101.048(2)(b) (West 2008); GA. CODE ANN. §§ 21–2–381, 21–2–417 (West 2007). The Florida and Georgia laws allow the voter a greater range of acceptable forms of identification to present when voting, similar to the list supplied by HAVA.

166. *Crawford*, 128 S. Ct. at 1640 (Souter, J., dissenting).

III. ANALYSIS

The decision in *Crawford* was, for the most part, dissatisfying because the plurality opinion did not provide a clear legal standard.[167] The Court neither resolved the ambiguity of *Burdick* nor did it provide a test on how to measure a burden on the right to vote. Justice Scalia's opinion was the closest to offering a workable solution, but his rule would make virtually all election laws constitutional. The downside to such an outcome is political party entrenchment and discriminatory effects will be ignored when considering election law challenges. This Comment suggests developing a rule courts can administer with clarity and predictability, while being cognizant of the ill effects and purposes behind some election laws. Finally, one significant teaching from *Crawford* is that succeeding on a facial challenge of a law will be difficult—especially without evidence of an actual harm. Future litigants now know an as-applied challenge will be the necessary avenue in order to challenge voter photo ID laws. This section closes by speculating on the outcome of *Crawford* had there been evidence of a voter who was unable to obtain a photo ID.

A. Questions Unresolved

The *Crawford* decision becomes less tidy when one considers the questions that were left unresolved. First and foremost, what is the *Burdick* test? There are three possible interpretations of the approach announced in *Anderson* and *Burdick*. Unfortunately, *Crawford* provided no guidance on the correct interpretation. Second, how does a court measure the severity of a burden on the right to vote? In *Crawford* the Court recognized there was no test to determine the magnitude or severity of the burden but failed to articulate a test for future guidance. The Court's lack of guidance on these issues could possibly leave lower courts grappling with a slew of new cases that may arise after the 2008 presidential election;[168] however, these cases will most likely have real plaintiffs who were not able to vote due to lack of a photo ID.

The first question lower courts will have to confront is what is the *Burdick* test? Justice Stevens believed that *Burdick* reaffirmed the flexible approach announced in *Anderson*,[169] but he did not offer guidance as to which interpretation. However, Justice Stevens started his analysis by discussing the state interests instead of identifying the severity of the

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167. *Id.* at 1627 (Scalia, J., plurality opinion) ("The lead opinion's record-based resolution of these cases, which neither rejects nor embraces the rule of our precedents, provides no certainty, and will embolden litigants who surmise that our precedents have been abandoned.").

168. *See generally* Posting of Michael C. Dorf to Dorf on Law, http://www.michaeldorf.org/2008/04/roberts-court-on-facial-challenges.html (Apr. 29, 2008, 14:43 EST).

169. *Crawford*, 128 S. Ct. at 1616 n.8 (Stevens, J., plurality opinion).

burden on the right to vote.[170] Under any interpretation of *Burdick*, the character and magnitude of the burden must be determined before proceeding to an inquiry of the state interests.[171] This deviation from *Burdick* may simply have been a matter of form over substance, as Justice Stevens later stated that due to the absence of any evidence in the record the magnitude of the burden could not be measured.[172]

Justice Scalia disagreed with the other plurality opinion in that *Burdick* simply adopted the balancing test from *Anderson*.[173] Interestingly, though, Justice Scalia joined the majority opinion in *Burdick* that explicitly stated *Anderson* was the correct standard for evaluating burdens on the right to vote.[174] However, in *Crawford* he believed that *Burdick* refined *Anderson's* sliding scale "into something resembling an administrable rule" by creating a two-tier analysis.[175] The first tier would allow deference to the state for important regulatory interests when the challenged law was non-severe and nondiscriminatory.[176] The second tier would subject laws imposing a severe burden on the right to vote to strict scrutiny.[177] Burdens that are merely inconvenient and applicable to the general public are not severe.[178] Thus, in Justice Scalia's opinion, *Burdick* refashioned the sliding scale of *Anderson* into the interpretation where a severe burden would trigger strict scrutiny.

It seems plausible, however, the *Burdick* Court did not intend this result. First, as previously stated, the *Burdick* Court explicitly stated *Anderson* was the controlling standard.[179] Although one of the interpretations of *Anderson* is a strict scrutiny trigger, neither *Anderson* nor *Burdick* expressly stated it was using that interpretation. The *Burdick* Court could have simply held that the burden on the right to vote was non-severe and the state's reasonable, nondiscriminatory restriction sufficiently justified the burden. Second, prior to explaining the *Anderson* standard, the *Burdick* Court stated that "a more flexible standard applies," as opposed to subjecting all election laws to strict scrutiny.[180] This statement seems contrary to an intention to create a rigid, two-tier approach in analyzing restrictions on the right to vote. Finally, *Burdick* incorporated language stating that severe burdens on the right to vote

