

February 2014

TJLP (Spring 2005) Volume 1 Number 3

Follow this and additional works at: <https://trace.tennessee.edu/tjlp>



Part of the [Law Commons](#)

Recommended Citation

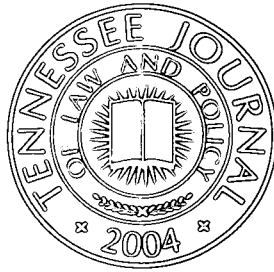
(2014) "TJLP (Spring 2005) Volume 1 Number 3," *Tennessee Journal of Law and Policy*: Vol. 1 : Iss. 3 , Article 1.

Available at: <https://trace.tennessee.edu/tjlp/vol1/iss3/1>

This Full Issue is brought to you for free and open access by Volunteer, Open Access, Library Journals (VOL Journals), published in partnership with The University of Tennessee (UT) University Libraries. This article has been accepted for inclusion in Tennessee Journal of Law and Policy by an authorized editor. For more information, please visit <https://trace.tennessee.edu/tjlp>.

TJLP

Tennessee Journal of Law & Policy



Spring 2005

Volume 1 Number 3

THE TENNESSEE JOURNAL OF LAW & POLICY is published four times per year and edited by students of the University of Tennessee College of Law. The publisher is THE TENNESSEE JOURNAL OF LAW & POLICY, 1505 W. Cumberland Ave., Knoxville, Tennessee 37996-1810. The subscription rate is \$30.00 per volume, \$8.00 per single issue. Unless notice to the contrary is received, THE TENNESSEE JOURNAL OF LAW & POLICY assumes that a renewal of the subscription is desired. All claims of non-receipt of an issue should be made within six months of date of publication if claimant wishes to avoid paying for the missing issue. To order back issues, contact THE TENNESSEE JOURNAL OF LAW & POLICY, 1505 W. Cumberland Ave., Knoxville, Tennessee 37996-1810. POSTMASTER: Send address changes to: THE TENNESSEE JOURNAL OF LAW & POLICY, 1505 W. Cumberland Ave., Knoxville, Tennessee 37996-1810.

Copyright © 2004, TENNESSEE JOURNAL OF LAW & POLICY, University of Tennessee College of Law. All Rights Reserved.
<http://www.law.utk.edu/students/tjlp/tjlp/home.htm>

ARTICLE

*GONZALES V. RAICH: AN OPENING FOR RATIONAL DRUG LAW
REFORM*

Martin D. Carcieri

ARTICLE

*LEGISLATIVE PREROGATIVE OR JUDICIAL FIAT: MANDATING
ELECTRONIC RECORDING OF STATIONHOUSE
INTERROGATIONS IN TENNESSEE*

Lance H. Selva & William L. Shulman

ARTICLE

*INCORPORATING THE REALITIES OF GENDER AND POWER
INTO U.S. ASYLUM LAW JURISPRUDENCE*

Amy M. Lighter Steill

THE TENNESSEE JOURNAL OF LAW & POLICY

2004-2005 Editorial Staff

Editorial Board

LEONARD O. EVANS III
Editor-In-Chief

RICHARD S. GREENE IV
Managing Editor

GIANNA MAIO
Publication Editor

DAVID DOTHARD
Articles Editor

TAMMI T. GAULDIN
Research Editor

L. NICHOLE CUNNINGHAM
Deputy Research Editor

MELODY S. SMITH
Deputy Research Editor

AMY M. LIGHTER STEILL
Deputy Research Editor

Editors-At-Large

MARK CASTLEBERRY
MATTHEW F. MILLER

Editors

MAHA M. AYESH
LAURA E. BROWN
NICOLE M. GRIDA
JOSEPH P. HYDER

W. DEREK MALCOLM
GEORGE EDWARD S. PETTIGREW
ANGELA J. WILLIAMS

THE TENNESSEE JOURNAL OF LAW & POLICY

Faculty Advisors

PENNY J. WHITE

Associate Professor of Law

OTIS H. STEPHENS, PH.D.

*Alumni Distinguished Service Professor of Political Science
and Resident Scholar of Constitutional Law*

University of Tennessee College of Law Administration

THOMAS C. GALLIGAN, JR.

Dean and Alvin E. Overton Distinguished Professor of Law

JOHN L. SOBIESKI, JR.

*Lindsay Young Distinguished Professor of Law
and Associate Dean for Academic Affairs*

RACHEL E. INMAN

Assistant Dean for Student Affairs

Special Thanks

STEPHEN E. COLLINS

Graphic Designer

Publication of contributions does not signify adoption of the views expressed therein by the TENNESSEE JOURNAL OF LAW & POLICY, its editors, or the University of Tennessee College of Law.



Contents

GONZALES V. RAICH: AN OPENING FOR RATIONAL DRUG LAW REFORM

Martin D. Carcieri 307

LEGISLATIVE PREROGATIVE OR JUDICIAL FIAT: MANDATING
ELECTRONIC RECORDING OF STATIONHOUSE
INTERROGATIONS IN TENNESSEE

Lance H. Selva & William L. Shulman 387

INCORPORATING THE REALITIES OF GENDER AND POWER
INTO U.S. ASYLUM LAW JURISPRUDENCE

Amy M. Lighter Steill 445

Gonzales v. Raich: An Opening For Rational Drug Law Reform

*Martin D. Carcieri**

I. Introduction	308
<i>A. Legal Context</i>	309
II. The Ninth Circuit Ruling	315
<i>A. Factual and Procedural Background</i>	315
<i>B. The Commerce Clause Merits</i>	318
1. <i>Wickard, Lopez, and Morrison</i>	319
2. Judge Beam's Thesis	329
<i>a. Raich is Indistinguishable from Lopez for Commerce Clause Purposes</i>	330
<i>b. Raich is Distinguishable from Wickard for Commerce Clause Purposes</i>	338
III. Solicitor General Clement's Reply and its Implications	343
<i>A. The Irrelevance of Medicinal Use to the Commerce Clause Merits</i>	343
1. The Personal Cultivation Initiative	349
<i>B. The Refined Policy Issue</i>	352
1. The Risks of the Personal Cultivation Initiative	354
2. The Costs of the Current Regime	360
<i>a. Economic Costs</i>	365
<i>b. Social Costs</i>	369
<i>c. The Imperative of Harm Reduction</i>	372
IV. Conclusion	375

First, do no harm.¹ He who seeks to regulate everything by law is more likely to arouse vices than to reform them.² It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.³ It is clear after all these many years that our federal government does not have the right answers. It is time for other, more local governments to retake command.⁴

I. Introduction

On June 28, 2004, the Supreme Court granted review in *Gonzales v. Raich*,⁵ one of the California medical marijuana cases.⁶ Oral argument was heard

*Assistant Professor of Political Science, University of Tennessee, Knoxville. J.D. Ph.D. Thanks to John Scheb for his valuable feedback on this project.

¹ Hippocrates, c. 420 B.C.

² Benedict de Spinoza, *Freedom of Thought and Speech*, reprinted in *CHIEF WORKS OF BENEDICT DE SPINOZA*, at 261 (R.H.M. Elwes, trans. 1936).

³ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

⁴ JAMES GRAY, *WHY OUR DRUG LAWS HAVE FAILED AND WHAT WE CAN DO ABOUT IT: A JUDICIAL INDICTMENT OF THE WAR ON DRUGS* 15 (2001).

⁵ See Transcript of Oral Argument, Nov. 29, 2004, *Ashcroft v. Raich*, No. 03-1454 (hereinafter, *Oral Arg.*) Since Alberto Gonzales replaced John Ashcroft as U.S. Attorney General on February 3, 2005, the Supreme Court's ruling will be titled *Gonzales v. Raich*.

⁶ See, e.g., *United States v. Oakland Cannabis Buyers' Coop.*,

on November 29, 2004, and a ruling is expected by June, 2005.⁷ *Raich* presents the Court an historic opportunity to enable sensible drug law reform at the State level.⁸

A. *Legal Context*

Raich arises at the nexus of three sources of law. It began as a conflict, brewing for some time,⁹ between state and federal legislation. The state law is Proposition 215. It was enacted by a California ballot initiative in 1996 and codified as the

532 U.S. 483 (2001); *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002); *Women's Alliance for Med. Marijuana v. United States*, No. 02-MC-7012 JF (N.D. Cal. 2002); *County of Santa Cruz v. Ashcroft*, 279 F. Supp. 2d 1192 (N.D. Cal. 2003).

⁷ See Charles Lane, *High Court Not Receptive to Marijuana Case*, WASH. POST, Nov. 30, 2004, at A03, and David Savage, *Justices Take on Medical Pot Law*, L.A. TIMES, Nov. 30, 2004, at A1.

⁸ It is fortunate that the Court has granted review at a relatively early stage in the litigation. As we shall see, the case came up in the remedial context, i.e., whether the District Court properly denied appellants' request for a preliminary injunction, pending trial, against enforcement of the CSA. Had the Supreme Court waited until the District Court, on remand, had granted the preliminary injunction and proceeded to trial, followed by an appeal from a final judgment in that case, any guidance the Court could provide on this urgent issue might have been postponed for years. When we consider that Judge Beam, dissenting in the Ninth Circuit opinion, would have remanded to the District Court for hearings on justiciability issues of standing and ripeness, see *Raich v. Ashcroft*, 352 F.3d 1222, 1237 (8th Circuit, 2003), the unlikelihood of this opportunity seems even clearer.

⁹ As the Mayor of Santa Cruz observed two years ago, "Clearly, state law and federal law are on a collision course." Christopher Krohn, *Why I'm Fighting Federal Drug Laws from City Hall*, N.Y. TIMES, Sep. 21, 2002, at A15.

Compassionate Use Act (CUA).¹⁰ The appellants in *Raich* possessed and used marijuana under the CUA, which is intended to ensure that seriously ill Californians have the right to obtain and use marijuana for medical purposes. Medical use is deemed appropriate once a physician determines that the person's health would benefit from the use of marijuana in the treatment of the following

¹⁰ Cal. Health & Safety Code § 11362.5. For background on Proposition 215, see ALAN BOCK, *WAITING TO EXHALE: THE POLITICS OF MEDICAL MARIJUANA* (2000); ROBERT J. MACCOUN & PETER REUTER, *DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES, AND PLACES*, 378-380 (2001) (*Rand Studies in Policy Analysis*) (hereinafter, "RAND"); and ED ROSENTHAL & STEVE KUBBY, *WHY MARIJUANA SHOULD BE ILLEGAL* 94-101 (2003).

On federal and state responses to medical marijuana generally, see RUDOLPH. J. GERBER, *LEGALIZING MARIJUANA: DRUG POLICY REFORM AND PROHIBITION POLITICS* chs. 1-3; 5-7 (2004); Lauryn Gouldin, *Cannabis, Compassionate Use and the Commerce Clause: Why Developments in California May Limit the Constitutional Reach of the Federal Drug Laws*, 1999 ANN. SURV. AM. L. 471, 475-82 (1999); Alistair Newbern, *Good Cop, Bad Cop: Federal Prosecution of State-Legalized Medical Marijuana Use After United States v. Lopez*, 88 CAL. L. REV. 1575, 1586-89 (2000); Erik R. Neusch, *Medical Marijuana's Fate in the Aftermath of the Supreme Court's New Commerce Clause Jurisprudence*, 72 U. COLO. L. REV. 201 (2001); Dennis Newitt, *The Medical Use of Marijuana: State Legislation, Judicial Interpretation and Federal Drug Laws*, 4 J. LEGAL ADVOC. & PRAC. 156, 158-68 (2002); Alex Kreit, *The Future of Medical Marijuana: Should the States Grow Their Own?* 151 U. PA. L. REV. 1787, 1793-1800 (2003). Every state that has voted on medical marijuana has legalized it. See Ethan Nadelmann, *Going to Pot: The Growing Movement Toward Ending America's Irrational Marijuana Prohibition*, NAT'L REVIEW, July 12, 2004, at 30.

medical conditions: cancer, anorexia, AIDS, chronic pain, spasticity, glaucoma, arthritis, migraine, or any other illness for which marijuana has shown to provide relief.¹¹

The federal law, enacted in 1970, is the Comprehensive Drug Prevention and Control Act, popularly called the Controlled Substances Act (CSA).¹² The CSA classifies marijuana as a Schedule I controlled substance, which means that in Congress' view, it has a high potential for abuse, no officially accepted medicinal uses, and no safe level of use under medical supervision.¹³ Except for rare controlled experiments, federal law flatly prohibits the possession or use of even small quantities of marijuana.¹⁴

Under the Supremacy Clause of Article VI,¹⁵ federal law preempts contrary state law.¹⁶ At the same time, Congress can act only within its constitutional powers. Among the most important of these is the power "[t]o regulate Commerce . . . among the several States . . .,"¹⁷ on which it expressly relied when enacting the CSA.¹⁸ For 60 years, such reliance would almost certainly have ensured federal power to enact the law in

¹¹ Cal. Health & Safety Code § 11362.5(b)(1)(A).

¹² 21 U.S.C. § 801 et. seq. (2002).

¹³ 21 U.S.C. § 812(b)(1). On the rest of the CSA scheduling system, see Gouldin, *supra* note 10, at 477-78, and Bock, *supra* note 10, at 223-224.

¹⁴ In *Oakland Cannabis*, the Supreme Court ruled that there is no medical necessity exception to enforcement of the CSA. 532 U.S. at 497-99.

¹⁵ U.S. CONST. art. VI, § 2.

¹⁶ See, e.g., *New York v. United States*, 505 U.S. 144 (1992); *Conant*, 309 F.3d at 645-46 (Kozinski, J., concurring).

¹⁷ U.S. CONST. art. I, § 8, cl. 3.

¹⁸ See *Raich*, 352 F.3d at 1227; 21 U.S.C.S. § 801 (2002).

question.¹⁹ Since 1995, however, the High Court has established precedent²⁰ striking down certain federal laws as beyond the power of Congress under the Commerce Clause. Though federal law may preempt contrary state law, it can do so only if the federal law is within Congress' power in the first place.²¹ Constitutional law, specifically Commerce Clause jurisprudence, is thus the third and overarching source of law within which *Raich* must be resolved.

In Part II, I argue that Judge Harry Pregerson's 9th Circuit opinion in *Raich* is correct: appellants' possession and use of marijuana under the authority of the CUA is beyond Congress' commerce power, and the CSA is unconstitutional as applied to them.²² Notwithstanding Judge Arlen Beam's

¹⁹ See Neusch, *supra* note 10, at 221-23; Newbern, *supra* note 10, at 1600-05; and Glenn Reynolds & Brandon Denning, *Rulings and Resistance: The New Commerce Clause Jurisprudence Encounters the Lower Courts*, 55 ARK. L. REV. 1253, 1257 (2003).

²⁰ See *United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000); *Jones v. United States*, 529 U.S. 848 (2000).

²¹ As the court notes in *Raich*, in *Oakland Cannabis* the Supreme Court expressly reserved the question whether the CSA exceeds Congress' power under the Commerce Clause. 352 F.3d at 1227.

²² The activity at issue in *Raich* is distinct from that for which other possible regimes of state law might provide, like the regulated cultivation and distribution of medical marijuana under controlled circumstances. See, e.g., Kreit, *supra* note 10; Newitt, *supra* note 10; Gouldin, *supra* note 10; J. GRAY, *supra* note 4, at 222-29; DIRK CHASE ELDREDGE, *ENDING THE WAR ON DRUGS* (1998); Eric Sterling, *Principles and Proposals for Managing the Drug Problem*, in *HOW TO LEGALIZE DRUGS*, 523-24 (Jefferson Fish ed., 1998). Regarding attempted bills at the state level, see Stanley Neustadter, *Legalization Legislation: Confronting the Details of Policy Choices*, in

spirited dissent and the Ninth Circuit's reputation for frequent reversal,²³ I shall argue that the Court

HOW TO LEGALIZE DRUGS (Jefferson Fish, ed., 1998). Though many such regimes are defensible policy, they do not seem promising insofar as distribution, particularly where money changes hands, is commerce that could constitutionally be regulated under the CSA. By contrast, appellants' activity in *Raich* is the private, personal cultivation, possession and (medical) use of marijuana.

The political branches of the federal government might seem best suited to provide drug policy reform. See ELDREDGE, *supra* note 22, at 165-66. The Bush Administration's appeal in *Raich* indicates the low likelihood of reform through the executive branch. As for Congress, Neusch observed that "[t]he most logical solution to the problem, rescheduling marijuana from a Schedule I to a Schedule II category, is not politically viable." Neusch, *supra* note 10, at 211. Indeed, shortly after Proposition 215 was enacted, Congress passed a "sense of the Congress" resolution in opposition to medical marijuana. Statement of National Antidrug Policy, Pub. L. No. 105-277, 112 Stat. 2681, 2757-61. As Uelman adds, "Ultimately, the final resolution of the medical marijuana issue will not come until Congress is ready to reclassify marijuana, removing it from Schedule I of the Controlled Substances Act. That's not likely to happen in the Congress elected on November 5, 2002." Gerald Uelman, *Marijuana: Federal Authorities Can't Distinguish Medical Use from Recreational Use, But Voters Can*, at <http://jurist.law.pitt.edu/forum/forumnew83.php> (Jan. 8, 2003). Most recently, Congress even rejected a bill directing the DEA not to enforce the CSA contrary to state laws allowing medical marijuana. See *Viewpoint*, ROLL CALL, July 13, 2004; *For the Record*, WASH. POST, Jul. 11, 2004, at T11. Neustadter opines that that the states can do nothing in this area until federal policy changes. See Neustadter, *supra* note 22, at 389-90. *Raich*, however, provides an opening for reform even assuming Congress' continued intransigence.

²³ The Ninth Circuit has a reputation for being overruled, even unanimously, more often than any other federal appellate court. See Adam Liptak, *Court That Ruled on Pledge Often Runs Afoul of Justices*, N.Y. TIMES, Jun. 30, 2002, at 1.

should affirm Judge Pregerson's opinion on the merits.

While the Ninth Circuit should be affirmed, we shall see in Part III that there is a fundamental oversight in the opinion that Acting Solicitor General Paul Clement predictably mentioned both in his brief and at oral argument. Pregerson repeatedly suggests that a key reason for his ruling is that appellants' use of marijuana is for *medicinal* purposes. While we shall see that this emphasis on the medicinal character of appellants' use is understandable, Mr. Clement suggested that this purpose is irrelevant to the constitutional issue at stake:²⁴ if the private possession and use of marijuana by adults is beyond Congress' commerce power, then that is so whether or not the consumption is for medicinal purposes, for the activity that Congress seeks to regulate is identical either way. Accordingly, the argument would run, a vote to affirm Pregerson is a vote for a slippery slope into a nightmare scenario in which states will be free to legalize the use of any Schedule One drug for recreational purposes.

Activities involving commerce are usually reachable by Congress, and Mr. Clement understood that no state would enact most of the noncommercial regimes he might have predicted. Had he had the time to develop his argument, however, he could plausibly have insisted that some states might seriously consider enacting what I shall call the Personal Cultivation Initiative (PCI). The PCI would allow any adult to cultivate and possess a limited number of marijuana plants within his

²⁴ See Brief for Petitioners, *Ashcroft v. Raich*, No. 03-1354 (Aug. 2004) at 40, and *Oral Arg.*, at 15.

domicile strictly for personal consumption, not sale or trade, solely by adults within that domicile.

Commerce Clause merits aside, then, the refined policy question in *Raich* is whether a State could rationally enact the PCI. I shall answer this question in the affirmative, arguing that even if the Justices are concerned about the policy implications of upholding Judge Pregerson, on reflection they could conclude that a State could rationally enact the PCI.²⁵

On this basis, I conclude that the Court should affirm Judge Pregerson with a broad ruling clearly acknowledging, or at least not denying, that State level reformers would not be wasting resources working to enact the PCI. As an empirical matter, however, any majority that could be formed to uphold Judge Pregerson would likely do so only on narrow grounds. Assuming this is correct, and that the medicinal/recreational distinction is irrelevant to the Commerce Clause question, I conclude by offering 1) an alternative basis for a narrow ruling upholding Judge Pregerson, and 2) some thoughts on the implications of a reversal of Judge Pregerson.

II. The Ninth Circuit Ruling

A. Factual and Procedural Background

Judge Pregerson succinctly presented the facts and procedure in *Raich*:

²⁵ As this discussion suggests, *Raich* involves an interesting confluence of liberal social policy and conservative constitutional interpretation. I shall return to this point.

Appellants Angel McClary Raich and Diane Monson (the "patient-appellants") are California citizens who currently use marijuana as a medical treatment. Appellant Raich has been diagnosed with more than ten serious medical conditions, including an inoperable brain tumor, life-threatening weight loss, a seizure disorder, nausea, and several chronic pain disorders. Appellant Monson suffers from severe chronic back pain and constant, painful muscle spasms. Her doctor states that these symptoms are caused by a degenerative disease of the spine.

Raich has been using marijuana as a medication for over five years, every two waking hours of every day. Her doctor contends that Raich has tried essentially all other legal alternatives and all are either ineffective or result in intolerable side effects; her doctor has provided a list of thirty-five medications that fall into the latter category alone. Raich's doctor states that foregoing marijuana treatment may be fatal. Monson has been using marijuana as a medication since 1999. Monson's doctor also contends that alternative medications have been tried and are either ineffective or produce intolerable side effects. As the district court put it: "Traditional medicine has utterly failed these women"

Appellant Monson cultivates her own marijuana. Raich is unable to cultivate her own. Instead, her two caregivers, appellants John Doe Number One and

John Doe Number Two, grow it for her. These caregivers provide Raich with her marijuana free of charge. They have sued anonymously in order to protect Raich's supply of medical marijuana. In growing marijuana for Raich, they allegedly use only soil, water, nutrients, growing equipment, supplies and lumber originating from or manufactured within California. Although these caregivers cultivate marijuana for Raich, she processes some of the marijuana into cannabis oils, balm, and foods.

On August 15, 2002, deputies from the Butte County Sheriff's Department and agents from the Drug Enforcement Agency ("DEA") came to Monson's home. The sheriff's deputies concluded that Monson's use of marijuana was legal under the Compassionate Use Act. However, after a three-hour standoff involving the Butte County District Attorney and the United States Attorney for the Eastern District of California, the DEA agents seized and destroyed Monson's six cannabis plants.²⁶

Fearing raids in the future and the prospect of being deprived of medicinal marijuana, the appellants sued the United States Attorney General John Ashcroft and the Administrator of the DEA Asa

²⁶ As Schlosser notes, Ashcroft had "vowed to 'escalate the war on drugs.'" ERIC SCHLOSSER, *REEFER MADNESS: SEX, DRUGS, AND CHEAP LABOR IN THE AMERICAN BLACK MARKET* 67 (2004).

Hutchison on October 9, 2002. Their suit seeks declaratory relief and preliminary and permanent injunctive relief. They seek a declaration that the CSA is unconstitutional to the extent it purports to prevent them from possessing, obtaining, manufacturing, or providing cannabis for medical use. The appellants also seek a declaration that the doctrine of medical necessity precludes enforcement of the CSA to prevent Raich and Monson from possessing, obtaining, or manufacturing cannabis for their personal medical use.²⁷

On March 5, 2003, the district court denied the appellants' motion for a preliminary injunction. The district court found that "despite the gravity of plaintiffs' need for medical cannabis, and despite the concrete interest of California to provide it for individuals like them," the appellants had not established the required "'irreducible minimum' of a likelihood of success on the merits under the law of this Circuit"²⁸

B. The Commerce Clause Merits

As this background indicates, though *Raich* centers on the *substantive* domain of the Commerce

²⁷ Since the Ninth Circuit ruled for appellants on the Commerce Clause issue, it did not address their other arguments, including the medical necessity claim. See *Raich*, 352 F.3d at 1227.

²⁸ *Id.* at 1225-26.

Clause, the case came to the Ninth Circuit in the *remedial* context of a request for a preliminary injunction. The questions are fused, however, since the substantive question must be addressed in order to resolve the remedial issue. As Judge Pregerson explains, “[T]he traditional test for granting preliminary injunctive relief requires the applicant to demonstrate: (1) a likelihood of success on the *merits*; (2) a significant threat of irreparable injury; (3) that the balance of hardships favors the applicant; and (4) whether any public interest favors granting the injunction.”²⁹ Pregerson gives the merits prong of this test, which embodies the Commerce Clause analysis, the lengthiest treatment. In this analysis, three cases are central: *Wickard v. Filburn*,³⁰ *United States v. Lopez*,³¹ and *United States v. Morrison*.³²

1. *Wickard, Lopez, and Morrison*

Wickard involved amendments to the 1938 Agricultural Adjustment Act. In order to stimulate trade, Congress sought to stabilize the national price of wheat by regulating the volume of wheat in interstate commerce. The Act thus provided for a national acreage allotment of wheat, which was subdivided into quotas for individual farmers. Roscoe Filburn owned a small farm in Ohio, and was allotted 11.1 acres for his 1941 wheat crop. He

²⁹ *Id.* at 1227. (emphasis added). While Pregerson mentions an alternative test, he notes the two “are not inconsistent,” and, indeed, “likelihood of success on the merits” is a key factor in both. *Id.*

³⁰ 317 U.S. 111 (1942).

³¹ 514 U.S. 549 (1995).

³² 529 U.S. 598 (2000).

grew 23 acres of wheat, intending to keep the excess crop for his own consumption. Filburn was fined under the Act, but he refused to pay the fine and filed suit, challenging the law's application to him under the Commerce Clause.

Writing for a unanimous Court, Justice Robert Jackson upheld the law as applied to Mr. Filburn. Rejecting the formalist distinctions of earlier cases,³³ Jackson wrote:

[I]t is well established by decisions of this Court that the power to regulate commerce includes the power to regulate the prices at which commodities in that commerce are dealt in It can hardly be denied that a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions.³⁴

How could a single wheat farmer have had such an influence? *Wickard* established the *aggregation principle*: “[A]ppellee’s own contribution to the demand for wheat may be trivial by itself, [but it] is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial.”³⁵ Moreover, even “if we assume that [the wheat] is

³³ See *Wickard*, 317 U.S. at 123-25.

³⁴ *Id.* at 128.

³⁵ *Id.* at 127-28. As Newbern notes, “*Wickard* stands for the proposition that no matter how personalized or local an economic actor’s conduct might be, if her conduct, multiplied, would affect interstate commerce, it may fall under Congress’ regulatory control.” Newbern, *supra* note 10, at 1601.

never marketed, it supplies the needs of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce”³⁶ Establishing “perhaps the most far-reaching example of Commerce Clause authority over intrastate activity,”³⁷ Jackson held that “even if appellee’s activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce”³⁸

Issued more than 50 years after *Wickard*, *Lopez* was a landmark ruling.³⁹ Section 922(q) of

³⁶ *Wickard*, 315 U.S. at 128.

³⁷ *Lopez*, 514 U.S. at 560.

³⁸ *Wickard*, 317 U.S. at 125.