170. *Id.* at 1616.
171. Anderson v. Celebrezze, 460 U.S. 780, 789 (1983).
172. *Crawford*, 128 S. Ct. at 1622 (Stevens, J., plurality opinion).
173. *Id.* at 1624 (Scalia, J., plurality opinion).
174. Burdick v. Takushi, 504 U.S. 428, 438 (1992); *Crawford*, 128 S. Ct. at 1616 n.8 (Stevens, J., plurality opinion) ("The *Burdick* opinion was explicit in its endorsement and adherence to *Anderson* . . . .") (citing *Burkick*, 504 U.S. 428 at 434).
175. *Crawford*, 128 S. Ct. at 1624 (Scalia, J., plurality opinion).
176. *Id.*
177. *Id.* Justice Scalia, in a parenthetical, seemed to suggest a severe burden is such where a law is "so burdensome as to be virtually impossible to satisfy." *Id.* at 1625.
178. *Id.* at 1625 (citing Storer v. Brown, 415 U.S. 724, 728–29 (1974)).
179. *Burdick*, 504 U.S. at 438.
180. *Id.* at 433-34.

require strict scrutiny and a "State's important regulatory interests are generally sufficient to justify [reasonable, non-discriminatory] restrictions."[181] The quoted phrase originated in *Anderson*,[182] which the Court immediately followed by stating there was no litmus test to distinguish between valid and invalid restrictions.[183] In addition, the use of the phrase "generally sufficient" suggests a balancing or sliding-scale aspect to a test because "generally" does not mean "always" and leaves open the possibility that some reasonable, non-discriminatory restrictions are not justifiable. This further supports the idea that the Court did not intend to create a bright-line rule between valid and invalid restrictions.

After deciding which interpretation of *Burdick* to follow, the lower courts will have to decide how to measure the burden on the right to vote. Applying Justice Scalia's interpretation will, in essence, foreclose the matter as nearly all reasonable, nondiscriminatory state election laws will be upheld unless the burden is severe.[184] However, if a lower court accepts *Burdick* as either the balancing test or sliding-scale interpretation of *Anderson*, then it will have to determine how to measure the severity of the burden on the right to vote.[185]

In *Crawford* Justice Stevens acknowledged that there was no "litmus test for measuring the severity of a burden a state law imposes on" the right to vote.[186] This fact was quite obvious as, looking at the same evidence, Justice Stevens found a limited burden[187] and Justice Souter found more than a trivial burden.[188] Undoubtedly, the availability of a bypass, such as the provisional ballot in SEA 483, affects the burden on the right to vote.[189] However, the availability of bypasses is not conclusive in measuring the burden either, as Justice Stevens believed the provisional ballot lowered the burden[190] and Justice Souter believed it increased the burden.[191] Furthermore, in *Burdick*, Justice Stevens joined in Justice Kennedy's dissent, who did not believe Hawaii's mechanisms for ballot access lowered the burden on the right to vote.[192]

Justice Scalia's two-tier analysis would make measuring the burden unnecessary. Unfortunately, this resolution would come with the side

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181. *Id.* at 434.
182. Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).
183. *Id.* at 789.
184. *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1624-25 (2008) (Scalia, J., plurality opinion).
185. *Anderson*, 460 U.S. at 789.
186. *Crawford*, 128 S. Ct. at 1616 (Stevens, J., plurality opinion).
187. *Id.* at 1623.
188. *Id.* at 1635 (Souter, J., dissenting).
189. *See id.* at 1621 (Stevens, J., plurality opinion); *id.* at 1631-32 (Souter, J., dissenting); Burdick v. Takushi, 504 U.S. 428, 435-36 (1992).
190. *Crawford*, 128 S. Ct. at 1621 (Stevens, J., plurality opinion).
191. *Id.* at 1631-32 (Souter, J., dissenting).
192. *See Burdick*, 504 U.S. at 448.

effect that nearly all election laws would be held constitutional.[193] Only regulations that were facially discriminatory or made it virtually impossible for anyone to vote would be unconstitutional.[194]

However, fashioning the *Anderson* standard into a more rigid legal rule does have a benefit. There is evidence that legal doctrine, more so than standards, constrains judicial ideology.[195] There is strong support for the proposition that judges ruled along political party lines in the voter photo ID cases in Indiana, Michigan, Georgia, Arizona, Missouri, and New Mexico.[196] Similarly, it is more likely for Democratic judges than for Republican judges to rule in favor of claims brought under Section 2 of the Voting Rights Act.[197] On the extreme end, one need look no further than *Bush v. Gore*[198] to ascertain the pitfalls of partisan ideology in judicial decision-making.[199] Commenting on the result in *Bush v. Gore*, Dean Erwin Chemerinsky noted that the Supreme Court "invented new constitutional rules and disregarded old ones to decide a presidential election," and concluded the decision was inexplicable except for partisanship ideology.[200] Indeed, Justice Stevens's dissent in *Bush v. Gore* suggests the real loser in the case was "the Nation's confidence in the judge as an *impartial* guardian of the rule of law."[201]

The negative effects would largely outweigh the positive effects of adopting Justice Scalia's rule. Many election laws that sought to entrench political parties through disproportionately burdening the right to vote of groups that share a political ideology would pass constitutional muster under the guise of reasonable and nondiscriminatory regulations.

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193. *See* Posting of Dan Tokaji to Election Law @ Moritz, http://moritzlaw.osu.edu/blogs/tokaji/2008_04_01_equalvote_archive.html (Apr. 29, 2008 06:53 CST) [hereinafter Tokaji].

194. *Crawford*, 128 S. Ct. at 1624 (Scalia, J., plurality opinion).

195. Adam B. Cox & Thomas J. Miles, *Judicial Ideology and the Transformation of Voting Rights Jurisprudence* 1 (Univ. of Chi., Pub. Law Working Paper No. 231, 2008), *available at* http://ssrn.com/abstract=1260998.

196. Christopher S. Elmendorf, *Undue Burdens on Voter Participation: New Pressures for a Structural Theory of the Right to Vote*, 35 HASTINGS CONST. L.Q. 643, 646-47, app. at 703 (2008) ("By way of summary, Democratic judges have expressed 'anti' views on the constitutionality of photo ID requirements 14 times, and 'pro' views only 3 times. For Republican judges, the respective numbers are 3 (anti) and 15 (pro).").

197. Cox & Miles, *supra* note 194, at 1. Section 2 of the Voting Rights Act provides in part: "No person acting under color of law shall - - (A) in determining whether any individual is qualified under State law or laws to vote in any election, apply any standard, practice, or procedure different from the standards, practices, or procedures applied under such law or laws to other individuals within the same county, parish, or similar political subdivision who have been found by State officials to be qualified to vote." 42 U.S.C.A. § 1971 (West 2008).

198. 531 U.S. 98 (2000).

199. Erwin Chemerinsky, *Further Thoughts*, 54 OKLA. L. REV. 59, 60 (2001).

200. *Id.* at 60. Dean Chemerinsky supported this contention by stating "[n]o prior case ever had found that differences within a state in counting ballots violates equal protection. For decades, the Supreme Court emphasized that state courts have the final say in interpreting state law; yet, the Supreme Court ended the counting because it believed Florida law required that result." *Id.*

201. *Bush*, 531 U.S. at 129 (Stevens, J., dissenting) (emphasis added).

Justice Scalia noted in *McConnell v. Federal Election Commission*[202] that those in power will instinctively try to keep it, with the best way to achieve that being the "suppression of election-time speech."[203] The *Harper* Court declined to discuss the current motivation behind the poll tax;[204] however, one-year prior to *Harper*, in *Harman v. Forssenius*,[205] the Court did discuss the original purpose behind Virginia's poll tax. The *Harman* Court looked to the legislative history of the poll tax to determine that its purpose was to circumvent the Fifteenth Amendment and disenfranchise African-Americans.[206] In support of the idea that election regulations can be an effective means to disenfranchise certain groups of citizens, Carter Glass[207] at the 1901-02 Virginia Constitutional Convention stated:

> Discrimination! Why, that is precisely what we propose; that, exactly, is what this Convention was elected for—to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every negro voter who can be gotten rid of, legally, without materially impairing the numerical strength of the white electorate.[208]

Indeed, within three months of becoming effective, the poll tax in *Harper* reduced the number of African-Americans registered to vote from 147,000 to 22,000.[209]

In *Clingman v. Beaver*,[210] Justice O'Connor echoed these concerns by recognizing that the political party in power has an incentive to shape election laws in order to retain power.[211] According to Justice O'Connor, under the *Burdick* test the Court's function is a limited but important one as a check against legislative action.[212] A heightened level of scrutiny

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202. 540 U.S. 93 (2003).

203. *Id.* at 263 (Scalia, J., concurring in part, dissenting in part, and concurring in the judgment in part).

204. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 n.3 (1966).

205. 380 U.S. 528 (1965).

206. *See id.* at 543. *See also* Va. Historical Soc'y, The Civil Rights Movement in Virginia—Voting Rights, http://www.vahistorical.org/civilrights/vote.htm (last visited Dec. 18, 2008) [hereinafter Voting Rights].

207. Carter Glass served in the Virginia Senate from 1899-1903, then enjoyed a long career as a Representative and Senator from Virginia in the United States Congress, eventually serving as the Secretary of the Treasury for the United States from 1918-20. Biographical Directory of the U.S. Congress, GLASS, Carter, http://bioguide.congress.gov/scripts/biodisplay.pl?index=G000232 (last visited Dec. 18, 2008).