³⁹ It has been described as the opening shot in a Commerce Clause revolution. See Newbern, *supra* note 10, at 1632; Reynolds & Denning, *supra* note 19 at 1257-62. Newbern notes that “[w]ithin eight months of *Lopez*’s decision, more than eighty challenges to federal Commerce Clause based criminal statutes were filed in district courts. Four years after *Lopez* was handed down, that number had grown to 566 cases filed in federal courts.” Newbern, *supra* note 10, at 1607-08. As Marcus Green thus observes, “[T]he *Lopez* decision is central to the ‘new federalism revival’ (consisting of) three interrelated lines of cases (those involving the Tenth Amendment, Eleventh Amendment, and the Commerce Clause).” Marcus Green, *Guns, Drugs, and Federalism: Rethinking Commerce-Enabled Regulation of Mere Possession*, 72 *FORDHAM L. REV.* 2543, 2545-46 (2004). In Calabresi’s view, “perhaps the most striking feature of the Rehnquist Court’s jurisprudence has been the revival over the last 5-10 years of doctrines of constitutional federalism.” Steven Calabresi, *Federalism and the Rehnquist Court: A Normative Defense*, 574 *ANNALS AM. ACAD. POL. & SCI.* 24, 25 (2001). For a nuanced view in which “there is both less and more to the federalism revolution than generally meets the

the Gun-Free Zones Act (GFZA) created a federal crime “for any individual knowingly to possess a firearm at a place the individual knows, or has reasonable cause to believe, is a school zone,” i.e., on or within 1000 feet of a public or private school.⁴⁰ Though Lopez was arrested and charged under the state counterpart of the GFZA, those charges were dropped when federal agents charged him with a violation of § 922(q).⁴¹ Upon conviction, Lopez appealed, challenging § 922(q) as beyond Congress’ commerce power.

Writing for a five-four majority, Chief Justice Rehnquist upheld the Fifth Circuit’s reversal of Lopez’s conviction. Though the Court did not directly overrule *Wickard*, “it carefully limited the reach of *Wickard*”⁴² Beginning with “first principles,”⁴³ and embracing a dual, rather than cooperative, model of federalism,⁴⁴ Rehnquist

eye,” see Richard Fallon, *The “Conservative” Paths of the Rehnquist Court’s Federalism Decisions*, 69 U. CHI. L. REV. 429, 493 (2002).

Linda Greenhouse recently opined that “the Rehnquist Court’s federalism revolution . . . appeared this term to stall in its tracks,” but she relies primarily on an Eleventh Amendment case, *Tennessee v. Lane*, 54 U.S. 509 (2004), for this assertion. Linda Greenhouse, *The Year Rehnquist May Have Lost His Court*, N. Y. Times, Jul. 3, 2004 at A1. On the Eleventh Amendment, see Newbern, *supra* note 10, at 1614-17.

⁴⁰ 18 U.S.C. § 922 (q)(1)(A).

⁴¹ See *Lopez*, 514 U.S. at 551.

⁴² *United States v. McCoy*, 823 F.3d 1114, 1120 (9th Cir. 2003).

⁴³ Newbern, *supra* note 10, at 1618 (“foreshadow[ing] the tone of the originalist argument to follow”).

⁴⁴ See CRAIG DUCAT, CONSTITUTIONAL INTERPRETATION: POWERS OF GOVERNMENT 271-76 (7th ed., 2000). In an influential article, Irving Kristol argued that federalism is one of four major pillars of our constitutional system, the others

quoted Madison's proposition: "[T]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite."⁴⁵ Citing John Marshall, he observed that "the federal government is acknowledged by all to be one of enumerated powers."⁴⁶ Regarding the Commerce Clause, Rehnquist wrote, "*Gibbons* . . . acknowledged that limitations on the commerce power are inherent in the very language of the Commerce Clause . . . enumeration presupposes something not enumerated."⁴⁷ In other words, if the power to

being democracy, republicanism, and capitalism. See Irving Kristol, *On the Character of the American Political Order*, in TAKING SIDES: CLASHING VIEWS ON CONTROVERSIAL POLITICAL ISSUES 4-10 (George McKenna & Stanley Feingold eds., 12th ed. 2001).

As an analogue, in spite of the powerful links between education on the one hand and the success of liberal republican democracy (via the exercise of fundamental rights like free speech and voting) on the other, the Court properly ruled in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), that education is not a fundamental interest for Equal Protection purposes. Among other reasons, principles of both federalism and separation of powers render the federal courts the last branch and level of government that should oversee the operation of public education. See generally, MARTIN D. CARCIERI, *DEMOCRACY AND EDUCATION IN CLASSICAL ATHENS AND THE AMERICAN FOUNDING* (2002).

⁴⁵ *Lopez*, 514 U.S. at 552 (quoting The FEDERALIST NO. 45 (James Madison), 292-93 (C. Rossiter, ed., 1961)).

⁴⁶ *Id.* at 566 (quoting *McCulloch v. Maryland*, 17 U.S. 316, 405 (1819)).

⁴⁷ *Id.* at 553. In the words of Marshall, one of the staunchest and most influential Federalists ever, "[I]t is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and

regulate interstate commerce is to have any coherent meaning, there must be activity that is not interstate commerce, i.e., that is intrastate and/or noncommercial.

The Court thus established firm limits on the meaning of “commerce” for Commerce Clause purposes. Drawing a line between commercial and noncommercial activity,⁴⁸ the Supreme Court wrote:

[S]ection 922(q) is a criminal statute that by its terms has nothing to do with “commerce” or any sort of economic enterprise, however broadly one might define those terms. Section 922(q) is not an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated The possession of a gun in a local school zone is in no sense an economic activity⁴⁹

In concurrence, Justices Kennedy and O’Connor added:

which does not extend to or affect other states.” *Gibbons v. Ogden*, 22 U.S. 1 (1824).

⁴⁸ As Justices Kennedy and O’Connor wrote, “we cannot avoid the obligation to draw lines, often close and difficult lines, in adjudicating constitutional rights.” *Lopez*, 514 U.S. at 579.

⁴⁹ *Id.* at 561, 567. Thus, though the Court upheld the federal loansharking law (Title II of the Consumer Credit Protection Act) in *Perez v. United States*, 402 U.S. 146 (1971), money changes hands by definition in such transactions. Because this is commercial as well as criminal activity, *Perez* is distinguishable from *Raich*.

[H]ere neither the actors nor their conduct have a commercial character and neither the purposes nor the design of the statute have an evident commercial nexus. The statute makes the simple possession of a gun within 1,000 feet of the grounds of the school a criminal offense. . . . [A]nd it does so by regulating *an activity beyond the realm of commerce in the ordinary and usual sense of that term*⁵⁰ (emphasis added).

In dissent, Justice Breyer powerfully argued that gun violence greatly impacts public education and thus interstate commerce.⁵¹ Yet this seamless substantive argument failed to meet the minimum requirements of any coherent theory of the balance of power that is necessarily imposed by federalism. As Kennedy and O'Connor replied:

In a sense any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far. If Congress attempts that extension, then at the least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern.⁵²

⁵⁰ *Id.* at 580, 583 (Kennedy and O'Connor, JJ., concurring) (emphasis added).

⁵¹ *Id.* at 615-31 (Breyer, Stevens, Souter and Ginsberg, JJ., dissenting).

⁵² *Id.* at 580 (Kennedy and O'Connor, JJ., concurring).

In other words, the limit imposed on congressional powers by the enumeration of those powers is reinforced by the fact that, in our system, states alone have a police power.⁵³ As the Chief Justice wrote, "Under our federal system, the States possess primary authority for defining and enforcing the criminal law."⁵⁴

⁵³ The police power is defined as "an authority conferred by the American constitutional system in the Tenth Amendment upon the individual states The power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity." BLACK'S LAW DICTIONARY 1041 (5th ed. 1979). See Newbern, *supra* note 10, at 1617-18 (on the Tenth Amendment). See *Lopez*, 514 U.S. at 567 (stating that "[t]o uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States").

⁵⁴ *Lopez*, 514 U.S. at 561 n.3, 564 (stating that "areas such as criminal law enforcement" are areas "where the States historically have been sovereign"). As Hamilton wrote, "[t]here is one transcendent advantage belonging to the province of the State governments . . . the ordinary administration of criminal and civil justice." THE FEDERALIST NO. 17 (Alexander Hamilton), 120 (C. Rossiter, ed., 1961). See *Lopez*, 514 U.S. at 583 (Kennedy and O'Connor, JJ., concurring) (writing that "the statute now before us forecloses the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise"). It is noteworthy that for most of American history, marijuana was regulated by colonial or state law. A 1619 Virginia statute even *required* every household to grow hemp. See Schlosser, *supra* note 26, 19-25; EDWARD BLOOMQUIST, MARIJUANA: THE SECOND TRIP 27-28 (1971).

See Newbern, *supra* note 10, 1581-85, 1627 (discussing explosion of federalization of crime since 1970 and noting the

Morrison involved a provision of the federal Violence Against Women Act (VAWA) that provided a civil remedy for gender-motivated violence.⁵⁵ Christy Brzonkala, a student at Virginia Tech, claimed that another student raped her and made statements showing a gender motivation for the attack. She sued him under the VAWA, and the District Court dismissed the action, partly on grounds that the civil remedy was beyond Congress' commerce power. The Fourth Circuit affirmed, as did the Supreme Court. Speaking for the same five-four majority as in *Lopez*, the Chief Justice wrote, "[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case. . . . Gender motivated crimes of violence are not, in any sense of the phrase, economic activity."⁵⁶ Rehnquist also indicated that the Court was serious about enforcing the "noninfinity principle,"⁵⁷ by skeptically regarding any interpretation that would in effect convert the commerce power into a general police power.⁵⁸

majority of federal drug arrests are for minor street crimes). See also *id.* at 1607 (stating that "[a]fter over half a century of allowing Congress to exercise [a general police power of the sort retained by the States], the Court finally said 'no' and decided to rein in the 'Hey, you-can-do-whatever-you-feel-like-Clause'").

⁵⁵ 42 U.S.C. § 13981 (2004).

⁵⁶ *Lopez*, 514 U.S. at 610, 613. As the Court wrote, "(i)ndeed, we can think of no better example of the police power, which the Founders denied the Federal Government and reposed in the States, than the suppression of violent crime and vindication of its victims"). *Id.* at 618.

⁵⁷ See Reynolds and Denning, *supra* note 19, at 1260.

⁵⁸ Though *Morrison* figures prominently in our analysis, it is distinct from *Lopez* and *Raich* in that 42 U.S.C. § 13981 did not seek to regulate possession, but rather physical violence.

In *Lopez* and *Morrison*,⁵⁹ the Court identified three broad categories of activity that Congress may regulate under its commerce power—the use of the *channels* of interstate commerce, the use of the *instrumentalities* of interstate commerce, and those activities that *substantially affect* interstate commerce.⁶⁰ Judge Beam, who dissented in the Ninth Circuit *Raich* opinion, does not dispute Judge Pregerson’s claim that *Raich* falls within the third category,⁶¹ and so we turn to the test developed in *Lopez*, and refined in *Morrison*, for evaluating whether a regulated activity “substantially affects” interstate commerce.⁶² In Pregerson’s words, the test is:

(1) whether the statute regulates commerce or any sort of economic enterprise; (2) whether the statute contains any “express jurisdictional element that might limit its reach to a discrete set” of cases; (3) whether the statute or its legislative history contains “express congressional findings” regarding the effects of the regulated activity upon interstate commerce; and (4) whether the link between the regulated activity and a substantial effect on interstate commerce is “attenuated.”⁶³

⁵⁹ See *Jones*, 529 U.S. 848. See also Reynolds and Denning, *supra* note 19, at 1261 (*Jones* decided same day as *Morrison*, and it “shores up some of the supporting timbers of *Lopez*”).

⁶⁰ See *Lopez*, 514 U.S. at 558-59; *Morrison* 529 U.S. at 608-09.

⁶¹ See *Raich*, 352 F.3d at 1229.

⁶² See *Morrison*, 529 U.S. at 609-13.

⁶³ *Raich*, 352 F.3d at 1229 (citations omitted).

Citing *United States v. McCoy*,⁶⁴ Pregerson observes, “[T]he first and the fourth factors are the most important.”⁶⁵

2. Judge Beam’s Thesis

Although the *Lopez/Morrison* test has been criticized as lacking clarity and the force of precedent,⁶⁶ these cases embody the law in this area

⁶⁴ *McCoy*, 323 F.3d 1114, 1115. In this case, a mother who possessed a photograph of herself and her ten year old daughter “partially unclothed, posed side by side for the camera, with their genital areas exposed,” was convicted under a federal law prohibiting the possession of child pornography. The Ninth Circuit invalidated the conviction on grounds that the photograph had “not been mailed, shipped, or transported interstate and [was] not intended for interstate distribution, or for any economic or commercial use” *Raich*, 352 F.3d at 1228 (citing *McCoy* at 1115).

⁶⁵ See *Raich*, 353 F.3d at 1229 (quoting *Morrison*, at 610-12, and *McCoy*, 823 F.3d at 1119, 1129). As for the second factor, Judge Pregerson observed that “no . . . jurisdictional hook exists in relevant portions of the CSA,” *Raich*, 352 F.3d at 1231. As far as the third factor, the Court in *Lopez* and *Morrison* downplayed the force of congressional findings where Congress otherwise appears to have exceeded its commerce power.

⁶⁶ See *Kreit*, *supra* note 10, at 1808 (stating that “while striking, the Court’s revival of the Commerce Clause doctrine has also come without expressly overturning old law, or announcing new law. This has led to a great deal of confusion about the reach of the new Commerce Clause”). See also *Reynolds and Denning*, *supra* note 19, at 1258. As Gouldin observes of *Lopez* and *Morrison*:

[T]he precedential value of these cases should not be overstated. The interpretation of the leanings of the Justices and application of the holding to future cases is an inherently

and are the proper basis for evaluating and responding to Judge Beam's core thesis. Judge Beam asserts that the facts in *Raich* are indistinguishable from those in *Wickard*⁶⁷ and that *Lopez* and *Morrison* "expressly affirm the continuing validity of *Wickard*."⁶⁸ There are two fatal flaws with Beam's argument, however: first, *Raich* is *indistinguishable* from *Lopez* for Commerce Clause purposes; second, *Raich* is *distinguishable* from *Wickard* for Commerce Clause purposes.⁶⁹

(a) *Raich* is indistinguishable from *Lopez* for Commerce Clause purposes

To lay the foundation for applying the first *Morrison* factor, Pregerson defined the "class of activities" in which appellants are engaged as the "intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes."⁷⁰ He conceded that the Ninth Circuit upheld the CSA's application in past Commerce

speculative undertaking The highly charged political and moral debate over drug policy in the United States makes it more difficult to predict how the Court would decide a case that threatened to upset the federal drug control scheme.

Gouldin, *supra* note 10, at 512-13.

⁶⁷ *Raich*, 352 F.3d at 1235, 1243 (Beam, J., dissenting).

⁶⁸ *Id.* at 1239 (Beam, J., dissenting).

⁶⁹ My two replies partly converge, insofar as *Lopez* struck down § 922(q), notwithstanding the holding in *Wickard*. If Pregerson is correct that *Raich* is indistinguishable from *Lopez*, then the reach of the CSA attempted in *Raich* is likewise properly invalidated, notwithstanding the holding in *Wickard*.

⁷⁰ *Raich*, 352 F.3d at 1228-29.

Clause challenges.⁷¹ However, he justified his narrow definition of the class of activities by citing to *McCoy*.⁷² He further noted that none of the Ninth Circuit cases presented the Commerce Clause issue that exists in *Raich* in pure form. He wrote:

. . . [N]one of the cases in which the Ninth Circuit has upheld the CSA on Commerce Clause grounds involved the use, possession, or cultivation of marijuana for medical purposes. [By contrast] . . . here the appellants are not only claiming that their activities do not have the same effect on interstate commerce as activities in other cases where the CSA has been upheld. Rather, they contend that, whereas the earlier cases concerned drug

⁷¹ See *United States v. Bramble*, 103 F.3d 1475 (9th Cir. 1996); *United States v. Tisor*, 96 F.3d 370 (9th Cir., 1996); *United States v. Kim*, 94 F.3d 1247 (9th Cir. 1996); *United States v. Visman*, 919 F.2d 1390 (9th Cir. 1990).

⁷² *Raich*, 352 F.3d at 1228-29 (stating that “[a] narrow categorization of the appellants’ activity is supported by our recent decision in . . . *McCoy* . . .”, and continuing:

[U]nder *McCoy*, the class of activities at issue in this case can properly be defined as the intrastate, noncommercial cultivation, possession, and use of marijuana for personal medical purposes on the advice of a physician and in accordance with state law. This class of activities does not involve sale, exchange, or distribution.)

See also Gouldin, *supra* note 10 at 517-18; Susan Klein, *A Colloquium on Community Policing: Independent-Norm Federalism in Criminal Law*, 90 CALIF. L. REV. 1541, 1590 (2002).

*trafficking, the appellants' conduct constitutes a separate and distinct class of activities: the intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient's physician pursuant to valid California state law.*⁷³

Having defined the class of activities, Pregerson next addressed the first *Morrison* factor: whether the statute regulates commerce or any sort

⁷³ *Raich*, 352 F.3d at 1227-28 (emphasis added). Indeed, post-*Lopez* lower federal court rejections of Commerce Clause challenges to CSA § 841(a)(1), as applied, have virtually never involved the narrow question of whether Congress can regulate mere intrastate possession and personal medicinal use of marijuana. These cases have involved one or more of the following: (a) another substance, usually cocaine or methamphetamine, (b) use of a firearm while engaged in a drug transaction, (c) possession of a controlled substance within 1000 feet of a school, (d) conspiracy, or (e) drug trafficking. See, e.g., *United States v. Davis*, 288 F.3d 359 (8th Cir. 2002); *United States v. Koons*, 300 F.3d 985 (8th Cir. 2002); *United States v. Walker*, 142 F.3d 103 (2d Cir. 1998); *United States v. Patterson*, 140 F.3d 767 (8th Cir. 1998); *United States v. Westbrook*, 125 F.3d 996 (7th Cir. 1997); *Proyect v. United States*, 101 F.3d 11 (2d Cir. 1996); *United States v. Zorilla*, 93 F.3d 7 (1st Cir., 1996); *United States v. Smith*, 920 F.Supp. 245 (D. Me. 1996). See generally, Neusch, *supra* note 10, at 235-43. The last of the Ninth Circuit cases cited above, *U.S. v. Visman*, was pre-*Lopez*, and so provides no guidance in resolving *Raich*.

For an assessment of lower courts' compliance with *Lopez* and *Morrison* in a variety of Commerce Clause contexts, see Reynolds and Denning, *supra* note 19, at 1297-99. Whatever problems there may be with lower court applications of *Lopez* and *Morrison*, they are irrelevant for our purposes since we are concerned only with what the Supreme Court should do in this case.

of economic enterprise. Both this inquiry and that concerning the class of activities concern, *inter alia*, whether or not the activity in question is “commercial.” Thus, Pregerson wrote:

As applied to the limited class of activities presented by this case, the CSA does not regulate commerce or any sort of economic enterprise. The cultivation, possession, and use of marijuana for medicinal purposes and not for exchange or distribution is not properly characterized as commercial or economic activity. *Lacking sale, exchange, or distribution, the activity does not possess the essential elements of commerce.*⁷⁴

Accordingly, in light of key precedent, the private possession and use of marijuana cannot be considered “commerce” regulable by federal law. Although the seeds, soil, planters, and lights required to produce a marijuana plant could have moved in interstate commerce, *Lopez* drew a crucial line, rooted in the balance of power which federalism demands. Mere possession, without more, is not economic activity under the Commerce Clause. If possession of a gun, as in *Lopez*, and

⁷⁴ *Raich*, 352 U.S. at 1229-30 n.3 (emphasis added) (adding further that “although the Doe appellants are providing marijuana to Raich, there is no “exchange” sufficient to make such activity commercial in character”). Though *Oakland Cannabis* also involved the CUA, the activity regulated in that case was sale and distribution, which is clearly commercial activity. 532 U.S. 483. Even if the Court had reached the Commerce Clause issue in that case, its ruling would be irrelevant where, as here, there is no economic activity.

commission of *malum in se* physical violence, as in *Morrison*,⁷⁵ do not qualify as economic activity, then Pregerson was correct that the peaceful, private, merely *malum prohibitum* possession and medicinal use of marijuana also does not qualify.⁷⁶

In response, Judge Beam, analogizing to *Wickard*, noted that Raich's marijuana *could be sold* in the marketplace.⁷⁷ He asserted that appellants "ignore the fungible economic nature of the substance at issue – marijuana plants – for which there is a well-established and variable interstate market."⁷⁸ Under the same rationale, Mr. Lopez

⁷⁵ *Morrison*, 529 U.S. at 617 (rejecting the argument "that Congress may regulate noneconomic violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce").

⁷⁶ See *RAND*, *supra* note 10, at 64 (describing marijuana use as merely *malum prohibitum*). See *Raich*, 352 F.3d at 1230 (holding that Raich's activity was not commerce and that the *Wickard* "aggregation principle" is simply inapplicable). Under these circumstances, there is simply nothing to aggregate. One billion times zero still equals zero.

Judge Beam tries to bootstrap Angel Raich's supplier's act of giving her marijuana into a commercial transaction by observing that "the consideration the caregivers receive is knowing that Ms. Raich is purportedly in less pain because of their efforts." *Raich*, 352 F.3d at 1240 n.6 (Beam, J., dissenting). Such sleight of hand, however, cannot transform a mere gift into a commercial transaction and thus a legally enforceable contract. Consideration is defined as "[s]ome right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." *BLACK'S LAW DICTIONARY* 277 (5th ed., 1979). The psychic gratification that Judge Beam suggests does not rise to this level. Even if it did, Beam can make no such claim against Diane Monson, who grows her own marijuana. This distinction, we shall see, may provide an opening for rational reform.

⁷⁷ *Raich*, 352 F.3d at 1239, 1242 (Beam, J., dissenting).

⁷⁸ *Id.* at 1239.

could also have found a purchaser for his gun. That possibility, however, did not transform possession of that gun into commerce.⁷⁹ Indeed, the implications of a legal principle under which the possibility of an event is equated with that event are staggering—both Orwellian⁸⁰ and Kafkaesque.⁸¹ Under this principle, if a person *could* commit a crime, we can assume for legal purposes that the person has. Beam was on particularly weak ground in relying on such a principle.⁸²

Having dealt with the first Morrison factor, Judge Pregerson then addressed the second *Morrison* factor: whether the link between the regulated activity and its substantial effect on interstate commerce is attenuated. He asserted that this is the case in *Raich*, observing that “[a]s the photograph in *McCoy* stood in contrast to the commercial nature of the larger child pornography industry, so does the medical marijuana at issue in

⁷⁹ Though Judge Reinhardt in *McCoy* argues that the photograph in question was not fungible, *see McCoy*, 823 F.3d 1122, it is by no means clear that buyers for such an object could not be found.

⁸⁰ *See generally*, GEORGE ORWELL, 1984.

⁸¹ *See generally*, FRANZ KAFKA, THE TRIAL.

⁸² Ignoring another key distinction, Beam argues that Pregerson’s attempt to distinguish *Raich* from *Proyect v. United States*, 101 F.3d 11 (2d Cir. 1996), fails. *Proyect* involved over 100 marijuana plants, thus establishing a reasonable inference of intent to traffic. *See Proyect*, 101 F.3d at 13. Though the DEA seized only six plants from Diane Monson, Beam writes that “[o]ver time it is likely that many times over 100 plants will be consumed by [Raich and Monson] alone.” *Raich*, 352 F.3d at 1239 n. 5 (Beam, J., dissenting). In other words, for constitutional purposes, possession for merely personal use can simply be equated with possession with intent to traffic. Such an attempt to paper over a key distinction cuts directly against the thrust of *Lopez*.

this case stand in contrast to the larger illicit drug trafficking industry.”⁸³ In response, Judge Beam quoted a Fourth Circuit ruling that “*Lopez* expressly reaffirmed the principle that ‘where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances is of no consequence’.”⁸⁴

There are at least two problems with this reply. First, the above quote is taken out of context. Far from reaffirming the principle cited by Judge Beam, the *Lopez* Court’s thrust was in the opposite direction. The full quote was:

[T]he [*Maryland v.*] *Wirtz* Court had held that “neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities” *Rather, “the Court has said only that where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.”*⁸⁵

Secondly, even beyond this contextual problem, the statement on which Beam relies seems to be legerdemain. As we have seen, it is the *activity* that Congress seeks to regulate that must bear a substantial relation to interstate commerce. If it does not, then one cannot simply assert that the

⁸³ *Raich*, 352 F.3d at 1230.

⁸⁴ *Id.* at 1240 (quoting *United States v. Leshuk*, 65 F. 3d 1105, 1112 (4th Cir. 1995)).

⁸⁵ *Lopez*, 514 U.S. at 558 (emphasis added) (citations omitted).

statute bears such a relation.⁸⁶ If the activity Congress seeks to regulate is not commerce, then by definition the statute bears no relation to commerce.

On these bases alone, I submit that Judge Pregerson was correct on the merits. Neither of the two key factors developed in *Lopez* and refined in *Morrison* was met, and so application of the CSA to appellants is beyond Congress' commerce power. The Supreme Court justifiably drew a line in *Lopez* that it reinforced in *Morrison*, and Pregerson is correct that appellants' activity in *Raich* falls on the same side of that line as did the activity reached by the laws in those cases.

Yet, there is a third problem with Judge Beam's argument that *Raich* satisfies the second *Morrison* factor. It concerns the meaning of the words "*effect on interstate commerce*." As we saw, *Wickard* held that "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic *effect on interstate commerce*"⁸⁷ To understand more fully the weakness of Judge Beam's position, we now turn to his analysis of *Wickard*.

⁸⁶ The same is true of the activity in *Raich*: the CSA is a criminal regulation and not an economic one. Therefore, marijuana grown and used at home could be deregulated without undercutting the rest of the CSA.

⁸⁷ *Wickard*, 317 U.S. at 125.

(b) *Raich* is distinguishable from *Wickard* for Commerce Clause Purposes

Judge Beam claims that *Raich* is indistinguishable from *Wickard*. To be sure, marijuana grown at home for personal consumption seems like wheat grown at home for personal consumption. As Beam notes, quoting *Wickard*, “[I]t supplies a need of the man who grew it which would otherwise be reflected by purchases on the open market.”⁸⁸ Further, *Wickard* held that intrastate, noncommercial activity is still sometimes reachable under the commerce power.⁸⁹ There are, however, two problems with Beam’s comparison of *Raich* with *Wickard*.

The first problem is evident in Beam’s claim that “as with the wheat consumed by the Filburns [in *Wickard*], plaintiffs are supplying their own needs, here symptom-relieving drugs, without having to resort to the outside marketplace. This deportment obviously has an *effect* on interstate commerce.”⁹⁰

⁸⁸ *Raich*, 352 F.3d at 1239 (Beam, J., dissenting) (quoting *Wickard*, 317 U.S. at 111).

⁸⁹ *Wickard*, 317 U.S. at 125.

⁹⁰ *Raich*, 352 F.3d at 1240. The same confusion is evident in Beam’s observation that Congressional findings in the CSA included the finding that “local distribution and possession of controlled substances contribute to *swelling* the interstate traffic in such substances.” *Id.* at 1241-42 (Beam, J., dissenting) (emphasis added).

Regarding the third *Morrison* factor, the existence of congressional findings, Beam observes that “Congress contemplated individual growers, possessors, and users when it made its findings regarding the CSA.” *Id.* at 1242 (Beam, J., dissenting) (citing 21 U.S.C. § 801(4)). Pregerson, however, notes:

In the aggregate, to be sure, an individual's cultivation, possession and personal use of marijuana will likely have an "effect on interstate commerce." That "effect," however, is a *decrease* rather than an *increase* in the volume of the interstate market, an inescapably vital distinction for Commerce Clause purposes. Where activity decreases the volume of illicit interstate marijuana traffic, Congress lacks even a legitimate, and certainly not compelling, interest in addressing the "problem." Far from undermining any rational congressional goals, the activity advances them.⁹¹

[T]hese findings are primarily concerned with the trafficking or distribution of controlled substances [Further,] there is no indication that Congress was considering anything like the class of activities at issue here when it made its findings. The findings are not specific to marijuana, much less intrastate medicinal use of marijuana that is not bought or sold and the use of which is based on the recommendation of a physician [Moreover,] Morrison counsels courts to take congressional findings with a grain of salt.

Id. at 1232.