208. *Harman*, 380 U.S. at 543 (quoting 2 VA. CONSTITUTIONAL CONVENTION (1901-1902), REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, STATE OF VIRGINIA: HELD IN THE CITY OF RICHMOND, JUNE 12, 1901, TO JUNE 26, 1902, at 2937, 3076–77 (J.H. Lindsay, ed., Hermitage Press 1906)). The Court noted that this was the general theme of the poll tax discussion with the only real debate occurring as to the effectiveness of the poll tax in disenfranchising African-Americans. *Id.* at 543 n.23.

209. Voting Rights, *supra* note 206.

210. 544 U.S. 581 (2005).

211. *Id.* at 603 (O'Connor, J., concurring in part and concurring in the judgment).

212. *Id.* at 602-03.

should be used when election regulations have "discriminatory effects"[213] because "there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition."[214]

Yet in *Crawford*, very little attention was paid to the evidence of entrenchment. Justice Stevens devoted a single paragraph discussing the evidence of entrenchment.[215] Fifty-two out of fifty-two Republican House members voted for SEA 483, while forty-five out of forty-eight Democrats (three were excused from voting) voted against it.[216] In addition, thirty-three out of thirty-three Republicans in the Senate voted for SEA 483 and seventeen out of seventeen Democrats voted against it.[217] Each of the opinions and dissents recognized that the burden SEA 483 placed on the right to vote would most likely fall on the poor.[218] Justice Stevens recognized that partisanship may have played a large part in the enactment of SEA 483, however, only if partisanship was the *sole reason* the law was passed would it be declared unconstitutional.[219]

B. A New Rule for Reviewing Election Regulations

The *Anderson* standard was the result of an effort to balance the individual's fundamental right to vote and the state's constitutional right to manage election procedures.[220] Voter rights issues came to national prominence after the problems experienced in the 2000 presidential election,[221] culminating in *Bush v. Gore*.[222] The complexity of these issues may not have been contemplated by the *Anderson* court in developing the flexible standard. The Court's interpretation and application of the *Anderson* standard after *Burdick* has yielded inconsistent results, with judicial political ideology playing a role in the decisions.[223] This unpre-

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213. Throughout Part III of this Comment the phrase "discriminatory effect" is synonymous with disparate impact, discriminatory impact, or disproportionate impact.

214. *Clingman*, 544 U.S. at 603.

215. Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1623-24 (2008) (Stevens, J., plurality opinion).

216. *Id.* at 1624 n.21.

217. *Id.*

218. *Id.* at 1621 ("[A] somewhat heavier burden may be placed on a limited number of persons. They include . . . persons who because of economic or other personal limitations may find it difficult either to secure a copy of their birth certificate or to assemble the other required documentation to obtain a state-issued identification . . . ."); *id.* at 1625 (Scalia, J., plurality opinion) ("The Indiana law affects different voters differently, but what petitioners view as the law's several light and heavy burdens are no more than the different impacts of the single burden that the law uniformly imposes on all voters.") (citation omitted); *id.* at 1634 (Souter, J., dissenting) ("Tens of thousands of voting-age residents lack the necessary photo identification. A large proportion of them are likely to be in bad shape economically.") (citations omitted); *id.* at 1644 (Breyer, J., dissenting) ("[A]n Indiana nondriver, most likely to be poor, elderly, or disabled, will find it difficult and expensive to travel to the Bureau of Motor Vehicles."); *id.* at 1644 (Breyer, J., dissenting) ("[T]his statute imposes a disproportionate burden upon those without valid photo IDs.").

219. *Id.* at 1624 (Stevens, J., plurality opinion).

220. Anderson v. Celebrezze, 460 U.S. 780, 788 (1983).

221. *See* Schultz, *supra* note 13, at 485-86.

222. 531 U.S. 98 (2000).

223. *See supra* Part III.A.

dictability suggests the *Anderson* standard needs to be refined into an "administrable rule"[224] or test.

The foundation of this proposed rule is that the right to vote is a fundamental right.[225] The right to vote is of the utmost importance in a democratic society because it allows a voice that protects and preserves all other rights guaranteed by the Constitution.[226] The protest that sparked the Revolutionary War was based on the theory of no taxation without representation.[227] The founding of the United States was based on the citizen's right to have a voice in the government through representation and although through the years the citizens allowed to vote have changed,[228] the right itself has not. Although this rule supports an idea that Justice Scalia described as "turn[ing] back decades of equal-protection jurisprudence,"[229] it is this Comment's position that the plurality opinions in *Crawford* did not place enough value on the fundamental right to vote.[230]

The new framework would begin with the presumption that election laws are constitutional.[231] This must be the starting point in order to preserve the state's express constitutional right to manage election procedures.[232] This starting point also stays true to the rule from *Anderson* and *Burdick* that reasonable, nondiscriminatory regulations will generally be constitutional.[233] However, if there is evidence of political party entrenchment or the law has a discriminatory effect, then the level of analysis would be raised to intermediate scrutiny. [234] The combination of evi-

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224. *Crawford*, 128 S. Ct. at 1624 (Scalia, J., concurring in the judgment) ("Although *Burdick* liberally quoted *Anderson*, *Burdick* forged *Anderson's* amorphous 'flexible standard' into something resembling an administrable rule.") (quoting Burdick v. Takushi, 504 U.S. 428, 434 (1992)).

225. *See* Clingman v. Beaver, 544 U.S. 581, 599 (2005) (O'Connor, J., concurring in part and concurring in the judgment) (quoting Wesberry v. Sanders, 376 U.S. 1, 17 (1964)); *Burdick*, 504 U.S. at 433 (quoting Ill. Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 184 (1979)); *Anderson*, 460 U.S. at 788; Harper v. Va. State Bd. of Elections, 383 U.S. 663, 667 (1966) (quoting Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

226. *See Wesberry*, 376 U.S. at 17.

227. UK Parliament, "No Taxation Without Representation"—Britain, America and the 1765 Stamp Act, http://www.parliament.uk/parliamentary_publications_and_archives/parliamentary_archives/archives___stamp_act.cfm (last visited on Dec. 18, 2008).

228. *See* Schultz, *supra* note 13, at 484.

229. *Crawford*, 128 S. Ct. at 1626 (Scalia, J., plurality opinion).

230. Neither Justice Stevens's, nor Justice Scalia's opinion mentioned that voting was a fundamental right. *See id.* at 1613-24 (Stevens, J.), 1624-27 (Scalia, J., plurality opinion).

231. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 628 (1969).

232. U.S. CONST. art. I, § 4, cl. 1; Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1191 (2008).

233. *See* Anderson v. Celebrezze, 460 U.S. 780, 788 (1983); *see also* Burdick v. Takushi, 504 U.S. 428, 434 (1992).

234. *See* Recent Cases, *Constitutional Law—Voting Rights—Seventh Circuit Upholds Voter ID Statute*, 120 HARV. L. REV. 1980, 1984-86 (2007) [hereinafter *Voting Rights*]. The *Voting Rights* article advocates a raised level of scrutiny, similar to the review used of campaign finance laws, that would look more to the "process by which such laws were enacted . . . ." *Id.* at 1985. The analysis would also "take a peek" at the effects of such regulations. *Id.* This comment suggests that evidence of entrenchment or discriminatory effect should raise the level of scrutiny to intermediate; the pres-

dence of both entrenchment and discriminatory effect would trigger strict scrutiny.[235] An intermediate level of scrutiny will shift the burden of proof to the state to provide evidence that the law is necessary to effectuate an important state interest.[236] Strict scrutiny will require a showing that the law is narrowly tailored to achieve a compelling state interest.[237]

Political party entrenchment is repugnant to the presumption of constitutionality and goal of democracy—that state legislatures can be held accountable by the constituency they represent.[238] Election regulations are the most logical way to achieve entrenchment.[239] Justice Rehnquist noted in his dissent in *Anderson* that it was the Court's duty to ensure the state was not trying to maintain the status quo through election regulations.[240] Evidence of entrenchment should remove the presumption of constitutionality and allow a court to take a closer look at the challenged law to ensure "the State's asserted interests are not merely a pretext for exclusionary or anticompetitive restrictions."[241]

Evidence of discriminatory effect should also trigger intermediate scrutiny. The strongest authority for this proposition is *Washington v. Davis*,[242] holding that discriminatory impact does not imply the regulation was passed with a discriminatory purpose. The Court had strong policy reasons for its holding in that subjecting all laws having a discriminatory impact to strict scrutiny would invalidate a great deal of legislation.[243] The Court was careful to state that discriminatory impact was not irrelevant and it would be viewed in conjunction with the facts on the record.[244] Applying intermediate scrutiny to election laws that have a discriminatory impact would not upset the policy considerations contemplated by the *Davis* Court.[245]

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ence of both entrenchment and discriminatory effect should trigger strict scrutiny. *See also* Clingman v. Beaver, 544 U.S. 581, 603 (2005) (O'Connor, J., concurring in part and concurring in the judgment) (noting heightened scrutiny should be used in cases where discriminatory effects are present).

235. *See infra* note 250.

236. *See Anderson*, 460 U.S. at 789 ("In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.").

237. *Burdick*, 504 U.S. at 434 ("[W]hen those rights are subjected to severe restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance.").

238. *See* Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 628 (1969); Reynolds v. Sims, 377 U.S. 533, 568 (1964) ("The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races."); *Voting Rights*, *supra* note 233, at 1986.

239. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 263 (2003).