This seems correct, as it is untenable that Congress can regulate anything it wants simply by issuing "findings." As the court in *Lopez* notes, "simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." *Lopez*, 514 U.S. at 557 (quoting *Hodel v. Virginia Surface Mining and Reclamation Assn., Inc.*, 452 U.S. 264, 311 (Rehnquist, J., concurring)). On this point, see Neusch, *supra* note 10, at 248.

⁹¹ Along these lines, relying on *Lopez*' distinction of § 922(q) from any "essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated," *Lopez*, 514 U.S. at 561, Beam suggests that making appellants' activity a federal crime is "an essential part of the regulation of some

In contrast to *Wickard*, there is not a problem that Congress needs to remedy.⁹² Raich's lack of need to buy marijuana is simply not a concern of Congress that justifies its power to make her mere possession and use of it a federal crime. The cited "effect on interstate commerce" is but a pretext for Congress to regulate activity properly addressed by the states, if necessary, under their police power.⁹³

The second problem with Beam's thesis is that the laws by which Congress sought to reach the two activities serve very different functions. As Rehnquist wrote in *Lopez*:

commercial activity," *Raich*, 352 F.3d at 1240 (Beam, J., dissenting). As indicated, however, Congress' purposes are *advanced* where appellants and others in their position need not purchase marijuana.

⁹² The same confusion is evident in *Proyect*. See *Proyect*, 101 F.3d at 14, n.1. As Gouldin notes, "[T]he problem for Congress is lessened. If everyone grew their own marijuana, the interstate market would disappear, and current congressional justifications for regulation would likewise evaporate." Gouldin, *supra* note 10, at 519. Justices Scalia and Stevens conceded this point at oral argument. See *Oral Arg.*, at 6-8, as well as Neusch, *supra* note 10, at 251, and Newbern, *supra* note 10, at 1623.

⁹³ Granted, Rehnquist uses the word "affect" with respect to interstate commerce, *Lopez*, 514 U.S. at 567, yet his point is that *Lopez*' gun possession *neither increased nor decreased* the volume of interstate commerce. It is interesting that Judge Beam even admits that he does not "believe that the commodity involved in *Wickard* was composed of any parts that had ever moved in interstate commerce." *Raich*, 352 F.3d at 1243 (Beam, J. dissenting). Yet, because "the grain was still deemed by the Supreme Court to be the proper subject of congressional regulation through the commerce power," *id.*, he woodenly, and in flat defiance of the thrust of *Lopez*, insists that *Wickard* controls.

[E]ven *Wickard*, perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that possession of a gun in a school zone does not [T]he Agricultural Adjustment Act of 1938 . . . was designed to regulate the volume of wheat moving in interstate and foreign commerce in order to avoid surpluses and shortages.⁹⁴

As this suggests, the Agricultural Adjustment Act was part of Congress' New Deal efforts to *stabilize* the price of wheat during the depression by *regulating* the volume of wheat in interstate commerce. The CSA, by contrast, seeks to *destroy* an interstate market by *criminalizing* the activity in question.⁹⁵ Indeed, Beam simply repeats the words "open market" used in *Wickard*; yet, there is no "open market" for marijuana similar to the legal market in which Filburn could have purchased wheat for personal consumption.⁹⁶ Beam simply

⁹⁴ *Lopez*, 514 U.S. at 560. As Justices Kennedy and O'Connor add, "Congress can regulate in the commercial sphere on the assumption that we have a single market and a unified purpose to build a stable national economy." *Id.* at 574 (Kennedy and O'Connor, JJ., concurring).

⁹⁵ As we saw, *Lopez*'s distinction between economic and criminal activity was heightened in *Morrison*. See Newbern, *supra* note 10, at 1620. As Kreit observes, "[T]he CSA does not seek to control the price of marijuana but rather to prevent its interstate distribution entirely." Kreit, *supra* note 10, at 1824.

⁹⁶ As Gouldin notes, the "analogy between growing marijuana for personal use and the cultivation of wheat for household use . . . ignores the critical differences between effects on a legitimate market and on a black market." Gouldin, *supra* note 10, at 514.

equates, for Commerce Clause purposes, economic regulation and criminal prohibition. Yet, given the *Lopez* Court's twin emphases on the limits of Congress' powers and the states' traditional responsibility for administering criminal law under their exclusive police power,⁹⁷ what is permissible for Commerce Clause purposes in one situation cannot simply be assumed permissible in the other. That case must be made, and Beam did not make it.⁹⁸

To conclude, Judge Pregerson had the better argument. Where the activity in question is purely intrastate, noncommercial, and not an essential part of a larger regulatory scheme, as in *Lopez* and

⁹⁷ Beam tries to smuggle in another basis for Congress' regulation of the activity in question by noting that in *United States v. Visman*, 919 F.2d 1390 (9th Cir. 1990), the court deferred to Congress' findings on the public health impact of intrastate drug activities. See *Raich*, 352 F.3d at 1240. Health policy, however, is also traditionally left to the States under the police power. See Kreit, *supra* note 10, at 1820-21.

⁹⁸ Contrary to Beam's claim, thus, just as Judge Reinhardt held *McCoy* distinguishable from *Wickard*, see *McCoy*, 823 F.3d at 1122-23, *Raich* is also distinguishable from *Wickard*.

In passing, let us observe that in his attempt to ignore recent precedents in favor of exclusive reliance on *Wickard*, a 60 year old case, Beam nowhere addressed the fundamental structural reason for the necessity of clear limits, under our federalism, on Congress' permissible reach under its commerce power, as articulated in *Lopez* and *Morrison*. He thus overlooks the balance that must exist in any viable, stable human institution, including a political constitution. The legislative and the executive powers are thus like two human legs that necessarily work together and cannot be clearly understood without the other. Given the dangers of concentrated power, there must be substantial balance between two power centers, whether they are different branches of the same level of government, or different levels of government, as in federalism.

McCoy, it is beyond Congress' commerce power.⁹⁹ Therefore, the Supreme Court should affirm the Ninth Circuit's ruling that the CSA is unconstitutional as applied to appellants. By upholding Judge Pregerson's decision, the Court would provide much needed coherence and continuity to its Commerce Clause jurisprudence.¹⁰⁰

III. Solicitor General Clement's Reply and its Implications

A. The Irrelevance of Medicinal Use to the Commerce Clause Merits

At this point, we must note something about Pregerson's opinion that Mr. Clement has predictably tried to use to his advantage. Whenever Pregerson describes appellants' activity in relation to the commerce power, he emphasizes key features, e.g., that it is "intrastate," "personal use," "noncommercial," and "under a valid state law." At every opportunity, however, he also mentions, and usually elaborates upon, the *medicinal* purpose of

⁹⁹ As Herman writes, "[W]hen one examines the CSA under the heightened standards the Court set forth in *Lopez* and *Morrison*, it becomes clear that the Act, as applied to the wholly intrastate cultivation, possession, and use of medical marijuana is highly constitutionally suspect, if not wholly unconstitutional." Caroline Herman, *Whatever Happened to Federalism? United States v. Oakland Cannabis Buyers' Cooperative*, 93 J. CRIM. L. & CRIMINOLOGY 121, 122 (2002).

¹⁰⁰ As Justices Kennedy and O'Connor note, "[T]he Court as an institution and the legal system as a whole have an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point." *Lopez*, 514 U.S. at 574 (Kennedy and O'Connor, JJ., concurring).

appellants' activity and its use under a physician's recommendation.¹⁰¹

In presenting the facts, for example, Pregerson underscores that Raich suffered from ten serious medical conditions and that she had tried dozens of alternative, legal medicines that failed her.¹⁰² In defining appellants' "class of activities," he thrice mentions that it was "for medical purposes."¹⁰³ When contrasting *Raich* to *Proyect v. United States*, he notes that "while *Proyect* argued that the marijuana was only for his personal consumption, he did not allege that it was for medicinal purposes."¹⁰⁴ Finally, with respect to congressional findings supporting the CSA, Pregerson writes that "the findings are not specific to marijuana, much less intrastate medicinal use of marijuana that is not bought or sold and the use of which is based on the recommendation of a physician."¹⁰⁵

¹⁰¹ In speaking to this precise point in *Conant*, it bears noting, Pregerson's Ninth Circuit colleague Judge Kozinski does the same thing. *Conant*, 309 F.3d at 647 (Kozinski, J., concurring).

¹⁰² See *Raich*, 352 F.3d at 1225.

¹⁰³ *Id.* at 1227-28.

¹⁰⁴ *Id.* at 1230, n.4.

¹⁰⁵ *Id.* at 1232. To illustrate further, consider the following passage from Pregerson's opinion:

Clearly, the way in which the activity or class of activities is defined is critical. We find that the appellants' class of activities—the intrastate, noncommercial cultivation, possession and use of marijuana for personal medical purposes on the advice of a physician—is, in fact, different in kind from drug trafficking. For instance, concern regarding users' health and safety is significantly different in the medicinal marijuana context, where the use is pursuant to a physician's recommendation. Further, the limited medicinal

To be sure, Pregerson's emphasis on the medicinal purpose of appellants' marijuana use is understandable. For one thing, such a purpose ensures that the plaintiffs' activities are within the scope of a valid state law, which is essential to their position's legitimacy. Secondly, describing the "class of activities" as narrowly as possible seems to bolster Pregerson's holding that appellant's activities are beyond the reach of the CSA. Third, whether marijuana use is for medicinal rather than recreational purposes is a key policy issue. Polls suggest that many who support legalizing medical marijuana draw the line at recreational use,¹⁰⁶ and

use of marijuana as recommended by a physician arguably does not raise the same policy concerns regarding the spread of drug abuse. Moreover, this limited use is clearly distinct from the broader illicit drug market—as well as any broader commercial market for medicinal marijuana—insofar as the medicinal marijuana at issue in this case is not intended for, nor does it enter, the stream of commerce.

Id. at 1228.

Here, Pregerson claims to give three reasons that appellants' activities are distinct from drug trafficking for Commerce Clause purposes, but only the third is relevant to the constitutional issue. The first two reasons are concerns properly left to the states where the activity in question is otherwise not federally regulable under the Commerce Clause. The first reason, "concern regarding users' health and safety," is, by definition, within the state's police power, and Pregerson expressly labels the second one a policy concern. The third reason, by contrast, while relevant to the Commerce Clause issue, would be true of some regimes of legalized recreational marijuana use.

¹⁰⁶ A TIME/CNN poll found that 80 percent of Americans favor legalizing marijuana for medical use, and 72 percent believe those arrested for possessing small amounts of marijuana should be fined, not jailed. See Joel Stein, *The New Politics of Pot*, TIME, Nov. 4, 2002, at 57-8.

although 12 states have legalized medical marijuana to date,¹⁰⁷ none currently legalize it for recreational purposes.

While Pregerson's emphasis on appellants' medicinal purposes is understandable, the Bush administration argued that it obscures a key problem. *Where a State legalizes the private, personal possession and use of marijuana, it is categorically irrelevant to the Commerce Clause issue whether that use is for medicinal rather than recreational purposes.* As the Solicitor General wrote, "for purposes of defining Congress's power under the Commerce Clause in enacting the CSA . . . , there is no basis for distinguishing marijuana production, distribution, or use for purported medicinal purposes, as opposed to recreational (or any other) purpose."¹⁰⁸ As he added at oral argument, "if Respondents are right on their Commerce Clause theory, . . . then I think their analysis would extend to recreational use of marijuana, as well as medical use of marijuana. . . ."¹⁰⁹

In response, Justice Souter suggested that medicinal use can be distinguished from recreational use based on doctors' claims of the medical benefits of smoked marijuana for sick patients.¹¹⁰ This overlooks, however, that from a constitutional perspective all that matters is whether

¹⁰⁷ See David Savage, *Justices Take on Medical Pot Law*, L.A. TIMES, Nov. 30, 2004, at A1.

¹⁰⁸ Brief for the Petitioners, *Ashcroft v. Raich*, *supra* note 24, at 40. While he thus raised the issue in his brief, Mr. Clement did not draw out its implications, rather simply declaring that the CSA reaches the medicinal use of cannabis. *Id.*

¹⁰⁹ *Oral Arg.*, at 15.

¹¹⁰ See *id.*, at 23-25.

the *activity* Congress seeks to criminalize constitutes interstate commerce. Whatever *motive* different people may have in engaging in the activity, or benefits they may derive therefrom, the activity itself - in this case, the private, personal adult possession and use of marijuana - remains the same.¹¹¹ The possession and consumption in question have as little or as much impact on interstate commerce either way. Judge Pregerson nowhere addresses this problem, and neither his intentions nor his repetitions make it disappear. That the medicinal/recreational distinction has great policy moment does not bestow constitutional significance. A wish is not a fact.¹¹²

Mr. Clement could thus have argued that if the Court upholds the Ninth Circuit ruling that appellants' private possession and use of marijuana for medicinal purposes are beyond Congress' reach, this immunity exists regardless of whether that use is medicinal. Such a ruling, he could have argued, will unavoidably enable States to legalize the possession and use of marijuana, *and indeed any Schedule I drug*, purely for recreational purposes.

We should not assume that Mr. Clement would have overplayed his hand with this point. To be sure, he might have been tempted to warn that upholding the Ninth Circuit would yield a nightmare scenario in which States legalize

¹¹¹ Even where motive can plausibly determine whether an activity is commercial or not, monetary gain is the prime motive in neither medicinal nor recreational use, and so this line of argument is unavailable.

¹¹² As it turns out, like many lower federal court §841(a)(1) rulings, *Raich* does not present the Commerce Clause issue in pure form. Stripped of the constitutionally irrelevant dimension of "medicinal purpose," the question is laid bare.

marijuana for minors, cocaine and heroin for adults, cocaine and heroin for minors, Amsterdam-style “cafes,” public opium dens, and “Needle Parks.”¹¹³ Yet he knows that some such regimes would impact interstate commerce in a way reachable by Congress. Even among those that would not, further, it is virtually impossible as a practical matter that any State would enact some of them.

As for minors, for example, special protections and disabilities for minors are strewn throughout U.S. law for reasons well understood,¹¹⁴ and there is no good reason to assume things would be different with the legalization of certain drugs. As for cocaine and heroin, notwithstanding the DEA’s representations to the contrary,¹¹⁵ Americans understand that these substances are far more

¹¹³ See RAND, *supra* note 10, at 281-86. See also U.S. Department of Justice, Drug Enforcement Administration, *Speaking Out Against Drug Legalization*, Mar. 2003, at <http://www.dea.gov>, at 3 (hereinafter DEA) (last visited June 12, 2005).

¹¹⁴ See RAND, *supra* note 10, at 63. All states impose age limits for the purchase of alcohol. Beyond this, a contract with a minor is voidable at the option of that minor. In First Amendment law, time, place and manner restrictions may be imposed on otherwise protected speech in the interest of protecting minors. In the law of negligence, standards of the duty of care differ depending on the defendant’s age. Finally, in family law, the welfare of the child is a primary criterion for the resolution of custody disputes.

¹¹⁵ Both the DEA and ONDCP websites refer in many places simply to “drug use” and “drug addiction” without distinguishing between marijuana on the one hand and cocaine and heroin on the other. See generally the Office of National Drug Control Policy (hereinafter ONDCP), at <http://www.whitehousedrugpolicy.gov/> (last visited September 4, 2005); DEA, *supra* note 113.

dangerous and addictive than marijuana.¹¹⁶ Indeed, even private adult recreational use of marijuana goes too far for many Americans.¹¹⁷ Any suggestion that States would legalize everything under the sun is unsupported by what we know of actual behavior.

1. The Personal Cultivation Initiative

Yet let us give Mr. Clement his due. Let us concede that, given the chance, some states would seriously consider legalizing the private cultivation, possession and use of marijuana for recreational

¹¹⁶ As MacCoun and Reuter note, “[f]or purposes of the legalization debate, marijuana is the cutting edge drug, the only politically plausible candidate for major legal change.” RAND, *supra* note 10, at 341. Even James Q. Wilson distinguishes marijuana for these purposes. See J.Q. Wilson, *Against the Legalization of Drugs*, COMMENTARY, Feb., 1990, at 21, 23.

That the distinction between marijuana and the harder drugs is well and widely understood is reflected in the fact that “[t]here are two major categories of bills: marijuana-only bills, and the omnibus legalization bills that would legalize the sale and possession of virtually all nonmedical substances.” Neustadter, *supra* note 22, at 390. The basis for this distinction consists largely of two key ways in which marijuana differs from these other substances: it has (1) a much higher safety margin and (2) a much lower dependence potential. See Robert Gable, *Not All Drugs are Created Equal*, in FISH, *supra* note 22, at 414.

In passing, I do not claim that decriminalizing the private possession of small amounts of other drugs would constitute insanity, given the well documented, multilevel costs of the War on Drugs. That vast subject, however, is beyond the scope of this article. In any case, since few if any States, given the option, would legalize or decriminalize cocaine or heroin, it is a moot point for our purposes.

¹¹⁷ See Stein, *supra* note 106, at 61.

purposes by adults. Imagine, for instance, that a state contemplates enacting the following law:

*It shall not be unlawful for an adult to cultivate within his domicile up to X cannabis plants per adult legally residing in that domicile for consumption solely by adults within that domicile, not for sale or trade.*¹¹⁸

Let us call this imaginary law, a variation on regimes tried or suggested before,¹¹⁹ the Personal Cultivation Initiative (PCI). Though the PCI

¹¹⁸ So long as this is roughly the substance of the law, it matters not whether a state enacts it by legislation or constitutional amendment. Since none of the medical marijuana laws recently enacted have been enacted by state legislation, however, the citizen's initiative process would seem the more likely avenue for such reform. For a defense of the legitimacy of the initiative process in the context of the medical marijuana debate, see Newbern, *supra* note 10, at 1631-32.

¹¹⁹ Several regimes introduced as bills or adopted as law by States in the 1980's allowed home growing for personal use. See RAND, *supra* note 10, at 364-66, and Neustadter, *supra* note 22, at 390-91. As one drug advisory council suggested, "the elimination, as an offense, of personal possession and use of marijuana. . . . Growing up to five plants per household for personal use would also no longer be an offense. This would apply to a normal residence, but should not apply to schools, colleges, or private institutions." *Drugs and Our Community: Report of the Premiere's Drug Advisory Council (1996) in Government & Private Commissions Supporting Marijuana Law Reform*, at <http://www.norml.org/index>. Further, as Schlosser notes, "[i]n 1972, the National Commission on Marijuana and Drug Abuse . . . unanimously agreed that possessing small amounts of marijuana in the home should no longer be a crime. Growing or selling marijuana for profit, using it in public, or driving under the influence would remain strictly forbidden." SCHLOSSER, *supra* note 26, at 23. As Sterling adds, "[s]ince marijuana is easily grown, cultivation for personal or family use should be allowed without registration or taxation." Sterling, *supra* note 22, at 524.

legalizes a narrowly circumscribes zone of cannabis use, it would function in effect like *decriminalization*.¹²⁰ Though the PCI legalizes a narrowly circumscribed zone of cannabis use, it would, in effect, function like decriminalization.¹²¹ Further, since it bans the sale or exchange of marijuana (unlike some proposals for regulated distribution) otherwise legitimate concerns about the *commercialization* of legal marijuana would not

¹²⁰ Several regimes introduced as bills or adopted as law by states in the 1980's allowed home growing for personal use. See RAND, *supra* note 10, at 364-66, and Neustadter, *supra* note 22, at 390-91. One drug advisory council has suggested "the elimination, as an offense, of personal possession and use of marijuana Growing up to five plants per household for personal use would also no longer be an offense. This would apply to a normal residence, but should not apply to schools, colleges, or private institutions." *Drugs and Our Community: Report of the Premiere's Drug Advisory Council* (1996) in *Government & Private Commissions Supporting Marijuana Law Reform*, at <http://www.norml.org/index>. Further, as Schlosser notes, "In 1972, the National Commission on Marijuana and Drug Abuse . . . unanimously agreed that possessing small amounts of marijuana in the home should no longer be a crime. Growing or selling marijuana for profit, using it in public, or driving under the influence would remain strictly forbidden." SCHLOSSER, *supra* note 26, at 23. As Sterling adds, "Since marijuana is easily grown, cultivation for personal or family use should be allowed without registration or taxation." Sterling, *supra* note 22, at 524.

¹²¹ Judge Gray describes decriminalization as follows: "[T]he possession, use, and sale of street drugs are still illegal. But as long as people stay within certain well-known guidelines, and do not otherwise commit any crimes, the police will 'look the other way' and not enforce the drug laws." J. GRAY, *supra* note 4, at 218. The bottom line is the same: keep it discrete, and there will be no trouble. For further analysis, see Richard Evans, *What Is "Legalization"? What Are "Drugs"? in Fish*, *supra* note 24, at 369-75.

arise.¹²² Because the PCI would have as little effect on commerce as would the activity in *Raich*, it would be as immune from the reach of Congress' commerce power as *Pregerson* has shown appellants' activity under the CUA to be, and for the same reasons. *If anything, the activity protected by the PCI is even further from interstate commerce than Raich's activity under the CUA.* The latter requires a person wishing to use marijuana to obtain a physician's written recommendation, and a doctor's visit is virtually always a commercial transaction. The act of obtaining the doctor's note is thus quite plausibly "connected with a commercial transaction."¹²³ The same can hardly be said of an adult who decides to grow a cannabis plant next to the tomatoes and carrots in his garden for his personal home consumption.

B. The Refined Issue

Any hesitation the Justices might have before issuing the broad ruling I advocate would likely be a matter of policy preference. While conscientious jurists try to separate their policy preferences from their constitutional interpretation, we know that they are not always successful. Taking the policy question head on, then, the issue for the Court is whether a state could rationally enact the PCI.¹²⁴ Weighing the risks of the PCI against the costs of

¹²² See *RAND*, *supra* note 10, at 326-27, 362-63.

¹²³ *Lopez*, 514 U.S. at 561.

¹²⁴ Since the United States Constitution, as we have seen, reserves the police power to the states alone, then where they are acting within the police power to regulate noneconomic activity, a presumption of constitutionality is appropriate, such that their action need only pass the rational basis test.

the current regime of absolute cannabis prohibition, could states rationally conclude that the latter outweigh the former? There are barriers to clear thinking on drug law reform, to be sure,¹²⁵ yet if the Justices can honestly say that a state could rationally enact the PCI, then given the strength of Pregerson's constitutional argument, they should rule that the states can decide this for themselves.¹²⁶

¹²⁵ See RAND, *supra* note 10, at 371-409; James Ostrowski, *Drug Prohibition Muddles Along: How a Failure of Persuasion Has Left Us with a Failed Policy*, in Fish, *supra* note 24, at 363-67.

¹²⁶ At this point, Mr. Clement might suggest that in the modern era, notwithstanding *Lopez* and *Morrison*, the Court should always defer to Congress in Commerce Clause cases, as it did in response to challenges to the 1964 Civil Rights Act. See *Heart of Atlanta Hotel v. United States*, 379 U.S. 241 (1964); *Katzenbach v. McClung*, 379 U.S. 294 (1964). In those cases, after all, it was Congress, not the states, that had it right on the policy merits: because an individual's race is categorically irrelevant to his character, intelligence, ability, or any other proper basis of treatment by the private or public sector (particularly at the core of civil society, as in public accommodations and public university admissions), state policies to the contrary were properly prohibited.

Beyond the amusing absurdity of such a conservative administration making this argument, racial nondiscrimination is now passé as a policy goal. *Heart of Atlanta* and *McClung* involved Title II of the 1964 Act, which bans race discrimination in public accommodations. While Title VI, which expressly forbids race discrimination by institutions accepting federal funds, may seem just as sounds, this is now wrong. With the Court's recent blessing, public institutions like the University of Michigan, which receive millions annually in federal funding, may openly engage in racial discrimination if they claim that it advances "diversity." See *Grutter v. Bollinger*, 139 U.S. 306 (2003). Since *Grutter* flatly contradicts the racial nondiscrimination standard expressly imposed by Title VI, Congress is apparently now obliged to repeal Title VI as bad policy, replacing the racial nondiscrimination standard with a "racial discrimination if

An exhaustive consideration of the PCI's policy merits would, of course, require a lengthy discussion that is necessarily beyond our present scope. For present purposes, I need only show that the Court could conclude that enactment of the PCI would not be irrational.

1. The Risks of the Personal Cultivation Initiative

Let us begin by acknowledging Mr. Clement's likely claim that the PCI is not without risks. Four common, related concerns are: (1) the impact of legalization on minors,¹²⁷ (2) that marijuana is a "gateway" to harder drugs,¹²⁸ (3) that legalization of cannabis will increase its use, and (4) that today's marijuana has a much higher potency than that of a generation or two ago. While these concerns are not completely unfounded, the Justices could find that States contemplating the PCI would be justified in concluding that these risks are greatly exaggerated. Even granting that they remain, we must still consider whether those risks are nonetheless outweighed by the costs of the present regime.

As for minors, let us concede that it is generally better for minors not to consume marijuana (or alcohol, tobacco, or fatty foods).

experts have good reasons" standard. I predict that will happen the same week Congress reclassifies marijuana under the CSA.

¹²⁷ As the DEA tells us, "The Legalization Lobby claims that the United States has wasted billions of dollars in its anti-drug efforts. But for those kids saved from drug addiction, this is hardly wasted dollars." DEA, *supra* note 113, at 2.

¹²⁸ See, e.g., ONDCP, *supra* note 115, at 9.

While the DEA assures us that “almost two-thirds of teens say their schools are drug-free,”¹²⁹ Judge Gray observes:

[O]ur current system is completely unable to keep illicit drugs out of our communities and away from our children Ask your local high school or junior college students and they will tell you . . . that it is easier for our children and underage adults to get illicit drugs than it is for them to get alcohol.¹³⁰

As Rosenthal, et al., notes:

[Parent groups] regularly complain to authorities that marijuana is more available than alcohol to their junior high and high school children. Laws forbid storeowners to sell alcohol or tobacco to minors, so teenagers need to use phony IDs or find an adult willing to buy liquor or cigarettes for them. However, marijuana may be only a phone call or bicycle ride away.¹³¹

¹²⁹ DEA, *supra* note 113, at 4.

¹³⁰ J. GRAY, *supra* note 4, at 50-51.

¹³¹ ROSENTHAL ET AL., *supra* note 10, at 75-76. As Mike Gray notes, a University of Maryland survey of high school students found that the hardest drug to obtain is not marijuana, but alcohol. See MIKE GRAY, DRUG CRAZY: HOW WE GOT INTO THIS MESS AND HOW WE CAN GET OUT OF IT 188, 191 (1998) (citing University of Maryland, Center for Substance Abuse Research, *Cesar Fax* 5:42, Oct. 28, 1996). See also SCHLOSSER, *supra* note 26, at 71; HUSAK, *infra* note 144, at 71-72; ELDREDGE, *supra* note 22, at 176-77; and Anita

As for the “gateway theory,” even if most cocaine and heroin addicts previously smoked marijuana, a one-way correlation does not prove that marijuana use is either necessary or sufficient for later addiction to harder drugs. As Mike Gray observes:

[T]he fallback line for cannabis prohibition, the moat around the castle, has always been the idea that marijuana is a stepping stone to harder drugs. But here again the actual experience of the [baby] boomers did not mesh properly with the official line. Of the seventy million Americans who smoked the weed, 98% didn’t wind up on anything harder than martinis. Only a tiny fraction went on to become heroin or cocaine addicts, and the cause-effect connection to reefer for this group was no more evident than was the connection to coffee.¹³²

Hamilton, *This Bud’s For the U.S.*, TIME, Aug. 23, 2004, at 36-37. Concededly, the PCI might provide some minors an additional avenue of access to cannabis they would not otherwise have had, i.e., their parents’ plants. Just as a liquor cabinet can be locked, however, it would not be difficult to secure such plants. See STERLING, *supra* note 22, at 517.

¹³² M. GRAY, *supra* note 131, at 187. Satirist George Carlin once observed that “mother’s milk leads to everything,” and as Sullivan has elaborated:

[T]he tired argument that pot is a ‘gateway’ drug to more serious narcotics is a fallacy. Sure, if you ask hardened drug addicts whether they started with pot, they usually say yet. But I doubt many of them are teetotalers, either. Why wasn’t their first beer a gateway drug? And if you ask a bunch of white-collar

The RAND report sums up the matter: “[W]e believe that there is little evidence that expanding marijuana use does increase the use of other, more harmful drugs [Cannabis] depenalization has no consequence for the prevalence of cannabis use. Moreover, it will not increase the use of other drugs for several reasons.”¹³³

As for the claim that legalization of marijuana will cause its increased use,¹³⁴ the RAND report notes that “[t]he effects of drug laws on drug use are considerably more uncertain and complex than is generally acknowledged by advocates on either side of the drug policy debate There are too many unknowns to predict the effects of drug legalization with any specificity.”¹³⁵ As one study found, however, “[T]here is little evidence that decriminalization of marijuana use necessarily leads to a substantial increase in marijuana use.”¹³⁶ Another observed:

professionals in their fifties whether they have ever smoked marijuana, they’d probably say yes as well. Andrew Sullivan, *Enjoy*, NEW REPUBLIC, May 28, 2001, at 6.

¹³³ RAND, *supra* note 10, at 346, 358. Putting the issue into broader perspective, Martinez adds that “the vast majority of caffeine, tobacco, and alcohol, or marijuana users do not advance to stronger drugs.” MARTIN MARTINEZ, *THE NEW PRESCRIPTION: MARIJUANA AS MEDICINE* 65 (2000).

¹³⁴ As the DEA says, for example, “[I]f the relatively modest outlays of federal dollars (\$19 billion in 2002) were not made, drug abuse and the attendant social costs . . . would be far greater.” DEA, *supra* note 113, at 12-13.

¹³⁵ RAND, *supra* note 10, at 100.

¹³⁶ INSTITUTE OF MEDICINE, *Marijuana and Medicine: Assessing the Scientific Base* 326 (Janet E. Jay et al. eds., 1999).

Between 1973 and 1978, possession of marijuana was reduced to a misdemeanor in twelve states, but the predicted explosion in cannabis use failed to materialize. The University of Michigan's annual high school survey . . . showed the seniors in these dozen states reported no more marijuana use than their counterparts in the other states.¹³⁷

Further, although the Dutch decriminalized cannabis, "Dutch national rates [of cannabis usage] now are somewhat lower than those in the United States [T]hroughout two decades of the 1976 policy, Dutch [cannabis] use levels have remained at or below those in the United States."¹³⁸

As for the alleged higher potency of today's marijuana,¹³⁹ finally, this is seriously contested. As a European Union drug monitoring agency recently reported:

[s]tatements in the popular media that the potency of cannabis has increased by ten times or more in recent decades are not supported by the limited data that are available from either the USA or Europe. The greatest long-term changes in potency appear to have occurred in the USA. It should be noted here that before 1980

¹³⁷ L.D. Johnston et al, *Marijuana Decriminalization: The Impact on Youth 1975-1980* in UNIVERSITY OF MICHIGAN, INSTITUTE FOR SOCIAL RESEARCH, MONITORING THE FUTURE, OCCASIONAL PAPER 13.

¹³⁸ RAND, *supra* note 10, at 256, 263.

¹³⁹ See DEA, *supra* note 113, at 9, and ONDCP, *supra* note 115, at 4.

herbal cannabis potency in the USA was very low by European standards.... The natural variation in the THC content between and within samples of herbal cannabis or cannabis resin at any one time and place far exceeds any long-term changes that may have occurred either in Europe or the USA.¹⁴⁰

Even putting this report aside, however, and assuming for the sake of argument that cannabis

¹⁴⁰ European Union Monitoring Centre on Drugs and Drug Addiction, *Overview of Cannabis Potency, 2004*, at <http://www.csdp.org/research/insights6web.pdf>. As Mike Gray adds:

[D]rug Czar William Bennett was among the first to break the bad news: the children of the boomers were facing a far more powerful form of cannabis than the stuff their parents experimented with in the sixties But once again, close inspection revealed a flaw in the official tale. It seems the baseline samples from the 1970's were not properly preserved, so there's really no way to tell what their original THC content was. On top of that, the government's own long-term study of marijuana potency at the University of Mississippi undermined Bennett's argument. The official numbers showed an average THC content in marijuana seized by the police since 1981 ranging between 2.3 and 3.8 percent. In the 1970s on the other hand, independent analysts found THC averaging 2 to 5 percent with some samples as high as 14 percent. As one authority put it, "If parents want to know what their kids are smoking today, they need only recall their own experience."

M. GRAY, *supra* note 131, at 186-87. See also Hamilton, *supra* note 131, at 37.

potency in the USA has greatly increased in the last generation, two things are notable. First, as Judge Gerber explains, this increase may be directly traceable to market responses to the U.S government's efforts in the 1970's and 1980's to eradicate marijuana smuggled from Mexico.¹⁴¹ Second, even if one who buys cannabis illegally can likely not know its potency, that risk is eliminated if he allowed to grow his own cannabis from the seeds of plants he has already consumed.

While the PCI poses risks, then, they are often exaggerated and plausibly minimal. Even conceding some risk, however, this is only part of a State's basis for rational policymaking in this area. To complete our assessment of whether the Court could find that States could rationally enact the PCI, thus, we turn to the costs of the current regime.

2. The Costs of the Current Regime

Two stark facts in particular would give states contemplating the PCI considerable pause before rejecting it. First, while American law completely *prohibits* marijuana, to which not a single death has ever been attributed,¹⁴² it properly *regulates* substances far more dangerous than marijuana, like

¹⁴¹ See Gerber, *supra* note 10, at 145-46. This dynamic seems to parallel that of alcohol bootleggers during Prohibition who recognized that greater profits could be realized at the same level of risk by smuggling hard liquor instead of beer and wine. See RAND, *supra* note 10, at 161.

¹⁴² As Harvard Medical Professor Lester Grinspoon has observed, "[D]espite its use by millions of people over thousands of years, cannabis has never caused a death." Lester Grinspoon, *Cannabis, the Wonder Drug*, in THE DRUG LEGALIZATION DEBATE 101-02 (James A. Inciardi, ed., 1999). See also ROSENTHAL ET AL., *supra* note 10, at 40.

alcohol, tobacco,¹⁴³ firearms, and explosives.¹⁴⁴ Second, by completely prohibiting marijuana, the

¹⁴³ Alcohol and tobacco in particular have often been singled out in this connection. A study recently commissioned by the U.S. government concluded that “users of marijuana are less likely to become dependent on the drug in comparison to alcohol and nicotine.” INSTITUTE OF MEDICINE, *supra* note 136, at 98. As for harms beyond dependence, alcohol related deaths total more than 100,000 per year, and tobacco causes more than 400,000 U.S. deaths each year. See ROSENTHAL ET AL., *supra* note 10, at 40-41, 103.

Several authorities and leading studies thus declare that marijuana is far less harmful than alcohol and tobacco. In the words of two reports cited, “An objective consideration of marijuana shows that it is responsible for less damage to the individual and society than are alcohol and cigarettes.” CALIFORNIA RESEARCH ADVISORY PANEL, *Twentieth Annual Report of the Research Advisory Panel* (1989), at <http://www.norml.org>. According to an article in *The Lancet*, a leading British medical journal, “The smoking of cannabis, even long-term, is not harmful to health It would be reasonable to judge cannabis as less of a threat . . . than alcohol or tobacco.” *Deglamorising Cannabis*, 346 *THE LANCET* 1241 (Nov. 14, 1998). See also ERIC GOODE, *BETWEEN POLITICS AND REASON: THE DRUG LEGALIZATION DEBATE* 155 (1997); SCHLOSSER, *supra* note 26, at 74; and Stein, *supra* note 106, at 61. As MacCoun and Reuter sum things up:

[T]hough cannabis use is not without harm, especially for adolescents, as a source of danger it is certainly trumped by alcohol, tobacco, reckless driving, criminality, and unsafe sexual behavior [Nonetheless] there are enormous political obstacles to prohibition of these substances; alcohol and tobacco have much larger and better organized constituencies than do(es) cannabis This begs the question: why not remove the inconsistency by changing the pot laws?

RAND, *supra* note 10, at 345, 358 (emphasis added).

Notwithstanding these authorities, the DEA simply declares in sweeping terms that “[d]rug use can be deadly, far more deadly than alcohol [D]rugs are far more addictive than alcohol.” DEA, *supra* note 113, at 8, 18. The most astonishing claim, however, may be the following: “Legalization proponents claim . . . that many people can use drugs in moderation and that many would choose not to use drugs, just as many abstain from alcohol and tobacco now. Yet how much misery can be attributed to alcoholism and smoking? Is the answer to just add more misery and addiction?” *Id.* at 14. This claim, it will be noticed, does not simply equate the effects of marijuana with the misery and addiction of alcohol and nicotine, which is patently false, but it does so in the service of blatant paternalism, which is antithetical to a free society. If free adults can be trusted to decide whether to risk the devastation of alcoholism and tobacco addiction, it is absurd to say they can not be trusted to decide whether to use marijuana, which is unquestionably far safer.

¹⁴⁴ Two other substances are noteworthy in this connection: fatty foods and caffeine. As for the former, though access to fattening foods is not regulated, “in March, the Centers for Disease Control and Prevention predicted that obesity will overtake smoking as the leading cause of preventable deaths in the United States by next year if current trends continue.” Rashad & Michael Grossman, *The Economics of Obesity*, 156 THE PUBLIC INTEREST 104. As Husak observes, “[P]eople overeat and grow obese, their health suffers, they may die prematurely. None of this is good What should be done about it? What about criminalizing it? . . . This is crazy The problem is not large enough to warrant such extreme infringements of liberty.” DOUGLAS HUSAK, *LEGALIZE THIS! THE CASE FOR LEGALIZING DRUGS* vii-viii (2002). As for caffeine:

[T]he risks of caffeine are greater than THC in every way Caffeine is physically addicting (with headache as the most often cited symptom) and can cause unnecessary stress, lightheadedness, breathlessness, and an irregular heartbeat or much worse in larger-than-average doses. Marijuana isn’t even

United States stands firmly against the recent tide of practice in other leading western democracies.¹⁴⁵

These facts standing alone may not sway rational people on this matter. They should, however, lead them to inquire into and seriously reflect upon the actual costs of our current regime. While this is a vast subject that cannot be fully treated here, we can at least summarize some of the

remotely as dangerous—no deaths by overdose,
no physical addiction, and minimal health risks
...”

Gable, *supra* note 116, at 406 (quoting D. Larsen).

Still, I assert that these substances that are far more dangerous and addicting than cannabis are *properly* regulated without a blanket prohibition. We know how prohibition of alcohol worked. As for nicotine (equaled in addictive power only by heroin) prohibition of cigarettes would create a truly nightmarish black market. *See* Fish, *supra* note 22, at 346. In light of these contrasts, the United States government’s claims of concern for health risks, *see* ONDCP, *supra* note 115, at 2; DEA, *supra* note 113, at 8-9, and lost productivity, *see* DEA, *supra* note 113, at 11, are exposed as blatant hypocrisy, which states can be trusted to put into perspective when contemplating the PCI.

¹⁴⁵ This includes several European countries and Canada. *See, e.g.,* J.F.O. McAllister, *Europe Goes to Pot*, TIME, Aug. 20, 2001, at 60-61; *European Drug Policy: Analysis and Case Studies*, at <http://www.norml.org/index>. As Hamilton observes, “[A]t the popular New Amsterdam Café in downtown Vancouver, customers openly smoke marijuana If passed within the year, as seems likely, new Canadian legislation would decriminalize possession of less than 15 grams of marijuana, meaning that offenders would given the equivalent of a traffic ticket.” Hamilton, *supra* note 131, at 37. MacCoun and Reuter conclude that “this reluctance (of political candidates to advocate change in U.S. marijuana law) is particularly a pity because major changes in the United States would be consistent with a general international trend toward less aggressive use of the criminal sanction against marijuana.” RAND, *supra* note 10, at 376.

economic and social costs of complete marijuana prohibition.¹⁴⁶ These costs are multidimensional, largely inextricable, and staggering.

¹⁴⁶ As for the constitutional costs of the war on marijuana, an account of these could fill volumes. See, e.g., ROSENTHAL ET AL., *supra* note 10, at ch. 1; ELDREDGE, *supra* note 22, at chs. 5-6; Newbern, *supra* note 10, at 1590-94; JOEL MILLER, *BAD TRIP: HOW THE WAR AGAINST DRUGS IS DESTROYING AMERICA* ch. 8 (2004), at chs. 5-6; J. GRAY, *supra* note 4, at ch. 3; Robert Sweet & Edward Harris, *Moral and Constitutional Considerations in Support of the Decriminalization of Drugs*, in Fish, *supra* note 22, at 430-84. This war threatens several fundamental constitutional interests, including those arising under the First, Fourth, Fifth, Sixth, Eighth, and Ninth Amendments, as well as the Tenth Amendment and the Commerce Clause. Some of these problems largely overlap with the economic and social costs we shall consider, however, and they can be expressed as technical legal objections, as well as "costs." I shall thus underscore a single way in which our government's propaganda in this war casually disregards fundamental Fourteenth Amendment values.

The ONDCP asks, "[W]hy legalize marijuana and add a third drug to the current list of licit threats?" ONDCP, *supra* note 115, at 8. See also DEA, *supra* note 113, at 18-19. The answer is that it is blatantly arbitrary simply to decree that the ravages of alcohol and tobacco, but not the demonstrably lesser evils of marijuana, will be tolerated simply because the former are currently legal and have powerful lobbies. The degree of actual harm a substance causes must be at least a major criterion for determining whether it will be regulated rather than completely prohibited. Where it is not, both due process and equal protection are deeply offended. As Justice Jackson wrote:

The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority be imposed generally. Conversely, nothing opens the door to arbitrary

a. Economic Costs

The DEA declares that “legalization [of marijuana] would result in skyrocketing costs that would be paid by American taxpayers and consumers.”¹⁴⁷ The current prohibition regime, however, includes a range of steep costs, both direct and indirect. The criminal justice process, of course, accounts for many of the *direct* economic costs. There are approximately seven hundred thousand marijuana arrests in the United States each year,¹⁴⁸ and the annual bill for prosecution, defense, incarceration, and court supervision of such nonviolent offenders is in the tens of billions of dollars.¹⁴⁹ As the RAND report notes, “[R]eductions

action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.

R. Express Agency, Inc. v. New York, 336 U.S. 106, 112-13 (1949).

On the liberty due process argument in the context of *Raich*, further, see Julie M. Carpenter, *Yes, Federal Power is Limited*, LEGAL TIMES, Nov. 29, 2004, at 34.

¹⁴⁷ DEA, *supra* note 113, at 11.

¹⁴⁸ In 2002, there were 697,082 marijuana arrests, and 6.5 million U.S. marijuana arrests since 1993. *Crime in the United States*, FBI Uniform Crime Reports (1993-2002, reported annually).

¹⁴⁹ See FAS Drug Policy Analysis Bulletin, at <http://www.mpp.org/arrests/fas61699> 1; *Still Crazy After All These Years: Marijuana Prohibition 1937-1997* at <http://norml.org>; FBI's combined Uniform Crime Reports: *Crime in the United States (1990-2000)*, at <http://www.norml.org/index>; and ROSENTHAL ET AL., *supra* note 10, at 82. See generally, MILLER, *supra* note 146; ELDREDGE, *supra* note 22, ch. 7; ROSENTHAL ET AL., *supra* note 10, ch. 3.

in criminal sanctioning, almost by definition, produce significant reductions in the criminal justice costs and burdens, as well as the intrusiveness associated with those sanctions.”¹⁵⁰

The *indirect* economic costs of complete prohibition are also staggering. Persons imprisoned for marijuana offenses generate numerous losses, such as “loss of income, potential welfare costs for dependents, and loss of productivity to society,”¹⁵¹ as well as loss of tax revenues that these prisoners and marijuana suppliers would generate if legally employed. It is a fundamental law of economics that criminalizing a substance greatly increases its

¹⁵⁰ RAND, *supra* note 10, at 326. As Fish writes:

[L]egalizing marijuana, and releasing from prison those who are there solely for its possession, would instantly save huge amounts of money, end the shortage of prison space, free up funds for drug treatment, and raise the possibility that consumers seeking intoxication might choose it in preference to the much more dangerous alcohol.

Fish, *supra* note 22, at 542.

Rosenthal adds that “if marijuana were legal or civilly regulated, there would be five percent fewer cops, cop cars, criminal court cases, and prisoners. The change in policy would result in a direct saving of \$16 billion a year.” ROSENTHAL ET AL., *supra* note 10, at 88. It has been estimated that marijuana decriminalization saves California \$100 million in enforcement costs each year. See Michael Aldrich & Tod Mikuriya, *Savings in California Marijuana Law Enforcement Costs Attributable to the Moscone Act of 1976 – A Summary*, 20 J. OF PSYCHOACTIVE DRUGS at 75-81 (Jan.-Mar. 1988).

¹⁵¹ ROSENTHAL ET AL., *supra* note 10, at 29.

price,¹⁵² yet criminalizing marijuana does not appear to decrease its use.¹⁵³ Under the PCI, then, the \$10.6 billion that the ONDCP estimates that Americans annually spend on cannabis, at prices dictated by its illegal status, would be spent or invested elsewhere in the U.S. economy (rather than the Canadian).

In passing, marijuana suppliers who become multimillionaires under the current regime¹⁵⁴ must

¹⁵² As Goode observes, “[B]ecause drugs are illegal, they are expensive and hence, they are hugely profitable to sell.” GOODE, *supra* note 143, at 152. As the RAND report adds, “[C]annabis . . . is extraordinarily expensive relative to its production cost or what it might cost if legal.” RAND, *supra* note 10, at 344. As Miller explains, “What appear to be absurdly high prices are simply the way the market rations supply and encourages new supplies in response to demand.” MILLER, *supra* note 146, at 18.

¹⁵³ According to a 2001 study sponsored by the United States government, “Existing research seems to indicate there is little apparent relationship between the severity of sanctions prescribed for drug use and prevalence or frequency of use, and that perceived legal risk explains very little in the variance of individual drug use.” Nat’l Research Council, *Informing America’s Policy on Illegal Drugs: What We Don’t Know Keeps Hurting Us*, Nat’l Acad. Press 192-93 (2001). As one commentator notes:

Between 1988 and 1998, British arrests for marijuana nearly quadrupled, reaching almost 100,000 a year. As many as 5600 marijuana offenders were annually imprisoned. And yet British marijuana use during that period continued to rise. *Despite having the most punitive marijuana laws in Europe, Great Britain soon had the highest rate of marijuana use among young people.*

SCHLOSSER, *supra* note 26, at 69-70 (emphasis added).

¹⁵⁴ See MILLER, *supra* note 146, at 15-18; ELDREDGE, *supra* note 22, ch. 3.

be understood as economic actors responding rationally to a market in which the profit potential exceeds the risks.¹⁵⁵ The PCI would inevitably destroy most of the illicit market. Since the PCI prohibits the sale of marijuana, a person buying marijuana rather than growing it would not only risk imprisonment, but would have to pay the inflated price associated with an illegal market.¹⁵⁶ Judge Gray notes that “[a] black market of some kind will always be with us, but it can be severely diminished

¹⁵⁵ As Miller observes, “These high prices lure entrepreneurs into the illegal drug markets like honey draws flies.” MILLER, *supra* note 146, at 16. Mike Gray notes, “[T]he black market is the purest form of unfettered free-market capitalism. The rules are Darwinian – survival of the fittest – and no matter what you do, the pirates will always be a step ahead [Thus,] the only way to destroy the black market is to underbid it.” M. GRAY, *supra* note 131, at 191. According to the RAND report:

Depenalization [of cannabis] along with removal of sanctions for home production and gifts [within quantity limits – the model used in South Australia] should substantially weaken the black market and generate a much greater reduction in criminal justice costs, with at most a small effect on prevalence and intensity of use.

RAND, *supra* note 10, at 11.

¹⁵⁶ As the DEA writes, “[O]nly about 5 percent of inmates in federal prison are there because of simple possession. Most drug criminals are in jail – even on possession charges – because they have plea-bargained down from major trafficking offenses In New York, . . . it is estimated that 97% of drug felons sentenced to prison were charged with sale or intent to sell, not simply possession.” DEA, *supra* note 113, at 3, 23. By destroying most of the adult market for marijuana, the PCI would give potential marijuana suppliers much less opportunity to become “drug felons” whom we must imprison.

in size and power.”¹⁵⁷ Thus, a state could rationally conclude that the PCI would severely diminish the size and power of the illicit marijuana market. If the demand for marijuana is here to stay,¹⁵⁸ and subject to inexorable economic laws, states could quite sensibly decide to take advantage of those laws, rather than be taken advantage of by them. Given the ongoing costs of homeland security and the war in Iraq, as well as massive federal budget deficits and widespread state budget shortfalls, the Supreme Court could conclude on economic grounds alone that a state could rationally enact the PCI.

b. Social Costs

The DEA underscores the social costs of “drug abuse,”¹⁵⁹ yet nowhere does it speak to the devastating social costs of marijuana prohibition. For one, the current regime drains billions of dollars that would enable *honest* law enforcement officials to combat serious, violent crime, which greatly affects law-abiding citizens’ quality of life.¹⁶⁰ Beyond this, marijuana prohibition creates

¹⁵⁷ J. GRAY, *supra* note 4, at 243.

¹⁵⁸ See ELDREDGE, *supra* note 22, at 160. As Hamilton observes, “[T]he U.S. seized more than 48,000 lbs. of marijuana along the Canadian border last year, nearly double the 26,000 lbs. it retrieved in 2002.” Hamilton, *supra* note 131, at 36-37.

¹⁵⁹ DEA, *supra* note 113, at 11.

¹⁶⁰ Notwithstanding our government’s claims that using marijuana causes one to be violent, see ONDCP, *supra* note 115, at 5, it is marijuana’s illegality that causes the violence that unavoidably attends the competition for huge profits where a widespread activity is criminalized. See Hamilton, *supra* note 131, at 37.

incentives for *dishonest* public officials, especially given their typically modest salaries, to cooperate with the illicit drug markets¹⁶¹ and to make budgetary ends meet through draconian forfeiture laws.¹⁶² Not only does the present regime undermine respect for and cooperation with law enforcement,¹⁶³ it also disproportionately burdens racial minorities and the poor,¹⁶⁴ exacerbating race

¹⁶¹ See generally MILLER, *supra* note 146, ch. 2; ELDREDGE, *supra* note 22, at 54-57; J. GRAY, *supra* note 4, at 67-77. As Rosenthal explains:

As with other banned substances from time immemorial, agencies charged with enforcing marijuana laws also have to deal with official corruption. Because of the high risk of the marijuana basis, those involved in marijuana sales on a large basis often try to bribe police officers and other agents. Given the huge sums of money involved, some portion of the law enforcement community will always be seduced.

ROSENTHAL ET AL., *supra* note 10, at 20. As Mike Gray thus writes, "Honest cops everywhere are watching in dismay as their departments are sucked under by payoffs at every level." M. GRAY, *supra* note 131, at 190.

¹⁶² See SCHLOSSER, *supra* note 26, at 61-62. See generally MILLER, who notes that "by linking police budgets to law enforcement, forfeiture laws induce police and prosecutors to neglect other, more pressing, crime problems . . . [F]orfeiture laws create . . . a great temptation for state and local police departments to target assets rather than criminal activity." MILLER, *supra* note 146, at 133 (citations omitted).

¹⁶³ See, e.g., ROSENTHAL ET AL., *supra* note 10, at 14, 71-72. In the words of the RAND report, "Depenalization of cannabis . . . should significantly enhance the perceived legitimacy and credibility of the government's control efforts against other illicit drugs." RAND, *supra* note 10, at 358-59.

¹⁶⁴ See, e.g., Steven Jonas, *Why the Drug War Will Never End*, in THE DRUG LEGALIZATION DEBATE 132-36 (James Inciardi ed., 1999); ELDREDGE, *supra* note 22, ch. 8; SCHLOSSER,

and class antagonisms. In addition, drug pushers become millionaires and are viewed as heroes,¹⁶⁵ which is hardly a message we want to send to youth. Perhaps most importantly, the CSA's flat prohibition of marijuana devastates countless families and individual lives through unnecessary imprisonment. We considered the economic costs of the incarceration of tens of thousands of nonviolent marijuana offenders, but the social costs of this regime extend to the effects of thrusting a nonviolent marijuana user into a world of prison gangs, sexual violence, hard drugs, and learned criminality.¹⁶⁶ These problems are exacerbated by prison overcrowding, which also may require the early release of violent offenders to make room for nonviolent ones.¹⁶⁷ As the RAND report concludes:

Like President Carter our judgment is
that at present the primary harms of

supra note 26, at 51-52; M. GRAY, *supra* note 131, at 189; ROSENTHAL ET AL., *supra* note 10, at 77-78; RAND, *supra* note 10, at 2, 5, 38. As former San Jose Police Chief Joseph McNamara observes, "Ninety million Americans have tried marijuana. When you look at who's going to jail, it is overwhelmingly disproportionate – it's Latinos and Blacks." Stein, *supra* note 106, at 61. As Ostrowski concludes, "It is difficult to resist the temptation to call the war on drugs a war on blacks." Ostrowski, *supra* note 125, at 354.

¹⁶⁵ See MILLER, *supra* note 146, at 18; ELDREDGE, *supra* note 22, at 105-06.

¹⁶⁶ See MILLER, *supra* note 146, at 173-78; ROSENTHAL ET AL., *supra* note 10, at 75, 77; SCHLOSSER, *supra* note 26, at 57.

¹⁶⁷ As Miller notes, part of the overcrowding problem is traceable to mandatory minimum sentences for drug convictions. MILLER, *supra* note 146, at 164-68. See J. GRAY, *supra* note 4, at 36. The very recent case of *United States v. Booker*, 125 S.Ct. 738 (2005) may provide some relief regarding this problem.

marijuana use come from criminalization, expensive and intrusive enforcement, inequity, shock to the conscience from disproportionate sentence, and a substantial [though generally nonviolent] black market. *This is not to ignore that the drug itself causes damage But the adverse consequences of criminalization, with current U.S. enforcement, seem more substantial.*¹⁶⁸

c. The Imperative of Harm Reduction

This brief overview of some risks associated with the PCI, along with the costs of the current regime, should be enough to establish that a state could rationally enact the PCI. It also brings us back to the fact that the current United States regime of complete cannabis prohibition runs counter to the recent trend of other western democracies.¹⁶⁹ These countries have embraced the

¹⁶⁸ RAND, *supra* note 10, at 356-57 (emphasis added).

¹⁶⁹ In *Grutter*, Justices Ginsberg and Souter rested their concurrence in part on the use of race preferences in other countries. While it is debatable whether this is appropriate, this inclination to take international developments into account should lead them to seriously consider the results of the European experience in harm reduction. Indeed, even *Lawrence*, authored by Justice Kennedy and joined by Justice O'Connor, relied on recent international legal trends in more than one place. *Lawrence v. Texas*, 539 U.S. 558, 572, 576, (2003). McAllister writes, "[A]s Europe is learning, it may be easier to knock down rogue missiles than to beat back a consensus among allies and neighbors who think it is smarter to live with cannabis than to fight it." McAllister, *supra* note 145, at 61.

goal of harm *reduction*¹⁷⁰ by asking the question: In the cold light of concrete experience, which does *more* harm to the individual and society—the use of marijuana or the enforcement of a regime of complete marijuana prohibition?¹⁷¹ For all these reasons, the Supreme Court should find that states could rationally decide that the PCI would yield far less harm than does the current regime.¹⁷²

¹⁷⁰ Hippocrates wrote, “First, do no harm.” Of course, with respect to marijuana law reform, this is impossible because there are risks or harms no matter what. A logical corollary of the ancient wisdom, however, must be that, where harm can not be avoided, it must be minimized.