240. *Anderson*, 460 U.S. at 817 (Rehnquist, J., dissenting).

241. Clingman v. Beaver, 544 U.S. 581, 603 (2005).

242. *See* 426 U.S. 229, 242 (1976).

243. *Id.* at 248.

244. *Id.* at 241-42.

245. The contested regulation in *Davis* was "Test 21," a test to determine minimum verbal and communicative skill, which applicants for the police academy were required to take. *Id.* at 234. The Supreme Court found no error in the District Court's finding that the test was "directly related to the

In suggesting that evidence of discriminatory effect trigger intermediate scrutiny it is relevant to note the *Davis* Court held that discriminatory effect alone was not sufficient to trigger *strict scrutiny*.[246] In addition, the respondents in *Davis* did not suffer a complete deprivation of the right to work, just in their chosen profession.[247] There is evidence that some voters—more likely African-Americans and Hispanic-Americans—will be completely deprived of their right to vote as a result of voter photo ID laws.[248]

Finally, evidence of both entrenchment and discriminatory effect should warrant strict scrutiny. Justice Stewart noted, in his concurring opinion in *Davis*, "that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume."[249] The majority noted that although discriminatory impact was not the sole touchstone to trigger strict scrutiny, it was not irrelevant either.[250] The Court further noted that a discriminatory purpose could "be inferred from the totality of the relevant facts."[251] Taken together, these statements suggest the record need not contain an overabundance of evidence to push discriminatory impact into discriminatory purpose and thus trigger strict scrutiny. This Comment suggests that evidence of entrenchment, combined with evidence of discriminatory impact, is sufficient to trigger strict scrutiny.

C. Facial Challenges

Although *Crawford* did not settle the proper interpretation of *Burdick*, what Justice Stevens made clear is that a facial challenge, where the record contains little or no evidence of an actual harm, has little chance of prevailing.[252] State laws carry with them a presumption of constitutionality.[253] As a result of this presumption, a state need only offer legitimate interests as justification for the law—without necessarily provid-

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requirements of the police training program." *Id.* at 251-52. Further, this contention "was supported by a validation study, as well as by other evidence of record." *Id.* Under intermediate scrutiny, Test 21 would comply with the requirement of a necessary regulation to effectuate an important state interest.

246. *Id.* at 242.

247. *See id.* at 232–33.

248. *See* Schultz, *supra* note 13, at 501-03.

249. *Davis*, 426 U.S. at 254 (Stewart, J., concurring in part and concurring in the judgment).

250. *Id.* at 242.

251. *Id.*

252. *See* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1621-22 (2008); *see also* Sabri v. United States, 541 U.S. 600, 609 (2004) ("We add an afterword on Sabri's technique for challenging his indictment by facial attack on the underlying statute, and begin by recalling that facial challenges *are best when infrequent.*") (emphasis added); *see also* Ayotte v. Planned Parenthood of N. New Eng., 546 U.S. 320, 328-29 (2006) ("We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact.") (citation omitted).

253. Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 628 (1969).

ing any evidence.[254] A plaintiff, on the other hand, must present evidence that an actual harm has occurred.[255] This principle was evident in *Washington State Grange v. Washington State Republican Party*,[256] a case decided approximately one month prior to *Crawford*, where the Court denied a facial challenge to Washington's Initiative 872 ("I-872").[257]

The Washington State Republican Party ("Party") filed suit almost immediately after implementation of I-872 seeking to have the law declared facially invalid.[258] The Party believed that the candidates' party designations on the ballot would confuse voters.[259] It argued that voters would assume a candidate was the nominee of the party he designated on the ballot, or at least believe the party supported the candidate, thus violating their associational rights.[260] Similar to *Crawford*, in *Washington State Grange* the Court would have to speculate as to the burden caused by the new ballot. In concluding that I-872 was constitutional,[261] the Court acknowledged that it was *possible* voters could be confused but there was "no evidentiary record against which to assess [the Party's] assertions that voters [would] be confused."[262]

Prior to reaching its decision, the Court laid out significant obstacles to overcome in order to prevail on a facial challenge.[263] The Court noted that it must resist the temptation to "speculate about hypothetical or imaginary cases."[264] The following passage is of particular importance in understanding Justice Stevens's opinion in *Crawford*:

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records. Facial challenges also run contrary to the funda-

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254. *See* Posting of Rick L. Hasen to FindLaw, http://writ.lp.findlaw.com/commentary/20080326_hasen.html#bio (Mar. 26, 2008).

255. *Id.*

256. 128 S. Ct. 1184 (2008).

257. *Id.* at 1187 ("The People's Choice Initiative of 2004, or Initiative 872 (I-872), provides that candidates for office shall be identified on the ballot by their self-designated party preference; that voters may vote for any candidate; and that the top two votegetters for each office, regardless of party preference, advance to the general election.") (internal quotation marks omitted).