¹⁷¹ Our government assures us that “European experiments with drug legalization have failed.” DEA, *supra* note 113, at 15. Such a sweeping condemnation, however, gratuitously oversimplifies a complex phenomenon, implying that Dutch cannabis reform, for example, has had the same success as the Swiss “Needle Park” experiment. As the RAND report sums up, however, “The Dutch have significantly reduced the monetary and human costs of incarcerating cannabis offenders with no apparent effect on levels of use.” RAND, *supra* note 10, at 261. See also Mary Cleveland, *Downsizing the Drug War and Considering “Legalization,”* in Fish, *supra* note 22, at 547, 570. For this reason, among others we have seen, states considering enacting the PCI and investigating the facts for themselves could conclude that our federal government is misleading us, if not lying to us, about this matter.

¹⁷² Both liberals and conservatives on the Court will likely have reservations about ruling as I have advocated. Newbern refers to the following:

The “liberal paradox” – the odd position in which liberal advocates of state-legalized medical marijuana use are placed in arguing for a reduced role for the federal government against a history that equates such arguments with a time in which states clung to their autonomy as means of preserving a racist past.

Newbern, *supra* note 10, at 1590.

The Court's liberals, however, should recognize that marijuana policy is categorically distinct from race policy. Marijuana legalization, be it for medicinal or recreational purposes, can simply not be equated with an attempt to resurrect Jim Crow. If anything, States are now trying to discriminate in favor of racial minorities, not against them, as in *Grutter*.

Under these circumstances, the liberals on a "pragmatic" Court, *see* Linda Greenhouse, *The Year Rehnquist May Have Lost His Court*, N. Y. Times, July 3, 2004, at 3, would be inclined to be sympathetic toward the CUA and even the PCI and should finally be willing to concede that *Lopez* and *Morrison* drew a valid line rooted in a division of power for which the Constitution clearly provides. They should be willing, that is, to accept what another great liberal Justice wrote long ago: "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

The Court's conservatives, by contrast, will struggle with the unpleasant fact that their federalism revolution may enable liberal social policy like the CUA and PCI. While authoritarian conservatives like Justices Scalia, Thomas, and Rehnquist may sufficiently support the war on marijuana and will argue Judge Pregerson misapplied *Lopez* and *Morrison*, the libertarian inclinations of Justices Kennedy and O'Connor might lead them to rule as I have advocated. To illustrate, consider *Lawrence*, in which the Court struck down a State law criminalizing private consensual homosexual sodomy by adults as a violation of the right of privacy, which is rooted in Fourteenth Amendment liberty due process. 539 U.S. 572. Implicitly relying on Mill's "harm principle," *see* J.S. MILL, ON LIBERTY 68 (G. Himmelfarb, ed. 1975), and the distinction between self regarding and other regarding behavior, *see* RAND, *supra* note 10, at 58-59, Kennedy and O'Connor held that the activity of adults in the privacy of their home is beyond the regulatory reach of government. As Kennedy wrote, "The present case does not involve minors. It does not involve persons who might be injured or coerced who are situated in relationships where consent might not easily be

IV. Conclusion

Gonzales v. Raich provides the Supreme Court with an historic opportunity to enable much needed reform. The Court should affirm the Ninth Circuit's ruling that the Controlled Substances Act is unconstitutional on Commerce Clause grounds, as it applies to the appellants. The Court should issue a broad rather than narrow ruling, acknowledging that the medicinal purpose of state-legalized marijuana use is irrelevant to whether it is beyond the reach of Congress' commerce power, and affirming, or at least not denying, that states could constitutionally enact the Personal Cultivation Initiative.

The Personal Cultivation Initiative would displace but a small corner of the CSA, legalizing only (1) the cultivation, possession and use, not sale or trade, of (2) marijuana (3) by adults, (4) in the home. Further, in ruling as I have advocated, the Court would not be making substantive policy. Rather, it would give expression to a coherent understanding of federalism by leaving the policy decision to the discretion of states under their police power. In the process, the Court would provide continuity and coherence in our Commerce Clause jurisprudence.

As suggested at the outset, however, the Court seems unlikely to issue the broad ruling I have advocated. It may instead rule narrowly for the respondents, although I have argued that it would

refused. It does not involve public conduct" *Lawrence*, 539 U.S. at 578. This substantially describes the activity protected by the PCI, and the right of privacy recognized in *Lawrence* takes on even added force when a State seeks to *protect* it, as under the PCI, rather than *violate* it, as did the Texas statute.

err by trying to rest such a narrow ruling on the medicinal/recreational distinction, irrelevant as it is to the Commerce Clause question. If the Court is not prepared to acknowledge that irrelevance, I submit that it should remain silent on the issue, allowing lower courts to forge a consensus as this area of law develops. The crux of a workable alternative basis for a narrow ruling in respondents' favor might look like the following:

1) *Unlike the federal laws in Lopez and Morrison, the CSA as applied in Raich neither complements nor cooperates with State law. To the contrary, it completely undermines it.*

2) *The State law in Raich functions to reduce the volume of a market that federal law seeks to destroy.*

Therefore, Congress has no rational basis to criminalize the activity protected by the State law in Raich, and so it is beyond its commerce power.

Whatever the merits of this formulation, we must recognize that the Court may rule against the respondents. Some have reported that the Court was skeptical of Raich and Monson's position at oral argument,¹⁷³ and comments by Justices Breyer¹⁷⁴

¹⁷³ See, e.g., *High Court Appears Hesitant to Endorse Medical Marijuana*, N.Y. TIMES, Nov. 29, 2004, at <http://www.nytimes.com/aponline/national/AP-Scotus-Medical-Marijuana>; Tony Mauro, *U.S. High Court not High on Medical Pot*, THE RECORDER, Nov. 30, 2004, at 1; Gail Gibson, *Medical Marijuana: Justices Skeptical over Patients' Use*, BALT. SUN, Nov. 30, 2004, at A1; and Linda Greenhouse, *States' Rights Defense Falters in Medical Marijuana Case*, N.Y. TIMES, Nov. 30, at <http://www.nytimes.com/2004/11/30/politics/30scotus>. As one observer wrote, "a majority of the justices made comments suggesting they thought that even small amounts of ostensibly medical marijuana, obtained for free, were part of a national

market for licit and illicit drugs – and thus subject to Congress’s constitutional power over trade among the states.” Charles Lane, *High Court Not Receptive to Marijuana Case*, WASH. POST, Nov. 30, 2004, at A03.

¹⁷⁴ Justice Breyer, of course, penned powerful dissents in *Lopez* and *Morrison*. As Savage writes, “(a) former Senate staffer, Breyer has consistently urged the Court to uphold acts of Congress.” Savage, *supra* note 7, at A1. At oral argument, accordingly, Breyer did two things.

First, in response to Barnett’s claim that respondents’ activity is noneconomic, Breyer responded that “it’s non-economic and it affects the economic.” *Oral Arg.* at 33. This echoes Breyer’s rejection of the economic/noneconomic distinction, see *Morrison*, 529 U.S. at 656-658, and reminds us why the Chief Justice observed in *Lopez* that “although Justice Breyer argues that acceptance of the government’s rationales would not authorize a federal police power, he is unable to identify any activity that the States may regulate but Congress may not.” *Lopez*, 514 U.S. at 564. For the commerce power to have any coherent meaning, we have seen, there must be something that is not interstate commerce. As Pregerson amply demonstrates, the activity at issue in this case qualifies. Second, Breyer suggested that the proper way for activists to secure a change in federal cannabis law on medicinal grounds is to request federal regulators at the FDA take it off the list of schedule I drugs. See *Oral Arg.*, at 50. This is consistent with the doctrine of exhaustion of administrative remedies, yet Barnett directed the Court’s attention to those *amicus curiae* briefs documenting the federal government’s obstruction of scientific research as well as those studies commissioned by the national government which have shown the medical benefits of cannabis. See *id.* at 51. One hopes that Breyer’s reflection on such obstruction may finally yield a crack in his “beltway mentality,” i.e., the assumption that all wisdom resides in Washington D.C., regardless of what the States or other western liberal democracies are doing. It can also only be hoped that Breyer will acknowledge the fundamental distinction between *Raich* and *Morrison*, the latter in which he dissented partly based on his description of § 13981 as “an instance not of state/federal conflict, but of state/federal efforts to cooperate in order to help solve a mutually acknowledged national problem.” *Morrison*, 529 U.S. at 662.

and Scalia¹⁷⁵ strongly suggest that they will rule for Congress. A majority ruling to this effect would seem at first glance a victory for the U.S. government. Beyond securing Washington's power to raid, prosecute, and imprison the likes of Angel Raich and Diane Monson, for example, it could slow the momentum of state cannabis law reform.

¹⁷⁵ Unlike Breyer, Scalia wrote nothing in *Lopez* and *Morrison*. Yet also unlike Breyer, he joined the majority in both opinions. His remark to Clement that "it seems rather ironic to appeal to the fact that home-grown marijuana would reduce the interstate commerce that you don't want to occur in order to regulate it," *Oral Arg.*, at 7, was thus no surprise. Nonetheless, Scalia pressed Barnett on two points.

He noted first that, relying on its commerce power, Congress has legitimately criminalized the mere possession of articles like ivory and eagle feathers. *Id.*, at 26-27. However, not only are such articles not medicine in the eyes of a substantial portion of the American medical community, but the criminalization of their possession is necessary for the protection of endangered species. As Barnett thus noted, "they're an essential part of a larger regulatory scheme that would be undercut unless those activities are reached," *id.* at 27, and so are well within a workable exception to *Lopez* and *Morrison*.

Expressing concern about the proper definition of the class of activities at issue in *Raich*, secondly, Scalia noted that he had heard "that there are communes that grow marijuana for the medical use of all the members of the commune." *Id.* at 28. Presumably not impressed by the fact that the CUA requires all members of such a commune to have valid doctor's notes, this line of challenge may suggest that his cultural conservatism, perhaps including support for the war on marijuana, will compel him to vote to reverse the Ninth Circuit. Indeed, though we can not know whether he was serious, he expressly opined that *Raich* "looks like *Wickard* to me." *Id.* at 40. As I have argued, however, making that case, as well as distinguishing *Lopez* and *Morrison*, may prove so difficult that any opinion Scalia writes will convince none but the drug warrior faithful.

Given the U.S. government's broader interests, however, a ruling against these women could backfire in several ways.

To begin, since it would only establish that the U.S. government has power under federal law to go after medical cannabis patients, such a ruling could underscore Washington's considerable irrelevance on this issue. Though states could not prevent the federal raids and prosecutions, that is, they would be required neither to assist in those raids nor to enforce the CSA's rigid federal prohibition in their courts, where the vast majority of cannabis prosecutions take place under state law. Since states with medical cannabis laws would be free to continue enforcing those laws, then, public authorities and medical cannabis patients in those states would likely find a ruling in Congress' favor simply irrelevant to how they operate on a daily basis. Indeed, just as *Roe v. Wade*¹⁷⁶ energized its opponents, such a ruling would likely have a similar effect. Although many in Washington are still gripped by the "reefer madness" hysteria of the 1930's, this issue is one of life and death for many people, and organizations like NORML and the Marijuana Policy Project would certainly ensure that reformers in every state are aware of the limits of such a ruling.

Beyond its reflection on the U.S. government generally, a ruling against Raich and Monson could leave the President, Congress, and the Court each with egg on their faces.

As for the President, the Constitution requires that the Chief Executive "shall take Care that the

¹⁷⁶ 410 U.S. 113 (1973).

Laws be faithfully executed.”¹⁷⁷ If the Court clears the way for Raich and Monson’s prosecution, then, Mr. Bush would seem duty bound to direct Mr. Gonzales to ensure that these women are convicted and imprisoned as the “drug felons” that U.S. law and propaganda declare them to be. The DEA, after all, found the courage to break down a sick woman’s door and destroy what state law and her doctor deemed medicine. The least Mr. Bush could do is order that these dangerous women be put on trial. His ratings are at an all time low,¹⁷⁸ to be sure, but he can certainly face down any fears that in a country where 80% of adults support legalized medicinal cannabis, a jury faced with imprisoning these women might resort to jury nullification, with the bad publicity that would generate.

If the Court rules for Congress, it might try to soften the blow by chanting the D word – not diversity, but democracy, something like “if change is to come, it must come through the democratic process, and so reformers should focus their efforts on Congress.” Though perhaps predictable, this would be a mockery of sick patients like Angel Raich and Diane Monson. Not only has the democratic process in twelve states already spoken, but there is no reason to expect courage from Congress on the medical cannabis issue any time soon. Indeed, like those of the President, Congress’ ratings are as low as they have been for some

¹⁷⁷ U.S. CONST. art. II, § 3.

¹⁷⁸ “President Bush’s approval ratings have continued to slide, with a Gallup/USA Today/CNN poll this week recording the highest negatives of his presidency.” David Ignatius, *A New Beginning?* WASH. POST, May 25, 2005, at A27.

time,¹⁷⁹ and for good reason. It is, for example, the one body that could have prevented our disastrous military invasion of Iraq, e.g., by threatening the President with impeachment and removal absent clear proof of weapons of mass destruction and links between Iraq and Al Qaeda. Having failed to act with the stakes this high, most members of Congress could hardly be expected to stand up to cultural conservatives and in favor of a few people who may not even live to vote against them in the next election. The scientific consensus that smoked cannabis provides relief for a range of ailments, based largely on studies commissioned by the U.S. government,¹⁸⁰ will thus continue to be ignored.

¹⁷⁹ As Ignatius observed, "a Pew Research Center Poll this month found that only 35 percent of the public approved of the Republican leadership in Congress." *Id.* See also Donald Lambro, *Public Mood Swings*, WASH. TIMES, May 12, 2005, at A20. (In recent polls, "Congress' scores dropped significantly.")

¹⁸⁰ As Congressman Pete Stark said on the House floor in 1999:

Mr. Speaker, I rise today in strong support of H.R. 912, The Medical Use of Marijuana Act, introduced by Representative Barney Frank. This bill would move marijuana from Schedule I of the Controlled Substances Act to Schedule II of the Act, allowing physicians to prescribe marijuana to patients with a clear medical need for the drug.

Institute of Medicine studies have shown that components of marijuana relieve symptoms associated with terrible diseases such as AIDS, cancer, glaucoma, and epilepsy. The New England Journal of Medicine also supports the medical use of marijuana in relieving the symptoms linked with these illnesses. As an appetite stimulant, marijuana can help prevent the weight loss associated with cancer and AIDS. It can alleviate the nausea and vomiting associated with cancer chemotherapy. Marijuana has also been proven to

provide some relief to patients with glaucoma and epilepsy. Additionally, marijuana can provide pain relief to millions of patients suffering from conditions ranging from post- surgery pain to chronic muscle spasms. Often the alternative pain relief options for these conditions have serious side effects such as liver and kidney damage, stomach bleeding, and ulcers. Marijuana has never been shown to cause death or serious illnesses such as these.

Opposition to medical marijuana use has often focused on the belief that legalizing the drug for medical use will lead to an increase in its recreational use. I do not condone recreational use of marijuana, nor does H.R. 912 seek to increase illicit use. This bill is simply meant to treat marijuana as we treat drugs such as morphine. It would only be available to those with a doctor's prescription.

A recent Institute of Medicine report entitled 'Medicine and Health Flash' concluded that there is no convincing data to support the belief that the medical use of marijuana will lead to an increase in its illicit use. The point of making marijuana a Schedule II drug is so that it can be regulated as closely as other prescription drug with the potential for abuse. As we have learned in the failing 'War on Drugs', treating marijuana as an illicit drug in all circumstances not only fails to curb its recreational use, it eliminates a potential treatment for some of the most painful and terrible diseases. Treating marijuana as a prescription drug will give doctors more alternatives for alleviating the pain and suffering of their patients.

H.R. 912 would allow for the use and possession of marijuana by those who have been prescribed the drug by a physician. Passage of this bill will succeed in opening the door to increased research into the ways marijuana can be of a medicinal value. We must not eliminate the drug as a potential tool for alleviating the suffering of millions of Americans. I urge my colleagues to support the Medical Use of Marijuana Act.

145 CONG. REC. 50 (1999).

Beyond this, cannabis' therapeutic potential has been recognized for millenia throughout the world. In the U.S.,

This, even though the U.S. government itself acknowledged this scientific consensus in the late 1970's when it established the compassionate investigative new drug (IND) program. Though it stopped admitting patients in the early 1990's in response to the AIDS epidemic, the U.S. government to this day provides marijuana to a handful of sick patients.¹⁸¹

American doctors began to explore cannabis-based medicine in the 19th century. The *United States Pharmacopoeia*, a highly selective drug reference manual, began listing *Extractum Cannabis* as a recognized medicine in 1850. In 1860, the Ohio State Medical Society held the first American clinical conference on medical marijuana, concluding that it was useful in the treatment of an array of ailments including tetanus, painful menstruation, convulsions, asthma, rheumatism, post-partum depression, gonorrhea, and chronic bronchitis. It has been reported that over 100 articles were published between 1840 and 1890 recommending cannabis for one disorder or another. Accordingly, pharmaceutical companies like Eli Lilly, Parke-Davis, and Squibb manufactured preparations during this period with traces of cannabis, made them available over the counter, and marketed them largely as painkillers or sedatives.

See generally Michael Aldrich, *History of Therapeutic Cannabis*, in CANNABIS IN MEDICAL PRACTICE (Mary Lynn Mathre, ed., 1997); BLOOMQUIST, *supra* note 54; ALAN BOCK, WAITING TO INHALE: THE POLITICS OF MEDICAL MARIJUANA (2000); RICHARD J. BONNIE & CHARLES H. WHITEBREAD II, THE MARIJUANA CONVICTION: A HISTORY OF MARIJUANA PROHIBITION IN THE UNITED STATES (1974); NICK BROWNLEE, THE ILLUSTRATED GUIDE TO CANNABIS (2003); ALBERT GOLDMAN, GRASSROOTS: MARIJUANA IN AMERICA TODAY (1979); LESTER GRINSPOON & SCOTT BAKALAR, MARIJUANA: THE FORBIDDEN MEDICINE (1993); MARK DAVID MERLIN, MAN AND MARIJUANA: SOME ASPECTS OF THEIR ANCIENT RELATIONSHIP (1972); LARRY SLOMAN, THE HISTORY OF MARIJUANA IN AMERICA: REEFER MADNESS (1979); DAVID SOLOMON, THE MARIJUANA PAPERS (1966); SOLOMON H. SNYDER, USES OF MARIJUANA (1971).

¹⁸¹ *See* BOCK, *supra* note 10, at 154-55.

Under these circumstances, the least Congress should have done long ago is to have reclassified cannabis as a schedule II substance under the CSA. As we have seen, however, even this modest step toward reason is not politically viable.¹⁸² Indeed, last year the House rejected a bill simply directing the DEA not to enforce the CSA contrary to state laws allowing medical marijuana.¹⁸³ Most recently, on May 4, 2005, the States' Rights to Medical Marijuana Act (HR 2087) was reintroduced and referred to the House Energy and Commerce Committee,¹⁸⁴ where it remains in limbo. If the Court rules against Raich and Monson, then, it will not only highlight Congress' failures in this area, but increase pressure for reform from a body with little political courage, even on behalf of the sick and dying.

As for the Court itself, finally, a realist can certainly say that the Court must simply choose in this case between conflicting but powerful and relevant principles - deferring to federal power vs. limiting federal power. I conclude, however, with three observations.

First, Raich and Monson challenged the CSA not on its face, but only as applied to the specific facts of their case. They do not seek to invalidate an entire statute or even a single provision of federal law, only to void its application to the facts of their

¹⁸² Neusch, *supra* note 10, at 211. Indeed, shortly after Proposition 215 was enacted, Congress passed a "sense of the Congress" resolution in opposition to medical marijuana. Act of Oct. 21, 1998, Pub. L. No. 105-277, 112 Stat. 2681, 2681-760.

¹⁸³ *Viewpoint*, ROLL CALL, July 13, 2004; *For the Record*, WASH. POST, July 11, 2004, at T11.

¹⁸⁴ 151 CONG. REC. 2975 (2005).

cases. In that sense, the ruling they seek is quite limited in scope.

Second, if the activities in *Lopez* and *Morrison* were beyond Congress' regulatory reach as non-economic activities, the Court would be hard pressed to make a convincing case that the activity in *Raich*, which is at the core of states' police power to legislate on behalf of public health and welfare, IS economic activity within Congress' reach. If the Court were to rule for Congress yet fail to make this case, it would undermine the coherence of its federalism jurisprudence for decades. Indeed, at that point, it would be difficult to identify any human activity Congress could not regulate. Even such a champion of federal power as John Marshall would never have gone that far.

Finally, beyond the Commerce Clause dimension of this case, Monson and Raich also filed suit under the Due Process clause of the Fifth Amendment.¹⁸⁵ The lower courts did not address this theory, and the justices did not focus on it at oral argument, yet there is a profound liberty dimension to this case. This in turn implicates cases like *Roe v. Wade*, which held that a woman has a constitutional right, early in her pregnancy and in consultation with her doctor, to abort a fetus. That being the law, it would be hard to see how a sick patient, in consultation with her doctor, would have no right to consume cannabis in the privacy of her home in order to relieve illness. Destruction of innocent potential human life would be protected, but protection of innocent actual human life would not. Once again, it would take decades to sort out

¹⁸⁵ See *Raich*, 352 F.3d at 1227.

such inconsistency in our constitutional law, and for this the Court would have egg on its face as well.

Whichever way the Court rules, the U.S. can resist the trend of other western liberal democracies for only so long. Especially if the states, like Canada and Europe, maintain their momentum toward more rational cannabis policy, Congress will eventually have to follow.

Legislative Prerogative or Judicial Fiat: Mandating Electronic Recording of Stationhouse Interrogations in Tennessee

Lance H. Selva & William L. Shulman***

Table of Contents

I. Introduction	388
II. The Problematic Nature of Confessions	391
A. <i>The Voluntariness Test</i>	391
B. <i>The Totality of the Circumstances Test</i>	395
C. <i>Tennessee Decisions</i>	399
III. Recorded Interrogations	400
A. Overview.....	400
B. <i>The Benefits and Costs of Recording</i>	404
C. <i>The State of the Law on Recording</i>	412
D. <i>Tennessee's Legislative Proposal</i>	425
IV. The Tennessee Supreme Court's Supervisory Powers Argument.....	432

* Lance Selva is a professor of criminal justice administration at Middle Tennessee State University. He is also a criminal defense practitioner. He received his J.D. from the University of Alabama School of Law in 1975 and earned a Ph.D. from Florida State University School of Criminology in 1984.

** William Shulman is an associate professor of criminal justice administration at Middle Tennessee State University. Mr. Shulman worked as a public defender in Nashville, Tennessee from 1986-1990. He received his J.D. from the University of Tennessee College of Law in 1975.

I. Introduction

The pendulum of credibility weighs heavily against a defendant who challenges the admissibility of his confession. If admitted, it will prove a virtual guarantee of conviction, as it is the most “potent of weapons for the prosecution.”¹ Although prosecutors lament the layers of constitutional rights in place to protect a defendant against coercive interrogation methods, most challenges to admissibility will come down to the detective’s word against that of the defendant. Absent a recording, the court will be called upon to decipher events that took place *in communicado* and will be consigned to speculate about what actually took place, weighing the relative credibility of witnesses. Where the court is left to speculate about what actually transpired, it is no secret that the defendant rarely prevails when a confession is in evidence. The entire set of rules governing the relationship between the suspect and interrogators is built on a house of cards whose major weakness resides in the premise that a court can accurately determine what transpired during the interrogation process.²

¹ Saul M. Kassin & Holly Sukel, *Coerced Confessions and the Jury: An Experimental Test of the “Harmless Error” Rule*, 21 L. & HUM. BEHAV. 27 (1997); see also Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recording of Custodial Interrogations*, 6 B.U. PUB. INT. L. J. 719, 741-43 (1997); Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s: An Empirical Study of the Effects of Miranda*, 43 UCLA L. REV. 839, 906-07 (1996).

² See Wayne T. Westling, *Something is Rotten in the Interrogation Room: Let’s Try Video Oversight*, 34 J. MARSHALL L. REV. 537 (2001).

The system now relies on DNA testing and widespread use of videotaping in DUI enforcement. Crime scenes and drug investigations are recorded on video cameras installed to monitor traffic and record license plates of people who violate traffic laws. New technology is employed on behalf of the State in enhancing prosecution proof, not to ensure or expand a defendant's right to a fair trial. Police and prosecutors find the use of videotaping cost-effective in many criminal justice activities, but not during interrogations.³ Unfortunately, too many interrogations are aimed at securing a confession without regard to securing reliable, fair, and objective indices of proof. Fundamental unfairness may arise not only because the confession may be unreliable, but also because no confession may have been forthcoming if the interrogation had been properly conducted. One irony of the failure to electronically record an interrogation is that when interrogators record such statements, courts readily admit them at the prosecutor's request.

The Tennessee Legislature recently embarked on an ambitious enterprise to render an accused's statements made during custodial interrogation inadmissible against the accused unless the entire interrogation were recorded.⁴ Any statement made during a prior custodial interrogation without being recorded in compliance with the bill's guidelines would be inadmissible for purposes other than

³ See Steven A. Drizin & Beth A. Colgan, *Let the Cameras Roll: Mandatory Videotaping of Interrogations Is the Solution to Illinois Problem of False Confessions*, 32 LOY. U. CHI. L. J. 337 (2001).

⁴ The bill targets only custodial interrogations in detention facilities. It would also require that *Miranda* rights and the accused's waiver of them be part of the recording.

impeachment.⁵ Coerced and involuntary confessions undermine both the integrity of our criminal justice system and the constitutional rights of defendants. One simple and expedient method of addressing that problem is to videotape the entire interrogation process. A videotape record would provide a more complete accounting from which a judge could make essential *Miranda* determinations such as voluntariness, the presence of warnings, and the waiver of rights.⁶ It would allow a judge to view a suspect's demeanor to help determine whether the suspect understood his rights. A videotape would also alleviate the problems of any contested confession by allowing a judge to view the exact dialogue between suspect and interrogator and determine whether that dialogue casts doubt on the voluntary nature of the confession. By viewing a recording of the entire interrogation process, a judge is able to see exactly what transpired in the interrogation room and further evaluate the confession in its own context.

This article assesses the feasibility, appropriateness and legal and political status of recording interrogations. Section II of this paper begins with a general discussion of the law of confessions, both from the United States Supreme Court and Tennessee courts. The current state of the law makes assessment of the voluntariness of confessions highly problematic. In that regard, we discuss the "voluntariness" and "totality of circumstances" tests and argue that both tests are inherently vague and rely extensively on the court

⁵ See generally S.B. 0343/H.B. 1138, (2003) (amending TENN. CODE ANN. § 40-14, *et seq.*, if enacted) [hereinafter "Tennessee proposal"].

⁶ See *Miranda v. Arizona*, 384 U.S. 436 (1966).

and jury to engage in specific fact-finding as to what took place in the interrogation room.

Section III deals with a variety of topics related to the current climate, both political and legal, regarding mandatory interrogations. Included in this section is an extensive survey of the costs and benefits of recording interrogations as well as a discussion of the current national state of the law regarding videotaping. In addition, we discuss Tennessee's legislative attempts at implementing recording requirements. In addition, this section examines the findings and recommendations of the Tennessee Law Enforcement Advisory Council.⁷

In Section IV we argue that the Tennessee Supreme Court could bring the current legislative impasse to an end if the court ordered mandatory videotaping of interrogations as a function of its inherent supervisory powers to regulate and administer a fair and reliable criminal justice system.

II. The Problematic Nature of Confessions

A. The Voluntariness Test

The traditional test for admissibility of a confession is the "voluntariness" test.⁸ A statement is "involuntary" and inadmissible if the defendant's was "overborne" or his "capacity for self-

⁷ Pursuant to H.R.J. Res. 862, 104th Gen. Assem., Reg. Sess. (Tenn. 2002), the Tennessee Law Enforcement Advisory Council was directed to report its study and evaluation of issues related to electronic recording of custodial interrogations in Tennessee to the Senate and House Judiciary Committees.

⁸ See *Schneekloth v. Bustamonte*, 412 U.S. 218, 224 (1973).

determination critically impaired when making the statement.”⁹ In order to make a determination of voluntariness, a court must examine the “totality of the circumstances,” including the characteristics of the individual suspect and details of the manner in which the interrogation was carried out. Without some improper state action such as coercive police tactics, there is little likelihood that a court will deem a confession involuntary. If involuntariness were found to exist, the prosecution would be precluded from using the statement for any purpose whatsoever.

Later, as established in *Miranda v. Arizona*,¹⁰ police were required to first tell a suspect of his rights and then obtain a waiver of those rights prior to a custodial interrogation.¹¹ Failure to satisfy any of the *Miranda* requirements would result in a suppression of the confession, even when a suspect had given a voluntary confession. The prosecution is precluded in its case-in-chief from using a defendant’s statement that was obtained in violation of *Miranda*. Unlike involuntary statements, however, statements obtained as a result of a *Miranda* violation may be used to impeach a testifying defendant who perjured himself at trial.¹²

As a result of *Miranda v. Arizona*, most litigation regarding confessions centers on the applicability of the Fifth Amendment. However, until the *Miranda* decision in 1966, the United States Supreme Court relied on other constitutional provisions for determining the admissibility of confessions, focusing largely on the voluntariness

⁹ *Id.*

¹⁰ 384 U.S. 436 (1966).

¹¹ *Id.* at 467-77.

¹² *Harris v. New York*, 401 U.S. 222 (1971).

of a suspect's confession in determining its validity and admissibility.¹³

In *Brown v. Mississippi*, the United States Supreme Court recognized Fourteenth Amendment due process principles as requiring the exclusion at trial of involuntary confessions extracted by coercive police methods.¹⁴ The case involved three suspects brutalized by sheriff's deputies. One of the suspects was hanged from the limb of a tree.¹⁵ He was later tied to a tree and beaten until he confessed.¹⁶ The other suspects were stripped and whipped with a leather strap in such a severe and atrocious manner that their backs were "cut to pieces."¹⁷ The United States Supreme Court described the techniques used by the deputies as "compulsion by torture" and revolting to the sense of fundamental fairness and justice.¹⁸ Ultimately, the Supreme Court of the United States found that the Due Process Clause of the Fourteenth Amendment prohibits the use of involuntary confessions or coerced confessions.¹⁹ The Tennessee Constitution provides the same protections.²⁰

Tennessee was not immune from review under the standard enunciated in the *Brown* decision. In the case of *Ashcraft v. Tennessee*,²¹ police interrogators carried out 36 hours of uninterrupted, incommunicado interrogation of a suspect using a

¹³ See, e.g., *Brown v. Mississippi*, 297 U.S. 278, 286 (1936).

¹⁴ See *Brown*, 297 U.S. 278.

¹⁵ *Id.* at 281.

¹⁶ *Id.*

¹⁷ *Id.* at 282.

¹⁸ *Id.* at 285.

¹⁹ See *Arizona v. Fulminate*, 499 U.S. 279, 287 (1991).

²⁰ TENN. CONST. art. I, § 8.

²¹ 322 U.S. 143 (1944).

string of replacement interrogators during which the interrogated individual was allowed virtually no sleep or other rest. In reviewing the interrogation procedure used, the United States Supreme Court held that the situation was “so inherently coercive” that, by its very nature, the interrogation was “irreconcilable with the possession of mental freedom by a suspect against whom [the] full coercive force [of the criminal justice system was] brought to bear.”²²

With the cases of *Massiah v. United States*²³ and *Escobedo v. Illinois*,²⁴ the focus of the Supreme Court shifted for a brief time from the voluntariness of a suspect’s confession under the Due Process Clause to a defendant’s right to assistance of counsel, as provided by the Sixth Amendment. However, two years later with the decision in *Miranda*, the Court directed that the Fifth Amendment be the guiding force behind inquiries into the admissibility of confessions.²⁵

The burden of proving the voluntariness of a suspect’s confession lies with the prosecution. It is the trial judge who determines whether or not that burden has been sufficiently met to admit the confession into evidence.²⁶ The standard under due process for determining the admissibility of a confession ultimately focuses on the issue of whether the behavior of state officials overcame the suspect’s will to resist, such that the suspect’s

²² *Id.* at 154.

²³ 377 U.S. 201 (1964).

²⁴ 378 U.S. 478 (1964).

²⁵ *See* 384 U.S. 436 (1966).

²⁶ *See State v. Pursley*, 550 S.W.2d 949 (Tenn. 1977).

confession was not freely given.²⁷ The dispositive question in each case is whether a suspect confessed because his “will was overborne.”²⁸

B. The Totality of the Circumstances Test

A court’s determination of “voluntariness” utilizes the totality of circumstances test. Voluntariness is assessed by looking at the totality of circumstances surrounding the process of interrogation including, but not limited to, a suspect’s age, education, and mental and physical condition.²⁹ Courts also consider the nature of the interrogation itself, including the location, duration, and methods used by the interrogators.³⁰ The totality of circumstances test, however, made the applicable guidelines to be followed less than clear. Under Supreme Court precedent, physical torture and abuse of suspects would constitute *per se* coerciveness.³¹ Perhaps the primary problem with the totality of circumstances tests is that no single factor, short of physical torture or abuse of the suspect, is determinative of a finding of involuntariness. There are no precise limiting factors restricting interrogators in obtaining confessions.

The factors a court must take into consideration include both internal attributes of the suspect and external factors affecting a suspect. The relevance

²⁷ See *State v. Kelly*, 603 S.W.2d 726, 728 (Tenn. 1980) (citing *Rogers v. Richmond*, 365 U.S. 534 (1961)).

²⁸ *Fulminate*, 499 U.S. at 287 n.3 (1991).

²⁹ See *Spano v. New York*, 360 U.S. 315 (1959).

³⁰ *Id.*

³¹ See, e.g., *Brown v. Mississippi*, 297 U.S. 278 (1936).

of both a suspect's personal attributes and external pressures exerted by a suspect's surroundings and methods of interrogation means that the amount of coercion needed to render a confession "involuntary" may vary from context to context. Courts have acknowledged that a person with a weaker mental framework might be much more prone to give an involuntary statement due to certain external factors which might be insufficient to render a confession involuntary if made by a suspect with a stronger internal make-up or character.³²

The failure by the courts to offer clear guidelines has made courts have to rely more on a factual examination of events that transpired between interrogators and suspects. The problem is that in situations where no full, objective record of the entire interrogation event exists, the application of the voluntariness test turns largely on a swearing contest between the suspect and his interrogators.

A major turning point in the use of the totality of circumstances test under the due process voluntariness standard took place in the case of *Escobedo v. Illinois*.³³ *Escobedo* was significant in the sense that it reflected the Court's disfavor of the voluntariness approach. It explicitly recognized the strong link between a defendant's right to counsel and his privilege against compelled self-incrimination. Rather than focusing its attention on the voluntariness issues of *Escobedo*'s confession, the Court turned its attention to the fact that police continually denied *Escobedo*'s repeated requests to

³² See, e.g., *State v. Benton*, 759 S.W.2d 427 (Tenn. Crim. App. 1988).

³³ 378 U.S. 478 (1964).

speak to his attorney.³⁴ In addition, the Court was mindful of the fact that no one ever informed the defendant of his right to remain silent.³⁵ The Court struck a poignant note with its comment that no system worth preserving should have to fear that a defendant permitted to consult with an attorney will exercise his rights even if the exercise of such rights will “thwart the effectiveness” of the interrogation process.³⁶

The Fifth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment and provides that “[n]o person...shall be compelled in any criminal case to be a witness against himself.”³⁷ The Tennessee Constitution also provides that a defendant cannot be compelled to give evidence against himself.³⁸ These privileges against self-incrimination appear to frame and limit police interrogation methods and the admissibility of confessions. In *Miranda v. Arizona*, the Court extended the Fifth Amendment privilege against self-incrimination by making it applicable to police interrogations of suspects in custody.³⁹ In that decision the Court delineated certain safeguards deemed necessary to protect a suspect’s rights.⁴⁰ The Court determined that no statements by a suspect, which stem from a custodial interrogation of the defendant, can be used in the criminal prosecution “unless [the State] demonstrates the use of procedural safeguards effective [in] secur[ing] a

³⁴ *Id.* at 481.

³⁵ *Id.* at 482-83.

³⁶ *Id.* at 490.

³⁷ U.S. CONST. amend. V.

³⁸ TENN. CONST. art. I § 9.

³⁹ 384 U.S. 436 (1966).

⁴⁰ *See id.*

suspect's] privilege against self-incrimination."⁴¹ According to the Court, before a custodial interrogation can take place law enforcement officers must advise a suspect of his rights to remain silent and to consult an attorney.⁴² If the suspect indicates either a desire to remain silent or requests an attorney, the questioning must cease.⁴³

The suspect can invoke these privileges "in any manner, at any time prior to or during questioning."⁴⁴ The state bears a heavy burden in demonstrating that a suspect "knowingly and intelligently" waived his privilege against self-incrimination and his right to counsel.⁴⁵ In the absence of demonstrated police compliance with the procedures articulated in *Miranda*, statements obtained from a suspect in custody are presumed to be coerced and are not admissible in a criminal prosecution as a matter of law.⁴⁶ As a result, the *Miranda* warnings and a valid waiver are prerequisites to the admissibility of any statement made by a suspect during custodial interrogation.⁴⁷

Subsequent decisions have gradually diminished *Miranda's* importance by expanding the types of words and actions constituting a waiver and recognizing that some statements in violation of the *Miranda* requirements may be introduced into evidence to impeach a defendant's credibility.⁴⁸ Moreover, the Supreme Court created a "public

⁴¹ *Id.* at 444.

⁴² *Id.* at 467, 470.

⁴³ *Id.* at 473-74.

⁴⁴ *Id.* at 473.

⁴⁵ *Id.* at 475.

⁴⁶ *Id.* at 478.

⁴⁷ *Id.* at 473-76.

⁴⁸ See *Harris v. New York*, 401 U.S. 222 (1971); see also *Oregon v. Haas*, 420 U.S. 714 (1975).

safety” exception, doing away with the need for *Miranda* warnings when police question a suspect at the scene of a crime that involves an imminent threat to public safety.⁴⁹ However, it is important to note that involuntary statements cannot be used for any purpose, including use of those statements for impeachment of the credibility of a defendant who takes the stand and perjures himself.⁵⁰

C. Tennessee Decisions

The Tennessee Supreme Court case law on confessions and interrogations has largely mirrored that of the Supreme Court. While Tennessee courts employ the “voluntariness” test to judge the admissibility of confessions, the test of voluntariness for confessions under Article I, Section 9 of the Tennessee Constitution is interpreted as being more protective of individual rights than the test of voluntariness under the Fifth Amendment.⁵¹ Further, the Tennessee Supreme Court does not recognize any authority requiring that interrogations be electronically recorded. Indeed, as the Supreme Court of Tennessee noted in *State v. Godsey*,⁵² neither the Tennessee Constitution nor the United States Constitution requires electronic recording of interrogations. The court noted that mandatory electronic recording of custodial interrogations would reduce court time

⁴⁹ See *New York v. Quarles*, 467 U.S. 649 (1984).

⁵⁰ See *Mincey v. Arizona*, 437 U.S. 385 (1978); *Harris v. New York*, 401 U.S. 222 (1971).

⁵¹ See generally *State v. Smith*, 933 S.W.2d 450, 455 (Tenn. 1996); *State v. Stephenson*, 878 S.W.2d 530 (Tenn. 1994). See also, V. Lakshmi Arimilli, *Confessions and the Tennessee Constitution*, 25 U. MEM. L. REV. 637 (1995).

⁵² 60 S.W. 3d 759 (Tenn. 2001).

required to resolve disputes over what took place during the interrogation process, and opined that sound policy considerations would support its adoption as a law enforcement practice.⁵³ The court stopped short of requiring electronic recording of interrogations as a constitutionally grounded prerequisite to the admissibility of statements by a defendant, while acknowledging that such recording could be beneficial. At the same time, as the court noted, “the issue of electronic recording of custodial interrogations ‘is one best suited to the direction of the General Assembly’ [of the Tennessee Legislature].”⁵⁴

III. Recorded Interrogations

A. Overview

The common characteristic of almost all unrecorded interrogations is that they take place *incommunicado*, totally closed to outside scrutiny. The content of statements can be controlled by how investigators choose to interrogate, and too often a suspect’s confession appears to be a doctored version of what the interrogator has suggested. Without the knowledge that an interrogation is being recorded, an interrogator’s dedication may become an unhealthy zeal, which may in turn lead to perjury or slanted testimony. An accurate recording of the entire interrogation would enable a fact-finder to ensure that witnesses testimony was based on genuine recall. A recording would also

⁵³ *Id.* at 771-72.

⁵⁴ *Id.* at 772 (citing *State v. Odom*, 928 S.W.2d 18, 23-24 (Tenn. 1996)).

assist the trier of fact in ascertaining the voluntariness of a suspect's confession and the context in which a particular statement was elicited. At the very least, it would be a step toward protecting suspects from coercive police tactics and the police from false claims of coercion. It would also instill some reliability into judicial determinations as to what went on during an interrogation in which a suspect made statements. Finally, recording the interrogation would reduce skepticism regarding the integrity of the process.

Given the well-publicized developments in the Central Park Jogger case, as well as the rampant use of coerced or otherwise improper confessions in Chicago, Illinois, the advantages and necessity of mandatory recording of interrogations should be self-evident.⁵⁵ The absence of a recording requirement hurts everyone except the police. Defendants questioning the voluntariness of their confessions, the adequacy of the *Miranda* admonitions, or their purported waivers must do so without the best evidence. Fact-finders must determine voluntariness, adequacy of rights admonitions and the validity of a waiver without the best evidence. Failure to record and preserve the best possible evidence undermines the legitimacy and credibility of the criminal justice process and opens the possibility of the abuse of power by the police.

⁵⁵ See Charles D. Weisselberg, *Deterring Police from Deliberately Violating Miranda: In the Stationhouse After Dickerson*, 99 MICH. L. REV. 1121 (2001). See also Drizen & Colgan, *supra* note 3; Stevan A. Drizen & Richard Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 893 (2004).

Mandating that interrogations be electronically recorded has long been recognized as a means of advancing our criminal justice system.⁵⁶ The American Law Institute's Model Code of Pre-Arrest Procedure and the Uniform Rules of Criminal Procedure require electronic recording of custodial interviews. In *Miranda*, the Court noted various forms of psychological pressure routinely employed by interrogators.⁵⁷ As Chief Justice Warren recognized, the only purpose of such techniques was to "subjugate the individual to the will of the examiner."⁵⁸

Little systematic reform of the interrogation process has taken place despite recognition that psychological pressures are often present in such encounters. In developing the *Miranda* rules, the Court likely believed that a suspect informed of her right to remain silent and the right to counsel would understand those rights and make appropriate decisions. That belief has turned out to be incorrect. *Miranda* was a small step toward confronting various forms of psychological pressure.⁵⁹ Trial judges who make determinations as to whether a suspect waived his rights during an

⁵⁶ James P. Barber & Philip R. Bates, *Videotape in Criminal Proceedings*, 25 HASTINGS L. J. 1017, 1020-26 (1974); Yale Kamisar, *Foreword: Brewer v. Williams—A Hard Look at a Discomfiting Record*, 60 GEO. L. J. 209, 238-43 (1977); See Roscoe Pound, *Legal Interrogation of Persons Accused or Suspected of Crimes* 24 J. AM. INST. CRIM. L. & CRIMINOLOGY 1014, 1017 (1934).

⁵⁷ *Miranda*, 384 U.S. at 446-54; see also Johnson, *supra* note 1 (providing an excellent exposition of the psychological games played by interrogators during interrogations).

⁵⁸ *Miranda*, 384 U.S. at 457.

⁵⁹ See Geoffrey R. Stone, *The Miranda Doctrine in the Supreme Court*, 1977 SUP. CT. REV. 99-169.

interrogation are hampered by the lack of objective, reliable evidence as to precisely what was said or done during an unrecorded interrogation.

As discussed more fully in this Section, there is cause for optimism. Currently three states – Alaska, Minnesota, and Texas – require the electronic recording of custodial interrogations. A fourth state, Illinois, recently enacted a more limited recording requirement requiring officers to tape interrogations of murder suspects.⁶⁰ In 1985, the Supreme Court of Alaska held that “an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect’s right to due process” under the Alaska Constitution, and that any statement thus obtained is generally inadmissible. The court mandated recording of station-house interrogations as a reasonable and necessary safeguard, essential to the adequate protection of a defendant’s right to counsel, his right against self-incrimination, and ultimately, his right to a fair trial.⁶¹ The court further reasoned that the integrity of the judicial system was at issue whenever a court determined the admissibility of a questionable confession based upon the testimony of interested parties. The Alaska Court recognized that a recording requirement would buttress judicial integrity merely by “the flip of a switch.”⁶²

In *State v. Scales*,⁶³ the Minnesota Supreme Court utilized its supervisory power and authority by mandating that all custodial interrogations of criminal suspects at a place of detention, including

⁶⁰ See 725 ILL. COMP. STAT. ANN. 5/103-2.1 (West 2003).

⁶¹ *Stephan v. State*, 711 P.2d 1156, 1159-60 (1985).

⁶² *Id.* at 1164.

⁶³ *State v. Scales*, 518 N.W.2d 587 (Minn. 1994).

any information concerning rights, waiver of those rights, or questioning, be electronically recorded where feasible. The court recognized that the process of *in communicado* interrogation and its perceived benefits by the police would be preserved while at the same time facilitating the judiciary's task of fact-finding since it would be based on reliable information.

The Texas Code of Criminal Procedure requires that custodial statements used against a defendant in a criminal proceeding be recorded.⁶⁴ Illinois will become the fourth state in the nation to require police to record interrogations.⁶⁵ The Illinois statute requires officers to tape interrogations of murder suspects only.⁶⁶ The statute was one of numerous reforms recommended by then-Governor George Ryan's Commission on Capital Cases. The commission was a response to 13 condemned men who had been exonerated, some due to allegations of police misconduct, including coerced confessions.⁶⁷

B. The Benefits and Costs of Recording

Every year, hundreds of innocent Americans are convicted of crimes because of false confessions. It

⁶⁴ TEX. CODE CRIM. PROC. ANN. Art. 38.22 §3 (1999). See also *Ragan v. State*, 642 S.W.2d 489, 490 (Tex. Crim. App. 1982).

⁶⁵ See 725 ILL. COMP. STAT. ANN. 5/103-21 (West 2003).

⁶⁶ This legislation was signed into law by the Governor on July 17, 2003, and takes effect in 2005. Steve Mills, *Law Mandates Taping of Police Interrogations*, CHI. TRIB., July 18, 2003, §1, at 1; see also, Leonard Post, *Illinois to Tape Questioning: It Gets Mostly Good Reviews in 2 States*, 25 NAT'L L.J. 46, P1 (2003).

⁶⁷ See Post, *supra* note 66.

is impossible to count how many people are charged based on false confessions and subsequently released after exonerating evidence comes to light.⁶⁸ Confessions obtained through coercion and intimidation are inherently untrustworthy; they obfuscate rather than illuminate the truth. The courts have to encourage practices that promote the truth, particularly in capital cases, in which the defendant's life is in jeopardy. Taking steps to ensure the integrity of our criminal justice system is of the utmost importance. Requiring electronic recordings as a prerequisite to the admissibility of a confession would significantly aid courts by presenting accurate facts to a jury for deliberation.

Electronic recordings of police interrogations facilitate a number of desirable goals. A recording provides an objective record and prevents a police officer from unfairly intimidating a suspect to obtain a statement before actually recording it. An interrogator who is aware that he is on tape would most probably act appropriately rather than risk his credibility. Moreover, law enforcement agencies that videotape interrogations find that it improves the ability of police to assess the guilt or innocence of a suspect.⁶⁹ Videotaping allows detectives to review the entire interrogation as the case unfolds in light of subsequent evidence. It also preserves the details of a suspect's statement that may not have been initially recorded in an interrogator's notes but subsequently become important. Furthermore,

⁶⁸ See Drizin & Leo, *supra* note 55 (documenting and analyzing over 125 false confessions).

⁶⁹ See William A. Gellar, *Police Videotaping of Suspect Interrogations and Confessions: A Preliminary Examination of Issues and Practices*, in NATIONAL INSTITUTE OF JUSTICE (1992).

videotaping permits other officers to evaluate the plausibility of suspects' statements.⁷⁰

In addition to aiding police in their assessment of guilt and innocence, videotaped admissions may be used against co-conspirators more effectively than written statements. Such recordings are especially effective against suspects who are familiar with deceptive physical evidence ploys. Police departments already using videotaping reported that videotaped interrogations and confessions led to more guilty pleas by suspects.⁷¹

Prosecutors have noted that by catching details that would otherwise remain missing from written interview notes or reports, videotaped interrogations provide a more complete record with which to better assess the state's case against an accused. They found that such taping enabled them to better prepare for trial. Because videotaped interrogations provided them with better knowledge of the case, including the demeanor and sophistication of the suspect, prosecutors found that videotaping assisted them in negotiating a higher percentage of guilty pleas and obtaining longer sentences.⁷² Judges and juries found that videotaping allowed them to determine more accurately a defendant's state of mind, as well as the sincerity of the defendant's remorse for any wrongdoing.⁷³

Recording would also conserve judicial resources by reducing the number of frivolous pre-trial challenges to confessions, which often involve

⁷⁰ *Id.* at 5.

⁷¹ *Id.* at 5, 6 and 10.

⁷² Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U. L. REV. 387, 409 (1996).

⁷³ See Richard A. Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621 (1996).

a “he said, she said” contest. A recording speaks for itself, literally, on the issue of what was said and the manner in which it was said. It would facilitate the resolution of a case in most instances because, in many cases, recording would eliminate debate over the circumstances surrounding such confessions. Issues of compliance with *Miranda*, voluntariness, and allegations of physical abuse and psychological overbearing would be minimized because a trial judge could make a determination based on objective and reliable information. Recording would serve as the best method for aiding the court’s determination of voluntariness in light of the totality of the circumstances.

A variety of objections have been raised about videotaping the interrogation process. It has been suggested that videotaping is not feasible, for example, because of space, personnel and funding limitations. Also, videotaping of suspects puts an unfair burden on law enforcement and would significantly lower the successful clearance rate in investigations of serious crimes.⁷⁴ In the early stages of an investigation, the police often do not have a clear idea of what happened, let alone who the suspects are. To require that all questioning of suspects be videotaped might significantly slow the course of many investigations and create an unacceptable risk for public safety. The main objection raised by police and prosecutors against recording is that it would prove to be impractical and costly to record all stationhouse interrogations. Specifically, such an objection centers on limited resources, including the price of videotape copies

⁷⁴ *Id.*

and the number of hours involved in recording and storage.⁷⁵

However, the cost of video or audio-electronic recording machines and tapes is relatively small compared to the cost incurred by investigation time, attorney time, and court time in conducting pre-trial hearings regarding the admissibility of a confession.⁷⁶ Cost-saving considerations may include reducing interrogation time. Recording could alleviate the need for detailed note taking. Additionally, increases in the number of guilty pleas and decreases in the number of suppression hearings involving defense challenges to the admissibility of an unrecorded interview could decrease the expenditure of judicial resources. Not only could the criminal justice process see savings, but the ancillary costs of civil litigation over false and problematic confessions could be reduced as well.

Ironically, police and prosecutors view videotaping to be cost-effective in other aspects of the criminal justice process, but not in the context of the interrogation process. Anyone familiar with DUI cases knows that most patrol cars are equipped with video cameras. The ultimate cost-benefit determination in favor of recording is the enhancement of the integrity of the judicial system. Any objective method of determining the credibility

⁷⁵ See Drizin & Colgan, *supra* note 3, at 408-10; Memorandum from David Jennings, Deputy Director, TBI, to Curtis Person, Chairman Senate Judiciary Committee and Joe Fowlkes, Chairman, House Judiciary Committee, on The Report of the Tennessee Law Enforcement Advisory Council on Recording Custodial Interrogations 2 (May 6, 2003) (on file with authors).

⁷⁶ GellAr, *supra* note 69 at 47-49.

of the respective parties enhances integrity.⁷⁷ State recording would open the door to the interrogation room and shine light on the process. Given the overriding importance of systemic integrity, it seems odd that the issue needs debate. Indeed, as the United States Supreme Court recently made clear, the reliability of evidence involving statements taken by police must be assessed “by testing in the crucible of cross-examination.”⁷⁸ The Court’s decision reflects not only the desire for reliable evidence, but also a means to determine reliability.⁷⁹ If out-of-court statements elicited in interrogations were important enough to require cross-examination for admissibility, then surely the procedural mandate of recording an interrogation would be conducive to the goal of reliability.

A 1992 study for the National Institute of Justice found that a number of police agencies throughout the United States regularly videotaped all or portions of the interrogation process.⁸⁰ Furthermore, over half of the nation’s police agencies use video technology for other purposes, even if not necessarily the recording of interrogations.⁸¹ Those who implemented electronic recording for interrogations expressed widespread satisfaction. According to the study, video technology has taken hold as one of the important administrative and operational tools of modern criminal justice agencies. The researchers found that of police departments that videotape interrogations, 65.8 percent found the procedure

⁷⁷ See *Stephan v. State*, 711 P.2d 1156 (1985).

⁷⁸ *Crawford v. Washington*, 541 U.S. 36 (2004).

⁷⁹ *Id.*

⁸⁰ Gellar, *supra* note 69, at 94.

⁸¹ *Id.* at 91-94.

“very useful” and another 31.3 percent found the procedure “somewhat useful.”⁸² Given the technology, the general sentiment expressed by departments using videotaping was that it was appropriate. Not using video is like not using state-of-the-art fingerprint analysis equipment. The larger the department, the more likely they are using videotaping. The study found that 97 percent of all departments in the nation that are videotaping either confessions or full interrogations find such videotaping, on balance, to be useful.⁸³

The broad findings of the 1992 study indicate that videotaping has fostered improvement in the quality of police interrogations. Desirable changes in interrogations included: (1) better investigator preparation for interview by forcing investigators to think out their questions and the sequence of questions in advance; (2) the ability to interrogate a suspect without the distractions of a typewriter, notebooks, statement forms, or court reporters; (3) the ability of other police and prosecutorial personnel to monitor the interrogation live via closed-circuit television and to send suggested questions into the interview room; and (4) the opportunity for interrogators to view the videotape in order to evaluate the suspect’s earlier statements and demeanor and to formulate further questions for any continuation of the interview. Taping would also allow for training new detectives and for providing advanced training to experienced detectives.⁸⁴

One important finding was the distinction between agencies videotaping the entire

⁸² *Id.* at 152.