258. *Id.* at 1189.

259. *Id.* at 1193.

260. *Id.*

261. *Id.* at 1195.

262. *Id.* at 1194. The Court further noted the record did not contain the new style of ballot because they had not been created yet; therefore, there was no way to determine how the party preference would appear on the ballots. *Id.*

263. *Id.* at 1190-91 ("[A] plaintiff can only succeed in a facial challenge by 'establish[ing] that no set of circumstances exists under which the Act would be valid . . . .'") (second alteration in original) (quoting United States v. Salerno, 481 U.S. 739, 745 (1987)); *see also* Crawford v. Marion County Election Bd., 128 S. Ct. 1610, 1621 (2008) ("Given the fact that petitioners have advanced a broad attack on the constitutionality of SEA 483, seeking relief that would invalidate the statute in all its applications, they bear a heavy burden of persuasion.").

264. *Wash. State Grange*, 128 S. Ct. at 1190 (internal quotation marks omitted).

> mental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution. We must keep in mind that a ruling of unconstitutionality frustrates the intent of the elected representatives of the people.[265]

In *Crawford*, Justice Stevens stated that the Court's reasoning in *Washington State Grange* applied "with added force to the arguments advanced by [the] petitioners in these cases."[266] Like the plaintiffs in *Washington State Grange*, the plaintiffs in *Crawford* filed suit shortly after SEA 483 was enacted.[267] In *Crawford*, the District Court,[268] the Seventh Circuit,[269] and the Supreme Court[270] all stressed that the record contained no evidence that any voter would be unable to vote due to the photo ID law. The lack of evidence proved fatal in both cases.[271]

Professor Richard Hasen suggested the strong stance on facial challenges in *Washington State Grange* set the stage for the more controversial issue of the voter photo ID law in *Crawford*.[272] However, the Court did state that it recognized the importance of the voter photo ID law cases.[273] It is hard to imagine that the Court granted certiorari with the idea that it would simply deny the plaintiffs facial challenge, especially considering the District Court and Court of Appeals had already done that.[274] A more plausible explanation is that the plurality opinions could not agree on an interpretation of *Burdick*. Disposing of the case via the facial challenge kept the Court from pronouncing an interpretation of *Bur-*

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265. *Id.* at 1191 (internal brackets omitted) (internal citations omitted) (internal quotation marks omitted).

266. *Crawford*, 128 S. Ct. at 1622.

267. *Id.* at 1614.

268. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 783 (S.D. Ind. 2006), *aff'd sub nom.* Crawford v. Marion County Election Bd., 472 F.3d 949, 952 (7th Cir. 2007), *aff'd* 128 S. Ct. 1610, 1623 (2008).

269. *Crawford*, 472 F.3d at 952.

270. *Crawford*, 128 S. Ct. at 1622-23.

271. *Id.* at 1615 ("[T]he District Court and the Court of Appeals correctly concluded that the evidence in the record is not sufficient to support a facial attack on the validity of the entire statute . . ."); Wash. State Grange v. Wash. State Republican Party, 128 S. Ct. 1184, 1193 (2008) ("But these cases involve a facial challenge, and we cannot strike down I-872 on its face based on the mere possibility of voter confusion.").

272. Hasen, *supra* note 254. Professor Hasen calls this the "unfair double standard" because the state can justify its election law by "merely positing—not proving—the existence of voter confusion or another interest. However, if voters (or groups) want to challenge a law, then they need to come forward with actual evidence of confusion or another burden. For them to posit the risk of confusion is not enough." Hason, *supra* note 254; *see also* Schultz, *supra* note 13, at 521–22.

273. *Crawford*, 128 S. Ct. at 1615.

274. Ind. Democratic Party v. Rokita, 458 F. Supp. 2d 775, 845 (S.D. Ind. 2006), *aff'd sub nom.* Crawford v. Marion County Election Bd., 472 F.3d 949 (7th Cir. 2007), *aff'd* 128 S. Ct. 1610 (2008); *Crawford*, 472 F.3d at 954.

dick that Chief Justice Roberts and Justices Stevens and Kennedy could not agree with.

It is possible the outcome in *Crawford* would have been drastically different had the plaintiffs produced one person that was unable to vote due to SEA 483.[275] The difference in the record between *Crawford* and *Burdick* is that in *Burdick* there was evidence of an actual harm to Alan Burdick, a voter who claimed he would not be able to vote for the candidate of his choice due to Hawaii's ban on write-in voting.[276] As previously noted, Justice Kennedy, joined by Justice Stevens, authored the dissent in *Burdick*.[277] In *Crawford*, Justice Stevens, joined by Justice Kennedy, stressed the significance of the absence of a single voter who would be harmed by the photo ID law.[278] Similarities exist when comparing the analysis of Justice Kennedy's dissent in *Burdick* with the analysis of Justice Souter's dissent in *Crawford*.[279] Both dissents found a significant burden to exist as to a certain group of voters and that the asserted state interests were lacking. Regardless of the facial challenge, it would seem possible that both Justices Stevens and Kennedy would have joined with Justice Souter in *Crawford* had there been at least one voter who had been denied the right to vote as a result of the photo ID law.