⁸³ *Id.*

⁸⁴ *Id.* at 110-11.

stationhouse interrogation, including preliminaries such as the admonitions and waivers required by *Miranda*, and those videotaping only the “recapitulation”—a statement recited by the suspect only after some prior “softening up” or unrecorded questioning of the suspect by police personnel. The distinction is important with regard to the reactions of the various groups surveyed. Generally, all participants supported recording of the entire interview whereas recapitulation tapes were criticized for neglecting to record the most critical portion of the questioning process.⁸⁵

The Texas Court of Criminal Appeals has provided anecdotal support for the recording of the entire interrogation session. In *Zimmerman v. State*,⁸⁶ the trial court overruled the defendant’s motion to suppress his confession despite his testimony that he was physically mistreated. Following his conviction for capital murder, a federal investigation into the interrogating officer’s conduct resulted in discovery of a recording of the officer’s conversation with the defendant in which the defendant inquired whether he would be beaten. The officer answered in the negative, adding that the defendant would not have been beaten in the first instance had he not been lying. Ruling on a motion for a new trial, the trial judge acknowledged his error in overruling the motion to suppress the confession.

All participants in the survey agreed that videotaping saved time and promoted greater respect for police procedures. There were fewer allegations of improper police conduct and those

⁸⁵ *Id.* at 133-34.

⁸⁶ *Zimmerman v. State*, 750 S.W.2d 194 (Tex. Crim. App. 1988).

made were easier to resolve. Participants involved in the criminal justice process agreed with the merits of videotaping. Importantly, in jurisdictions in which interrogations were recorded, there was greater confidence in the judicial determination of the admissibility of a suspect's statements, as well as a higher degree of credibility afforded the verdict.⁸⁷

The issue for our system, as the study began by noting, is not whether video technology presents an *ideal* tool to fix all existing problems, but whether it is more reliable and efficient than traditional documentation methods and does not present offsetting complications or costs.⁸⁸ Despite variations, such as taping full interrogations versus recaptulations only, and taping overtly versus covertly, the videotaping of suspects' statements is a practical, efficient, and affordable step towards a more reliable, objective and legitimate criminal justice system. Electronic recording might require law enforcement officers to alter their interrogation tactics and could force states to budget for audio and video equipment. Notwithstanding these costs, however, a suspect's constitutional rights ought to be the underlying rationale for requiring electronic recording of interrogations.

C. The State of the Law on Recording

During the past four decades of interrogation monitoring, it has become obvious that recorded interrogations can significantly buttress judicial review of a process to which the police and a suspect are often the only witnesses. The inherent

⁸⁷ Gellar, *supra* note 69, at 133.

⁸⁸ *Id.* at 28.

difficulty of determining what actually transpired during an interrogation together with the importance of enforcing a suspect's right against self-incrimination provided much of the motivation for the Supreme Court's decision in *Miranda v. Arizona*.⁸⁹ The decision mandated that, prior to any interrogation, police officers admonish suspects in custody of certain constitutional protections they possess. As a result, judges and legal scholars began calling for routine tape recording of stationhouse interrogations.⁹⁰

The arguments for reform have remained consistent in their rationale that a recording would best assist a court in deciphering what actually took place in the interrogation room. An electronic recording would provide the most efficient and effective means for a court to reconstruct the actual conditions of the interrogation in order to discern whether constitutional procedural safeguards had been followed. The ability to resolve a "swearing contest" on the basis of an objective and reliable record would minimize the speculative, fact-finding function of the court in determining who is telling the truth, a decision usually deferring to the police officer.

Notwithstanding the recognized advantages of electronic recording, only four states require electronic recording of interrogations: Alaska and Minnesota mandate recording through court

⁸⁹ *Miranda*, 384 U.S. at 436.

⁹⁰ See, e.g., Barber & Bates, *supra* note 56; Leo, *supra* note 73; Pound, *supra* note 56; Daniel Donovan & John Rhodes, *Comes a Time: The Case for Recording Interrogations*, 61 MONT. L. REV. 223 (2000); Drizen & Colgan, *supra* note 3; Westling, *supra* note 2.

decisions;⁹¹ Texas imposed a more narrow requirement via a state statute that prohibits the admission of an unrecorded oral confession;⁹² and Illinois implemented the videotaping of interrogations in homicide prosecutions.⁹³ The question remains why many, if not most, stationhouse interrogations in the United States remain unrecorded. The fact that courts have undertaken little reform in this area is confusing in light of the fact that the Supreme Court seemed to go out of its way in *Miranda* to encourage such innovation. "Congress and the States are free to develop their own safeguards for the privilege against self-incrimination, as long as those safeguards are as effective as those devised by the Court."⁹⁴ Given the rather straightforward arguments for mandatory recording, such as having an accurate, objective record of what occurred during the interrogation, one can only surmise that critics of recording are threatened by the unveiling of the interrogation process itself.⁹⁵

The Tennessee Supreme Court, considering the issue in *State v. Godsey*,⁹⁶ declined to require taping, noting that neither the Tennessee State Constitution nor the Federal Constitution requires such recording.⁹⁷ Although the court in *Godsey* provided a long list of states that have similarly

⁹¹ *Stephan*, 711 P.2d at 1156; *Scales*, 518 N.W.2d at 587.

⁹² George E. Dix, *Texas "Confession" Law and Oral Self-Incriminating Statements*, 41 BAYLOR L. REV. 1 (1989).

⁹³ Post, *supra* note 66; Mills, *supra* note 66.

⁹⁴ *Miranda*, 384 U.S. at 490.

⁹⁵ Leo, *supra* note 73, at 687; Drizen & Colgan, *supra* note 3, at 392-93.

⁹⁶ *State v. Godsey*, 60 S.W.3d 759 (Tenn. 2001).

⁹⁷ *Id.* at 771.

declined to impose such a requirement,⁹⁸ the court nevertheless recognized the minimal inconvenience and expense associated with recording interrogations and the sound policy considerations that support its adoption as a law enforcement practice.⁹⁹ It seems the court's justification for rejecting a recording requirement was based solely on the fact that it is not recognized as a constitutional due process requirement.

The *Godsey* court ended its discussion of electronic recording by stating that the issue was more appropriate for legislative consideration.¹⁰⁰ One legal commentator astutely pointed out that in reading opinions such as *Godsey* it is easy to conclude that courts are reluctant to be perceived as acting as super legislative bodies. This reluctance is due primarily to the fact that taking a stand on constitutional grounds would demand some type of affirmative action by the court that would force the government to create a quasi-right with "financial implications."¹⁰¹

Other courts have commented little about why tape recording of confessions is not constitutionally required, and further, why, even in the absence of a constitutional imperative, such a requirement should not be mandated under a court's supervisory power. As Sklansky points out, most courts have relied on the United States Supreme Court decisions of *California v. Trombetta*¹⁰² and *Arizona v.*

⁹⁸ *Id.* at 772, n.7.

⁹⁹ *Id.* at 772.

¹⁰⁰ *Id.*

¹⁰¹ David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1269-70 (2002).

¹⁰² 467 U.S. 479 (1984).

*Youngblood*¹⁰³ in holding that the Due Process Clause of the Fourteenth Amendment does not require the police to preserve evidence solely on the basis that it might later prove exculpatory.¹⁰⁴ However, those cases were construed as such because of the federal guarantee of due process and did not impose restrictions on the application of parallel guarantees within state constitutions, nor did they restrict a state appellate court's right to exercise its supervisory power in implementing such a requirement.

The Tennessee Supreme Court has restrained from establishing a recording requirement, either out of unwillingness to interpret the Tennessee Constitution in a different sense than the Federal Constitution or perhaps out of deference to the state legislature. Although recognizing the value that such a rule would have in terms of conserving judicial resources in resolving disputes over interrogations, the Tennessee Supreme Court continues to decline to adopt such a rule on due process grounds.¹⁰⁵ Tennessee judges seem to be reluctant to act as gatekeepers for the jury except in cases of overt and manifest abuse, particularly in the absence of a reliable means of establishing allegations of illegality and impropriety.

While a number of common law countries including Great Britain, Canada, and Australia¹⁰⁶ have adopted a requirement that police tape record

¹⁰³ 488 U.S. 51 (1988).

¹⁰⁴ See Sklansky, *supra* note 101, at 1267-68.

¹⁰⁵ See *Godsey*, 60 S.W.3d at 771-72.

¹⁰⁶ See generally Donovan & Rhodes, *supra* note 90; Wayne T. Westling & Vicki Waye, *Videotaping Police Interrogations: Lesson from Australia*, 25 AM. J. CRIM. L. 493 (1998).

interviews with suspects, only two state courts have mandated a similar requirement. In the landmark case of *Stephan v. State*,¹⁰⁷ the Alaska Supreme Court held that the Due Process Clause of the Alaska Constitution requires electronic recording of custodial interrogation conducted in a place of detention.¹⁰⁸ Any statement obtained in violation of that due process right is generally inadmissible in a proceeding against the defendant.¹⁰⁹ *Stephan* involved conflicting testimony about what occurred during the unrecorded portions of the interrogation. Stephan claimed that his confession was the product of promises of leniency and was obtained in the absence of an attorney after his request for one. The officer testified to the contrary, leaving the trial court to resolve the conflict and evaluate the credibility of the witnesses. Without a full recording, the court chose to believe the officer's recollections in making a determination that the confession was voluntary and, thus, admissible at the defendant's trial.

Of course, courts faced with conflicting testimony from defendants and officers tend to defer to an officer's recollection of what took place during the interrogation process at the expense of the defendant's account. In most instances, in the absence of a tape recording, the officer invariably wins the swearing contest.¹¹⁰

The *Stephan* court was convinced that recording "is now a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self-incrimination

¹⁰⁷ 711 P.2d 1156.

¹⁰⁸ *Id.* at 1158.

¹⁰⁹ *Id.* at 1159-60.

¹¹⁰ See *Harris v. State*, 678 P.2d 397 (Alaska App. 1984).

and, ultimately, his right to a fair trial.”¹¹¹ The court emphasized that its holding was based solely upon the requirements of Article I, §7 of the Alaska Constitution. While recognizing that custodial interrogations need not be recorded in order to satisfy the due process requirements of the Federal Constitution, the court felt obliged to adopt a more rigorous safeguard for the admissibility of evidence under the Due Process Clause of the Alaska Constitution, thus construing Alaska’s constitutional provision as affording rights beyond the framework of those guaranteed by the United States Constitution.¹¹²

It is interesting to note the *Stephan* court’s emphasis on the need to ensure that the voluntariness of a confession is confirmed by reference to an objective and complete record is at least as important as the need to ensure the validity of a breath alcohol test that is tested independently. The court felt that given the relative ease with which such confirmation could be provided, there was no legitimate reason not to require it.¹¹³

The *Stephan* court also noted the heavy burden upon the state to show that a defendant knowingly and intelligently waived his privilege against self-incrimination and his right to counsel. It found that the contents of an interrogation are material to determining the voluntariness of a confession. It recognized that the trial court must resolve the typical “swearing contest” between the officer and defendant from a situation in which the interrogation is conducted largely *in communicado*. Private interrogations result in a “gap in our

¹¹¹ *Stephan*, 711 P.2d at 1159-60.

¹¹² *Id.* at 1160.

¹¹³ *Id.*

knowledge as to what in fact goes on in the interrogation room.”¹¹⁴ The *Stephan* court justified its recording mandate on the basis that a tape recording would provide the most objective means for evaluating exactly what took place during an interrogation.

In adopting the recording requirement, the *Stephan* court held that the recording must clearly indicate that it recounts the entire interview process, including the admonition of the *Miranda* rights and any waiver of them, so that the court is not left to speculate about what transpired from the very beginning of the interview. It further held that anytime a full recording is not made, the state was under a duty to provide proof by a preponderance of the evidence that recording was not feasible under the circumstances. However, in such cases, the failure to record would be viewed with distrust.¹¹⁵ In those instances in which the court determined that a recording of the interrogation was not feasible despite the good faith efforts of the officers involved, the state would have the burden of proving the defendant’s confession was knowing and voluntary.¹¹⁶

In forging a clear mandate regarding recording, the *Stephan* court adopted a general rule of exclusion recognizing that while other approaches have merit, an exclusionary rule would strike the best balance of protecting a suspect’s rights, providing clear and definite direction to officers, and preserving the integrity of the justice system.¹¹⁷ The Alaska court sought to achieve two purposes in

¹¹⁴ *Id.* at 1161.

¹¹⁵ *Id.* at 1162-63.

¹¹⁶ *Id.* at 1163.

¹¹⁷ *Id.*

utilizing a general exclusionary rule: deterring illegal methods of law enforcement, and ensuring judicial integrity by preventing courts from becoming parties to the invasion of a suspect's constitutional rights.¹¹⁸

The importance of the Alaska court's opinion is its pointed intent to ensure and enhance the integrity of the judicial system, which it felt to be in question whenever a court ruled upon the admissibility of a questionable confession. This was particularly the case when such a confession was based solely upon a court's acceptance of the testimony of an interested party, the interrogating officer, or the suspect. The Alaska Supreme Court deemed trial courts to have even greater responsibility when objective evidence of a confession could have been preserved by the "mere flip of a switch."¹¹⁹ Requiring recording of the custodial interrogation process would provide objective, reliable evidence and would go far in avoiding any suggestion that a court was biased in favor of either party.

Ultimately, the Alaska court sought to further the protection of individual constitutional rights through a general exclusionary rule. As the court noted, "[S]trong protection is needed to ensure that a suspect's right to counsel, his privilege against self-incrimination, and due process guarantees are protected."¹²⁰ Recognizing that a confession is generally considered conclusive evidence of guilt, the court found that such a rule of exclusion was justified in any circumstance where the state, without excuse, failed to preserve evidence of the interaction between interrogator and interrogated

¹¹⁸ *Id.* at 1163, n.25.

¹¹⁹ *Id.* at 1164.

¹²⁰ *Id.*

leading up to the formal statement. Again, the court noted that the arbitrary failure to preserve the entire interrogation directly affected a defendant's ability to present his defense, either at trial or at a suppression hearing regarding the admissibility of the confession.¹²¹ The court went on to recognize exclusion of the confession as the only appropriate remedy for unexcused failure to electronically record the interrogation when a recording was feasible.¹²²

In almost two decades since the Supreme Court of Alaska mandated the recording of stationhouse interrogations whenever feasible, only one other court has followed suit. Expressly endorsing the reasoning of the Alaska court, the Minnesota Supreme Court exercised its supervisory power in holding that interrogators must record, whenever feasible, all custodial interrogations of criminal suspects when questioning takes place at a place of detention.¹²³ The court further held that violation of this requirement could lead to suppression of any evidence obtained from the interrogation.¹²⁴ The *Scales* court chose not to determine at that time whether a criminal suspect had a due process right under the Minnesota Constitution to have his custodial interrogation recorded.¹²⁵ Instead, the court based its holding on its "supervisory power to ensure the fair administration of justice."¹²⁶

The Minnesota court had admonished law enforcement officers on two prior occasions for

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Scales*, 518 N.W.2d at 587.

¹²⁴ *Id.* at 592.

¹²⁵ *Id.*

¹²⁶ *Id.*

their failure to electronically record the custodial interrogations of criminal suspects.¹²⁷ The Minnesota court noted in *State v. Robinson*¹²⁸ that many factual disputes arising from a suspect's claim of a violation of his constitutional rights could be prevented if interrogations were recorded. Similarly, in *State v. Pilcher*,¹²⁹ the court criticized officers for their failure to use technological means at their disposal to fully record those conversations and events transpiring before the actual questioning itself. The court issued the warning that it would look with great disfavor upon further disregard of its warnings.¹³⁰ The *Scales* case was the consequence and, in essence, the result of law enforcement's failure to heed the court's admonitions.

The Minnesota court, in a finding similar to that of the Alaska Supreme Court, noted the benefits that a recording requirement would provide by citing the resulting reduction in the number of disputes over adherence to the *Miranda* requirements and the voluntariness of purported waivers of those *Miranda* rights. The benefits of such recordings would facilitate a defendant's challenge to an officer's misleading or false testimony while protecting the state against meritless claims by a defendant.¹³¹

Whereas the *Stephan* court adopted the exclusionary rule as a sanction for violating its recording requirement, the *Scales* court's reasoning

¹²⁷ See *State v. Pilcher*, 472 N.W.2d 327, 333 (Minn. 1991); *State v. Robinson*, 427 N.W.2d 217, 224, n.5 (Minn. 1988).

¹²⁸ *Robinson*, 427 N.W.2d at 224, n.5.

¹²⁹ *Pilcher*, 472 N.W. at 333.

¹³⁰ *Id.*

¹³¹ *Scales*, 518 N.W.2d at 591.

was different. Although it utilized the same sort of exclusionary rule for violating its recording mandate, the *Scales* court noted that application of the exclusionary rule to an interrogation statement that was obtained in violation of its recording rule would be decided on a case-by-case basis and excluded only in the event that a statement was obtained because of a “substantial” violation.¹³²

Texas is the third state that presently has a recording requirement, but that requirement is much more limited than in either Alaska or Minnesota. Pursuant to the Texas Code of Criminal Procedure Art.38.22, Section 2, the interrogator must only record the confession, but not the interrogation preceding the confession.¹³³ Dix¹³⁴ provides a review of how Texas confession law developed legislatively, noting that Texas courts have traditionally adhered to the general rule prohibiting the use of oral, out of court confessions against a defendant.¹³⁵ It appears that the premise of the Texas statute is that oral confessions made by suspects in custody are inherently unreliable and, consequently, inadmissible for any purpose.¹³⁶

Dix notes that the Texas legislature’s decision to allow the evidentiary use of recorded oral statements was widely viewed as a major modification of the Texas prohibition against use of oral, out of court confessions.¹³⁷ In legislating such a modification, the state legislature exhibited a

¹³² *Id.* at 592.

¹³³ TEX. CODE CRIM. PROC. ANN. art. 38.22, §3 (1999).

¹³⁴ See generally Dix, *supra* note 92.

¹³⁵ *Id.* at 5.

¹³⁶ See *Butler v. State*, 493 S.W.2d 190 (Tex. Crim. App. 1973).

¹³⁷ See Dix, *supra* note 92, at 71.

concern for the interests of the reliability and accuracy of the in-court representations of what a defendant had orally admitted prior to trial. The legislature seemed to manifest a desire to prevent or deter unacceptable police behavior by requiring an objective record of what transpired in the interrogation and confession process.¹³⁸ While the thrust of the Texas statute focuses on the reliability aspects of recording, there is no right on the part of a defendant to a visual recording as opposed to an audio recording.¹³⁹

Illinois became the fourth state in the nation to require police to tape interrogations. Beginning in 2005, under a new state law, officers are required to tape interrogations of murder suspects or risk suppression of the suspect's confession as evidence.¹⁴⁰ The Illinois statute, which was signed into law by Governor Rod Blagojevich on July 17, 2003, is an outgrowth of reforms recommended by former Governor Ryan's Commission on Capital Cases. The Commission's recommendations were a consequence of alleged widespread police misconduct, including coerced confessions, in obtaining convictions against a number of individuals sentenced to death and ultimately freed.

The statute contains a number of exceptions, including one allowing use of untaped statements in court if electronic recording was not feasible. Other exceptions allow the admission of out-of-state interrogations and spontaneous statements if not made in response to questioning by officers.¹⁴¹ The

¹³⁸ *Id.*

¹³⁹ *Id.* at 73, n. 256.

¹⁴⁰ See generally Post, *supra* note 66; Mills, *supra* note 66.

¹⁴¹ See Post, *supra* note 66, at 18.

Illinois directive recognizes that in certain circumstances it is neither practical nor possible to obtain contemporaneous recordings. At the same time, it recognizes the necessity of a recorded statement when a suspect in a stationhouse gives a formal confession.

Although only a few courts and legislatures have enacted mandatory recording requirements concerning interrogations, it is likely that more will follow in the future. Tennessee recently considered such a mandate through legislation. The following section examines the Tennessee legislative proposal that renders inadmissible any statement made by an accused during an unrecorded custodial interrogation.

D. Tennessee's Legislative Proposal

Although a strong argument could be made that the mandatory recording of interrogations involves a due process issue and is therefore a constitutional issue necessitating judicial protection, the first move for reform was initiated by the Tennessee legislature.¹⁴² As noted previously, compelling policy reasons supported such a move. Indeed, the Tennessee Supreme Court has recognized the value of such a rule in terms of conserving judicial resources by reducing the amount of court time spent resolving disputes over what took place

¹⁴² The legislature's first proposal to adopt a mandatory recording requirement was contained in SB0343/HB1138. Tennessee Proposal, *supra* note 5. Note that additional versions of a mandatory recording bill were introduced in the most recent Legislative session. See SB1679/HB204. These versions are substantially similar to the original bills and do not raise materially different issues regarding the discussion in this article.

during an interrogation, but has nonetheless declined to adopt a rule requiring such recording.¹⁴³ As the court commented in *State v. Odom*, the issue of electronic recording of custodial interrogations “is one more properly directed to the General Assembly.”¹⁴⁴ Such legislation, if adopted, would allow state courts to sidestep the question of whether such recording is a constitutional prerequisite for the admissibility of confessions.

The Tennessee proposal would require electronic recording, by video or audio, of the entire interrogation, including that which preceded the confession. The bill would essentially prohibit the “softening up” of a suspect, then capturing the admonishments, waiver, and confession in a subsequent session. The proposed recording requirement was limited to a custodial interrogation conducted at a place of detention. Both the *Miranda* rights and any waiver of those rights would have to be captured on the recording. All voices would have to be identified and, upon motion, defense counsel would receive a copy of the interrogation prior to any hearing requiring the recorded confessions or waivers.

Further, the proposed bill would also apply to written statements made during the course of custodial interrogations, which would be inadmissible as evidence unless the defendant voluntarily and knowingly waived her or his *Miranda* rights. Any statements made by a suspect during custodial interrogation which are not recorded in compliance with the proposal would be admissible for impeachment purposes only. The

¹⁴³ See *Godsey*, 60 S.W.3d 759 at 772.

¹⁴⁴ *Odom*, 928 S.W.2d at 23-24.

preponderance of the evidence burden in that situation would be upon the suspect to show that he was subjected to a custodial interrogation that was not recorded, and later subjected to a recorded interrogation involving the same offense.

Moreover, the bill required electronic recording of the entire police interview before a particular admission became admissible. For maximum objective value, the entire interrogation session needs recording, beginning with the first introduction of the parties. It is extremely important that all preliminaries be recorded because they are often a breeding ground for claims of physical and psychological pressure and could undermine the reliability of any subsequent recording. Merely capturing the defendant's incriminating comments without also recording the police "lead-in" would give an imbalanced picture of the entire event. Frequently, what takes place in the beginning of an interrogation dictates the outcome.¹⁴⁵ It is clear that a recording of properly trained officers eliciting a confession from a suspect could withstand legal challenges. A recording lacking the initial contact between interrogator and suspect fails to accomplish the primary objective of a recording requirement: creating an accurate, detailed, and complete record of an interrogation.

The exclusionary requirement of the proposal was tempered by certain exceptions. These exceptions included statements made by a suspect in open court during a trial, before a grand jury, or at preliminary hearing; *res gestae* statements¹⁴⁶;

¹⁴⁵ See, e.g., *Stephan*, 711 P.2d at 1164 (quoting *Harris*, 678 P.2d at 413-14).

¹⁴⁶ The term *res gestae* is commonly confused with the excited utterance hearsay exception. NEAL COHEN, SARAH

statements not produced during custodial interrogation; statements made in circumstances in which videotaping was not feasible; and statements made under other exigent circumstances. If the State sought to demonstrate that any of the exceptions should apply, it would have to do so by a preponderance of the evidence. The numerous exceptions contained in the bill adequately addressed feasibility concerns likely to be voiced by law enforcement. Apart from the exigent circumstances exception, the general feasibility exceptions would have allowed officers to show that it was not possible for them to record the particular interrogation.

One drawback of the legislation was that it would have allowed an audio recording in lieu of videotaping. An audio recording would obviously not capture the physical nuances of the parties nor would it show the physical environs. Much as DUI enforcement utilizes videotape to capture a person's actions, a videotape would more reliably record the entire context of an encounter. The parties' actions and demeanor, which are of paramount importance in an interrogation setting, would be largely ignored by use of a sound recording.

Moreover, there would be difficulty in indicating when multiple interrogators were present; an audio recording alone may not always clearly indicate which person was talking. If the interviewer and interviewee consistently talk over each other, neither may be understood. Perhaps

SHEPPEARD & DONALD PAINE, TENNESSEE LAW OF EVIDENCE, 532 (1995). The proposal does not define the term or distinguish it from the spontaneous statement exception under section (g) (6) of the Tennessee Proposal.

most important, however, is that descriptions of head, eye, facial, or hand movements would not be conveyed to a listener without a verbal clarification. In short, a sound recording by itself simply cannot convey the entire context within which the words are conveyed.

The House and Senate Judiciary Committees directed the Tennessee Law Enforcement Advisory Council to study and evaluate issues related to electronic recording of custodial interrogations of suspects and to report its final findings or recommendations following the convening of the 103rd General Assembly.¹⁴⁷ The purpose of the Advisory Council¹⁴⁸ is to monitor and evaluate the status of technological developments and related issues to Tennessee law enforcement, and to submit its findings to the governor and legislative judiciary committees.

The Comptroller's Office of Research developed a survey for all Tennessee law enforcement agencies in November, 2002. Tennessee law enforcement personnel from 400 agencies responded to the survey.¹⁴⁹ 43 percent of agencies that responded electronically record custodial interrogations.¹⁵⁰ The primary reasons cited for not recording interrogations included the following: sufficiency of a written statement; unwillingness of suspects to speak if they are recorded; prohibitive equipment cost; and concerns

¹⁴⁷ H.R.J. Res. 862, 102nd Gen. Assem., Reg. Sess. (Tenn. 2002).

¹⁴⁸ Delineated in TENN. CODE ANN. §38-13-101 et. seq.

¹⁴⁹ TENNESSEE LAW ENFORCEMENT ADVISORY COUNCIL CUSTODIAL INTERROGATION SURVEY, TENNESSEE COMPTROLLER'S OFFICE OF RESEARCH (2002).

¹⁵⁰ *Id.* at 2.

about equipment malfunctions.¹⁵¹ Agencies utilizing recording report that it provides numerous benefits including enhanced law enforcement credibility, availability of tapes for training, reduced officer time in court, and ease of demonstrating that the suspect has been treated fairly.¹⁵² The major drawback cited by those using recording was the expense associated with recording custodial interrogations.¹⁵³ Only 23.3 percent of agencies using electronic recording recorded *all* custodial interrogations. Of the agencies reporting that they recorded some custodial interrogations, the decision to record was based primarily on the severity of the offense.¹⁵⁴

The Council identified several concerns regarding electronic recording of custodial interrogations. The most significant concern centered on the costs associated with such recording,¹⁵⁵ specifically costs associated with recording *all* custodial interrogations. The proposal mandated the recording of custodial interrogations *at a place of detention*. Because some interrogations undoubtedly occur outside of the stationhouse, cost concerns could be lessened.

There was also a concern that recording would not serve the interest of judicial economy because confessions encourage plea bargains.¹⁵⁶ Common sense would seem to indicate, however, that a tape evidencing a voluntary confession would make a

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 3.

¹⁵⁵ See Jennings, *supra* note 75, at 2.

¹⁵⁶ *Id.* at 3.

defendant less likely to challenge the admissibility of the statement. Moreover, recordings would most certainly lead to fewer allegations of improper, abusive, or coercive interrogation procedures that could result in civil litigation and involve judicial resources beyond the criminal justice system.

The cost of failing to implement the recording program would far outweigh the cost of recording when the increased cost of criminal and civil litigation due to allegations of improper police conduct is figured in. The cost of the recording equipment and videotapes is minuscule compared to the cost of going to trial with tainted evidence and the resulting lawsuits involving police accused of unethical conduct.

DNA technology has cleared scores of defendants years after their convictions, including some who were on death row, many of whom had confessed to crimes they did not commit. DNA technology is costly, but its benefits are considered invaluable. What price is too high to bolster the truth-finding function of the law? Effectively using electronic recordings of interrogations would likely result in significant cost savings to the criminal justice system as a whole.