Justice Stevens's disposition of *Crawford* by way of the facial challenge was correct based on the reasoning in *Washington State Grange*, although it may have only delayed the inevitable as future plaintiffs now know they must bring an "as applied" challenge[280] and be able to prove they have suffered an actual harm. The downside, unfortunately, is

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275. *Crawford* was a 6-3 decision upholding SEA 483; however, provided the record *had* shown evidence of an actual harm and Justices Stevens and Kennedy adhered to their reasoning in Burdick v. Takushi, 504 U.S. 428, 442-450 (1992) (Kennedy, J., dissenting), it is possible the outcome of the case would have been 6–3 or 5–4 (depending on Chief Justice Roberts's vote) holding SEA 483 unconstitutional. The facial challenge would seemingly be a non-issue in such a case because Justice Scalia expressed his dissatisfaction with the lead opinion resolving the case in such a manner, *Crawford*, 128 S. Ct. at 1624 (Scalia, J., plurality opinion), and the dissenting opinions did not discuss facial challenges, *id.* at 1627-43 (Souter, J., dissenting); *id.* at 1643-45 (Breyer, J., dissenting).

276. *See Burdick*, 504 U.S. at 430.

277. *Id.* at 442 (Kennedy, J., dissenting).

278. *Crawford*, 128 S. Ct. at 1621.

279. *Compare Burdick*, 504 U.S. at 448–450 (Kennedy, J., dissenting), *with Crawford*, 128 S. Ct. at 1636–1643 (Souter, J., dissenting). The result of each dissent is not surprising as both used the flexible standard of *Anderson* in finding a substantial burden on the right to vote and thus taking a close look at the purported state interests.

280. 16 C.J.S. *Constitutional Law* § 187 (2008) ("An 'as applied' challenge to the constitutionality of a statute is evaluated considering how it operates in practice against the particular litigant and under the facts of the instant case, not hypothetical facts in other situations."); *see also* Boddie v. Connecticut, 401 U.S. 371, 379 (1971) ("Our cases further establish that a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question. Thus, in cases involving religious freedom, free speech or assembly, this Court has often held that a valid statute was unconstitutionally applied in particular circumstances because it interfered with an individual's exercise of those rights.").

someone will have been denied his or her fundamental right to vote in order for these cases to be filed.[281]

CONCLUSION

The standard articulated many years ago in *Anderson* was an effort at compromise between the fundamental right to vote and the state's constitutional right to manage elections. The standard was ambiguous because it was open to different interpretations resulting in unpredictable outcomes. In *Crawford*, the Court had the opportunity to clarify *Anderson* and *Burdick* in order to provide guidance to the lower courts that may face multiple lawsuits after the 2008 presidential election. Unfortunately, the *Crawford* Court did not provide this guidance. Justice Scalia fashioned a rule that would remove the ambiguity and unpredictability of *Anderson*, while eliminating political ideology from judicial decisions. However, this rule would also allow greater opportunity for political party entrenchment through the disproportionate burden of groups of voters that share similar political ideologies.

Therefore, this Comment suggests a rule similar to that of Justice Scalia's but allows for adjustments to be made to account for evidence of entrenchment or discriminatory effects. The existence of such evidence would trigger an intermediate level of scrutiny in place of the baseline differential review. Further, the existence of evidence suggesting both entrenchment and discriminatory effect would trigger strict scrutiny. This rule would eliminate the ambiguity and unpredictability of *Anderson* and *Burdick*, account for entrenchment and discriminatory effect, curtail political ideology in judicial decisions, and allow states to manage election procedures.

The Court's disfavor of facial challenges provided guidance to litigants in terms of what type of suit to file in the future. The next voter photo ID case that comes before the Court will be an as-applied challenge. The Court must then make hard decisions concerning the correct interpretation of *Burdick* and measuring the magnitude of the burden on the right to vote. It is this Comment's suggestion that the Court adopt a rule that requires an intermediate level of scrutiny where there is evidence of entrenchment or discriminatory effect and strict scrutiny where evidence of both are present.

*Bryan P. Jensen**

281. *See* Tokaji, *supra* note 193.

* J.D. Candidate, 2010, University of Denver Sturm College of Law. I would like to thank Professor Martin Katz for his guidance, J. Zach Courson for his comments and suggestions, and the rest of the *Denver University Law Review* staff for all their hard work. I would especially like to thank my wife Brandy for her love, support, and patience.