In this society, with its advanced technology and almost universal availability of recording technology, there is no reason not to increase the reliability of the criminal justice system as much as possible by requiring recording. Resisting the use of inexpensive technology to safeguard due process and fairness is unjustifiable. The interrogation event should speak for itself. The fact-finder should not be required to filter through inferences drawn from a "he-said, she-said" drama involving the

disparate perceptions of individuals, each with their own perceptual biases or shortcomings.

This Tennessee legislature's recording proposal was tabled in spring 2004. If this proposal is not implemented, reliability and accuracy will continue to be sacrificed in the name of efficiency and expediency. In the absence of legislative action on recording, it falls to the judiciary to take the lead in addressing the issue.

IV. The Tennessee Supreme Court's Supervisory Powers Argument

The obvious judicial response given the Tennessee Supreme Court's history is to adopt a due process approach and find that the Tennessee Constitution requires mandatory videotaping to ensure a criminal defendant's basic rights to fairness. The court has a history of interpreting constitutional rights, both procedural and substantive, more broadly than the United States Supreme Court.¹⁵⁷

In addition, the state's due process approach has found legal support in one other state. The Alaska Supreme Court in *Stephan v. State*¹⁵⁸ held under its state constitution that due process required electronic recording of stationhouse interrogations. This approach has the added attraction of operating as an extension of the United States Supreme Court's *Miranda* decision, which is firmly entrenched in this country's criminal process.¹⁵⁹

¹⁵⁷ See *State v. Jacumin*, 778 S.W.2d 430 (Tenn. 1989); *Planned Parenthood of Middle Tennessee v. Sundquist*, 38 S.W.3d. 1 (Tenn. 2000).

¹⁵⁸ *Stephan*, 711 P.2d at 1156.

¹⁵⁹ *Miranda*, 384 U.S. at 436.

Since *Miranda* was given a firm constitutional grounding in the Supreme Court's *Dickerson* decision,¹⁶⁰ what began as a prophylactic rule made by judicial fiat has been strengthened. Videotaped interrogations could share a similar lineage and become enshrined as constitutional doctrine.

The court addressed this constitutional approach, albeit in a cursory fashion, in *State v. Godsey*.¹⁶¹ In *Godsey*, the court considered but did not ultimately apply due process and other constitutional considerations in support of mandatory videotaping. Rather, the court elected to leave the matter to legislative consideration.¹⁶²

However, the *Godsey* case does not end the inquiry into the court's possible involvement in this matter. There is another compelling argument that the court has not specifically addressed: the court has the power and duty, under both statutory and case law, in its supervision and administration of the criminal justice system, to order videotaped interrogations when significant public interest demands it. This "supervisory powers" argument has been the basis for court action in a number of important areas in the criminal justice system specifically and the judicial system generally.¹⁶³

The basis for the Tennessee Supreme Court's supervisory powers is perhaps best summarized in *Cantor v. Brading*:

The supreme judicial and judicial
supervisory power [of the Supreme Court]

¹⁶⁰ *Dickerson v. United States*, 530 U.S. 428 (2000).

¹⁶¹ 60 S.W.3d 759.

¹⁶² *Id.*

¹⁶³ See *infra* notes 168, 169, 171-73.

is an inherent power of the Supreme Court and has been so recognized by the legislative branch of our government. T.C.A. §16-331 recognized that the Supreme Court has power to take all actions as may be necessary to the orderly administration of justice within the State, whether enumerated in that Code section or elsewhere. T.C.A. §16-332 declares that the power is of common law origin as it existed at the time of our Constitution.¹⁶⁴

The court's supervisory or plenary powers are clearly endorsed by the current statutory schemes in T.C.A. §16-3-503 and -504. This power is in addition to the court's ability to make specific rules, either by drafting rules of court or court opinions.

An example of the court's supervisory power is found in Rule 13 of the Supreme Court Rules. Rule 13 adopts a broad scheme of appointing attorneys and resources to indigent defendants, setting out elaborate procedures, standards and fees for the appointment of counsel in capital and non-capital cases. Section 3 in particular sets out standards of experience and training that specifically govern who may and may not sit as counsel in a capital case. There is nothing in either the federal or Tennessee constitutions, nor in case law decided under them, specifically calling for these procedures. In fact, the constitutional requirements related to the right to assistance of counsel are generally couched in terms of competency and effectiveness, and the United States Supreme Court's standards for competency of counsel are couched in broad terms requiring

¹⁶⁴ Cantor v. Brading, 494 S.W.2d 139, 142 (Tenn. App. 1973).

counsel to meet minimal standards of performance.¹⁶⁵

Rule 13, at least as it applies to capital counsel, goes well beyond the minimal standards demanded by constitutional considerations. It appears to enhance and embellish the specific rights to counsel found in both the federal and Tennessee constitutions. Furthermore, Rule 13 also comes with a price tag. Experienced attorneys handling death penalty cases will spend more time and resources on the case than inexperienced attorneys, and since attorneys bill the state for their fees in appointed cases, the bills submitted by Rule 13 attorneys cost the taxpayers more.

Another example of the court using its plenary powers to make rules that embellish and enhance constitutional rights is in Section VII of Rule 11 of the Tennessee Supreme Court Rules. The purpose of this rule, which sets out detailed procedures for appointing substitute judges in the absence of a presiding trial judge, is to empower the state constitution's guarantee of open proceedings.¹⁶⁶

These examples illustrate the court's willingness to address a problem, overlooked by the legislature, in the administration of the criminal justice system, as well as a willingness to promulgate rules of conduct that ensure constitutional rights in spite of potential financial impact. The court does not accept the argument that it should refrain from addressing a problem when legislative action is not forthcoming. The language in *Cary v. Cary* is compelling:

¹⁶⁵ See *Strickland v. Washington*, 466 U.S. 668 (1984).

¹⁶⁶ TENN. CONST. art. I, § 7.

It is primarily for the Legislature to determine the public policy of this state; however, where there is no declaration in the constitution or statutes and the area is governed by common law doctrines, it is the province of the courts to consider the public policy of the state as reflected in old, court-made rules.¹⁶⁷

Many other examples of the Tennessee Supreme Court's rulemaking fall into a second category: adopting a procedure or rule under the plenary powers as part of a court decision to deal with a specific issue before it. *State v. Reid*¹⁶⁸ is an example of such a decision in which a "rule" is announced as part of the court's opinion. The *Reid* court approved of the trial court's adoption of a rule establishing a notice requirement for the defense when mental health evidence was to be admitted at the sentencing phase of a case. This procedure was adopted to standardize a response to a recurring problem and was approved by the court despite the defense argument that the court could not create a statutory procedure when none was in place. The absence of legislative activity is not the end of the inquiry; rather, in some areas, it is the beginning.

In a similar area, the Tennessee Supreme Court, in *Van Tran v. State*,¹⁶⁹ used its plenary powers to establish a procedure to be applied by lower courts when a death row inmate asserted a competency defense to application of the death penalty. *Van Tran* is another example of the court intervening where it felt it necessary to protect a defendant's

¹⁶⁷ *Cary v. Cary*, 937 S.W.2d 777 (Tenn. 1996).

¹⁶⁸ *State v. Reid*, 981 S.W.2d 166 (Tenn. 1998).

¹⁶⁹ *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999).

basic constitutional rights.¹⁷⁰ Again, the court did not hesitate to address an area of the law in which the legislature had not set forth any rules or procedures to ensure fairness and consistency.

Other examples of the court's exercise of its supervisory powers specifically involve evidentiary problems. For example, in *Mathis v. State*,¹⁷¹ the court reversed a murder conviction by applying a rule requiring that convictions based on the testimony of an accomplice be corroborated by independent evidence.¹⁷² There is nothing in either the federal or Tennessee Constitutions requiring corroboration of accomplice testimony. In fact, neither constitution says much about the types of evidence that are admissible in a criminal trial. The court's action suggests, however, that this corroboration "rule" helps to ensure that convictions are based upon reliable evidence. Similar to the rule regarding the appointment of counsel, the corroboration rule has potential costs to law enforcement and prosecutors in the handling of criminal cases. The costs associated with finding and bringing to court corroboration witnesses necessary to support a conviction are real.

In *State v. Smith*,¹⁷³ the court had the opportunity to address another evidentiary issue. The issue, a potential nightmare for the prosecution, involved the introduction of hearsay testimony that another person committed the crime for which the defendant was being tried. The court set forth

¹⁷⁰ See *Ford v. Wainwright*, 477 U.S. 399 (1986).

¹⁷¹ *Mathis v. State*, 590 S.W.2d 449 (Tenn. 1979).

¹⁷² See *Proctor v. State*, 565 S.W.2d 909 (Tenn. Crim. App. 1978).

¹⁷³ *Smith*, 933 S.W.2d 450.

standards that must be met before the introduction of a third party's admission of guilt. Although this case would seem to limit the scope of evidence offered by a defendant, it nonetheless indicates the court's concern with reliability of evidence.

It might be argued that the above examples are distinguishable from the issue of videotaped interrogations in that the above examples show the court's exercise of its supervisory powers in implementing procedures to be followed by the lower courts. The videotaping issue, on the other hand potentially involves the court's imposition of rules on another branch of government, namely, law enforcement.

A strong argument exists for the court to act in the areas directly related to the supervision of the lower courts of this state. The high court is the repository of judicial power in the state, and without question has the ultimate power to supervise the practice of attorneys and lower courts. However, this distinction should not bar rule-making in this area.

First, the clear language of the Tennessee Supreme Court indicates that its plenary power extends broadly to the "administration of justice" in Tennessee.¹⁷⁴ Moreover, as previously noted, the court has adopted other rules that impose costs on police, the prosecution and the public. Certainly, the court's establishment of rules or guidelines for admissibility of evidence is related to the administration of justice, especially when compelling public policy reasons require the court's involvement. As such, one of the most important

¹⁷⁴ *Belmont v. Bd. of Law Exam'rs*, 511 S.W.2d 461 (Tenn. 1974).

functions of any court is ensuring the reliability of evidence in a criminal case.¹⁷⁵

Further, the Tennessee Supreme Court expressly adopted the United States Supreme Court's dictates in the *Miranda*,¹⁷⁶ *Weeks*,¹⁷⁷ *McNabb*,¹⁷⁸ and *Mallory*¹⁷⁹ cases, all of which involved United States Supreme Court rule-making. The Tennessee Supreme Court has never found the rules announced in these cases unenforceable because they were promulgated by the judicial system in the absence of a legislative mandate. Moreover, the rules in the above cases involved potential costs imposed on law enforcement. Even before *Dickerson*,¹⁸⁰ which shows *Miranda* to be rooted in the federal Constitution, the Tennessee Supreme Court approved *Miranda* as a prophylactic rule to protect a defendant's constitutional rights. In fact, the court has intimated that its view of the self-incrimination privilege is broader and more expansive than the privilege in the federal Constitution.¹⁸¹ Rule-making in the area of interrogations, thus, has been a fixed part of the law in this state for years.

The final, and perhaps most compelling, reason for judicial rule-making in this area is that the defendant's rights are central to the notion of a fair trial. The right against self-incrimination, the right to confront witnesses and evidence, and the right to the assistance of counsel are all fundamental and necessary. The notion that videotaping of

¹⁷⁵ See *Crawford*, 541 U.S. at 61.

¹⁷⁶ *Miranda*, 384 U.S. at 436.

¹⁷⁷ *Weeks v. United States*, 232 U.S. 383 (1914).

¹⁷⁸ *McNabb v. United States*, 318 U.S. 332 (1943).

¹⁷⁹ *Mallory v. United States*, 354 U.S. 449 (1957).

¹⁸⁰ *Dickerson*, 530 U.S. at 428.

¹⁸¹ See *Smith*, 933 S.W.2d at 455.

interrogations is necessary to protect those important constitutional rights is compelling. Rights are substantially enhanced by the videotaping requirement in the ways thoroughly explored above.¹⁸²

The supervisory powers approach to this problem has been adopted by one state's high court. The Minnesota Supreme Court was asked in *State v. Scales*¹⁸³ to follow the Alaska Supreme Court's holding in *Stephan v. State*,¹⁸⁴ and hold that the Minnesota Constitution requires mandatory videotaping. The *Scales* court instead mandated the taping based on its inherent supervisory powers to insure the fair administration of justice. The *Scales* court held that recording of interrogations at a place of detention was a "reasonable and necessary safeguard" essential to preserving valuable constitutional rights.¹⁸⁵

The voluntariness jurisprudence of the United States Supreme Court developed initially in part to ensure that the product of police interrogations is reliable. As a general principle, then, it is reasonable to demand that a court admit the most reliable evidence available. Frequently that means assessing the admissibility of a defendant's statement.

Videotaping interrogations also touches on the issue of reliability. All trial courts routinely deal with this issue. Matters involving introduction of hearsay evidence, the application of the best evidence rule, and admission of expert testimony all

¹⁸² See *supra* pp. 404-07.

¹⁸³ *Scales*, 518 N.W.2d at 587.

¹⁸⁴ *Stephan*, 711 P.2d at 1156.

¹⁸⁵ 518 N.W.2d at 592.

require courts to serve as gate-keepers.¹⁸⁶ At common law, courts served a similar function. In the absence of formal rules of evidence, an even greater responsibility was placed on the court to evaluate evidence. Professor Jones perhaps states it best: "It has been broadly stated that the best evidence that is obtainable under the circumstances of the case must be adduced to prove any disputed fact."¹⁸⁷

It seems clear that the Tennessee Supreme Court had the common law power to make rules related to the determination of the reliability of evidence. As seen in *Smith*¹⁸⁸ and *Proctor*,¹⁸⁹ the court has embraced this common law power in recent times. By adopting a mandatory videotaping rule, the Tennessee Supreme Court would simply continue a tradition of intervening in evidentiary matters that influence the "administration of justice" in this state and for which there are no legislative solutions.

A major argument in support of videotaping a defendant's interrogation is that by preserving the entire context of the encounter, as well as the exact words spoken by the parties, the court would allow a more reliable version of the evidence to come before the fact finder. The benefits to the fact finder, as well as to the public's assurance that the

¹⁸⁶ See, e.g. *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579 (1993)(rejecting Frye's "general acceptance" test for admissibility of scientific evidence and placing burden on trial judge under Federal Rules of Evidence to make important preliminary assessments of reliability of scientific methodology).

¹⁸⁷ 1 BURR W. JONES, *THE LAW OF EVIDENCE: CIVIL AND CRIMINAL*, §231,444 (1958).

¹⁸⁸ *Smith*, 933 S.W.2d at 450.

¹⁸⁹ *Proctor*, 565 S.W.2d at 909.

trial procedure is fair, are clear.¹⁹⁰ The question is not whether the court is constitutionally required to resolve this problem, although as discussed in Section III.C., several state courts have found constitutional grounding for their decisions requiring mandatory taping. The argument is that the court should use its plenary power as it has in other areas in the criminal justice system when to do so comes at little price to the government and provides a compelling service to the adversarial system.

Indeed, if the Tennessee Supreme Court began as a general trial court that routinely dealt with problems of reliability of evidence, then the modern court, which derives much of its plenary power from that era, clearly has the power to intervene in this area where the legislature has not. Requiring the videotaping of interrogations is surely no more of an intrusion in police affairs than *Miranda*, *McNabb*, and *Mallory*. All of these rules have one thing in common: they ensure that justice is administered more fairly than would be the case in the absence of the rules.

By exercising its plenary power over the issue of recording interrogations, the court would actually accomplish two things. In addition to giving vitality to important constitutional rights, it would also ensure the fair administration of justice. Moreover, videotaping is beneficial to all citizens. A videotape of the interrogation event ensures the availability of a more objective form of evidence for courts to use in ruling on the propriety of the police conduct. This will lead to fairer rulings as to whether the evidence should be admitted in criminal

¹⁹⁰ See *supra* notes 55, 73 and 87.

proceedings. With better rulings, the public will be assured that verdicts are based on more reliable proof and are worthy of public support.

***Incorporating the Realities of Gender and Power
into U.S. Asylum Law Jurisprudence***

Amy M. Lighter Steill*

I. Introduction.....	446
II. Asylum Law in the United States	453
A. <i>History of Refugee Status Based on Gender</i>	455
B. <i>The Current Landscape of U.S. Asylum Law</i>	457
1. Persecution requirement	458
a. <i>Well-founded Fear</i>	459
b. <i>Persecution</i>	462
2. The "On Account Of" Requirement	463
3. The State Action Requirement	467
4. The Social Group Requirement	468
C. <i>Limitations of Gender as a "Particular Social Group"</i>	473
III. Linking Gender and Persecution	477
A. <i>Categories of Violence</i>	477
B. <i>Categories of Power</i>	482
1. Dominance-Subjugation and Patriarchy	483
2. Relational Power	484
3. Legal or Collective Empowerment	487
4. Other Relevant Definitions	489
IV. Understanding and Utilizing Power Theory in Asylum Adjudication	489
V. Conclusion	492

* Amy Lighter Steill works as an assistant public defender in Knoxville, Tennessee. She is a 2004 graduate of the University of Tennessee College of Law.

*Gender is an organizing principle, not a simple variable, in migration.*¹

I. Introduction

The Office of the United Nations High Commissioner for Refugees (hereinafter “UNHCR”) estimates that 80 percent of the approximately 40 million refugees and internally displaced persons are women and children.² In 2002, the United States received approximately 81,100 new applications for asylum.³ If these were to follow the demographics of refugees as a whole, nearly 65,000 of those applications would involve women and children. In light of such striking numbers, the UNHCR has asserted that “ensuring equal treatment of refugee women and men may require specific action in favour of the former.”⁴

¹ Joan Fitzpatrick, *The Gender Dimension of U.S. Immigration Policy*, 9 YALE J. L. & FEMINISM 23, 24 (1997).

² Women’s Commission for Refugee Women and Children, *2001 Consolidated Inter-Agency Appeals: Women and War* ¶ 1 (Feb. 2001), available at <http://www.reliefweb.int/library/GHARKit/FilesFeb2001/woman&war.html> (last visited April 30, 2004). See also Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT’L L.J. 625, 625 n.1 (1993) (surveying statistics from various sources indicating that, while precise numbers of female refugees are unknown, reliable sources indicate that women account for well over half of all refugees).

³ In addition, about 26,800 refugees resettled in the United States in 2002. UNHCR, REFUGEES BY NUMBERS 11 (2003), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/basics> (last visited May 19, 2004).

⁴ United Nations High Commissioner for Refugees Executive Committee Conclusion No. 64 (1990), available at <http://www.uchastings.edu/cgrs/law/unhcr.html> (last visited February 22, 2004).

The U.S. administrative and federal courts adjudicating asylum petitions have evinced a desire to make asylum determinations without consideration of the applicant's gender,⁵ but this has not translated into equal treatment of applicants. In what may be interpreted more benevolently as a well-intentioned effort to ensure gender equality by not overtly "favoring" one gender over the other, the courts are actually falling prey to what one commentator labeled a "gender paradox."⁶ In other words, courts are discriminating against one gender by refusing to acknowledge that issues unique to one gender require treating its members differently in the legal context. Despite global advances in the status of women over the last century, there still exists a power differential rooted in culture and gender, which must be taken into account in asylum decisions if women's asylum applications are to be adjudicated fairly.⁷

This Article contends that the only way to achieve gender parity in asylum adjudication is to recognize that there are certain inherent differences in the experiences of women and men seeking asylum. Furthermore, it is imperative that U.S. governmental authorities recognize that certain types of violence that are disproportionately

⁵ See, e.g., *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1996). The court notes, "The only distinguishing characteristic about this case that I can perceive to set it apart from others we already have decided is that it involves a woman. Reliance upon such a distinction to support a separate category for treatment of women's asylum claims, to my mind, would be impermissible." *Id.* at 377.

⁶ Jenny-Brooke Condon, *Asylum Law's Gender Paradox*, 33 SETON HALL L. REV. 207 (2002).

⁷ For a more detailed discussion of the character and implications of this power differential, see *infra* Part III.B.

committed against women can be cognized in the terms of the asylum statute as currently written, thereby entitling victims of such violence to protection under our current asylum laws.⁸

To gain asylum under U.S. law, an applicant must demonstrate her eligibility by demonstrating several elements outlined in the Immigration and Nationality Act of 1952 ("INA").⁹ She must demonstrate that she is unwilling or unable to return to her home country because she has been persecuted or has a well-founded fear of future persecution.¹⁰ She must also show that she was

⁸ Although *Desir v. Ilchert*, 840 F.2d 723, 726-27 (9th Cir. 1988), held that it is not necessary for asylum that women have suffered "bodily harm or a threat to life or liberty," violence against women is a recurring theme in asylum applications, and therefore should be defined. For the purposes of this Article, "violence against women" is defined in the same way as it is by the UNHCR. In its publication *Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response* 10 (May 1, 2003), available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/+PwwBmeMUIECwwwwwwwwwwwwwhFqA72ZR0gRfZNtFqrpGdBnqBAFqA72ZR0gRfZNcFqewXhc nL1wcawDmaHnDmnGe2Rxw5nmaUodcnDqnaawtwoD5Ba2nh1tnn5Ca2nB1GDnn5awDmafdBnGDwccOayo5pcwqnma7nG5dD5Dzmxwwwwwwwww1FqmRbZ/pendoc.pdf> (last visited April 6, 2004) (hereinafter "UNHCR Gender-Based Violence Guidelines"), the UNHCR defines "gender-based violence" as "violence that targets individuals or groups of individuals on the basis of their gender . . . [or] violence that is directed at a person on the basis of gender or sex" and "violence against women" as gender-based violence that "results in, or is likely to result in, physical, sexual and psychological harm to women and girls." UNHCR Gender-Based Violence Guidelines at 10.

⁹ Immigration and Nationality Act § 101(a)(42)(A) (codified as amended at 8 U.S.C. § 1101(a)(42)(A) (2004)).

¹⁰ *Id.*

targeted for that persecution on account of at least one of five statutorily protected factors: (1) race, (2) religion, (3) nationality, (4) political opinion, or (5) membership in a particular social group.¹¹ Finally, she must prove that she was unable or unwilling to seek protection from the government of her home country.¹²

Under the current scheme, many women deserving of asylum are denied relief because their cases do not fit within the parameters of the law. Typically, it is claimed that they do not fit within a cognizable social group or that they were not persecuted because of another statutorily recognized ground for asylum. An exemplary case that has received a great deal of attention in recent years is that of Rodi Alvarado.

Alvarado, a Guatemalan, applied for asylum in the United States after suffering years of continual, horrific physical and sexual abuse at the hands of her husband.¹³ Among many other abuses, he threatened to cut off her limbs and face with a machete if she ever attempted to leave him, kicked her repeatedly in an attempt to abort their second child, and kicked her genitals with enough force to cause her to bleed for eight days.¹⁴ The Board of Immigration Appeals ("BIA") acknowledged that "a woman [who] chooses the wrong husband" has few options in Guatemala, where the government

¹¹ *Id.*

¹² *Id.* See also discussion *infra* Part II.

¹³ *In re R-A-*, 22 I. & N. Dec. 906, 908 (B.I.A. 1999).

¹⁴ *Id.* at 908-10. Her husband committed countless offenses against her catalogued by the BIA, including: raping her "almost daily," using her head to break mirrors and beat against furniture, and pistol-whipping her. *Id.*

has failed to provide resources to deal with the problem of domestic violence.¹⁵

Nonetheless, in its 1999 decision, the BIA reversed the decision of an immigration judge and denied asylum to Alvarado. The 10-5 majority reasoned that Alvarado was ineligible for protection because her situation was essentially personal rather than political,¹⁶ thus precluding her from fitting into a social group cognizable under the statute.¹⁷ Deeming that Alvarado's husband's behavior was "senseless . . . and irrational . . . ,"¹⁸ the court attributed Alvarado's abuse to the husband's "warped perception of and reaction to her behavior . . . psychological disorder, pure meanness, or no apparent reason at all."¹⁹ In so doing, the BIA effectively held that, as regrettable as the courts may find Alvarado's history of abuse, the violence directed toward Alvarado was ultimately random.

¹⁵ *Id.* at 910.

¹⁶ *Id.* at 916-17. The court reasoned that "there has been no showing that the respondent's husband targeted any other women in Guatemala, even though we may reasonably presume that they, too, did not all share his view of male domination." *Id.* at 917.

¹⁷ *Id.* at 917-20. In holding that Alvarado did not fit into any cognizable social group, the court explained:

[T]he respondent has shown that women living with abusive partners face a variety of . . . problems in obtaining protection or in leaving the abusive relationship. But the respondent has not shown that "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" is . . . a recognized segment of the population, within Guatemala.

Id. at 918.

¹⁸ *Id.* at 908.

¹⁹ *Id.* at 927.

In effect, the courts told Alvarado and other women fleeing situations of “private” violence that their cases are simultaneously too narrow and too broad to fit within the courts’ interpretation of the INA.²⁰ Their situations are too narrow because they are considered to be the victims of random violence, placing them outside the scope of asylum law. The cases are too broad in the sense that women suffering domestic abuse fail to fit within a discrete social group, since domestic violence is framed as a problem for all women generally. The text of the INA itself, however, is flexible enough that it does not have to be interpreted so as to exclude asylum seekers fleeing this type of violence. As Anita Sinha put it, “the problem for asylum claims involving gender-related persecution is in the

²⁰ See, e.g., *In re M-S-M-* (Immigr. Ct. July 1999), available at <http://www.uchastings.edu/cgrs/summaries/100-199/summary126.html> (holding that because a domestic abuser had no connection with the Mexican government or law enforcement, his wife was not “persecuted” for purposes of the INA); *In re D-K-* (Immigr. Ct. Dec. 8, 1998), available at <http://www.uchastings.edu/cgrs/law/ij/117.html> (rejecting a battered woman’s asylum petition for failing to show “that the violence against her is related to anything more than evil in the heart of her husband”); *In re F-L-*, available at 31 (Immigr. Ct. July 24, 1998), at <http://www.uchastings.edu/cgrs/law/ij/216.pdf> (ruling that forced prostitution did not constitute persecution); *In re A-*, at 13 (Immigr. Ct. Jan. 8, 1998), available at <http://www.uchastings.edu/chrs/law/ij/263.pdf> (finding that the situation of a woman applying for asylum on the basis that she feared “a violent attack by the male members of her family based on her defiance of their wishes that she not marry her husband” was a “personal family dispute” not covered by the INA); *In re G-R-* (Immigr. Ct. Oct. 20, 1997), available at <http://www.uchastings.edu/cgrs/summaries/1-50/summary37.html> (finding no nexus between domestic abuse and any enumerated ground for asylum).

interpretation and not the letter of the law.”²¹

Ultimately, even if an asylum applicant demonstrates all of the elements required under the INA, asylum is an essentially discretionary remedy,²² and it should remain so in order to maintain the flexibility required to respond to the complex realities of refugees’ situations.

Following the controversial ruling in the case of *In re R-A-*, the Department of Justice (hereinafter “DOJ”) proposed a regulation attempting to provide guidance to asylum adjudicators confronted with issues of gender-based persecution.²³

Unfortunately, the proposed regulation, as currently written, is deeply flawed.²⁴ Indeed, it may be better for the cause of women asylum-seekers if that regulation, which has languished in a pending state for nearly four years, is never codified.

Nonetheless, the fact that women such as Rodi Alvarado are not being granted asylum demonstrates the need to provide clearer guidance to asylum adjudicators and judges, who must be informed about the realities of gender discrimination and how the existing law can address them. This Article contends that such guidance should come in the form of clearer regulations interpreting the existing law, rather than statutory amendment or any other proposed solutions.

²¹ Anita Sinha, Note, *Domestic Violence and U.S. Asylum Law: Eliminating the “Cultural Hook” for Claims Involving Gender-Related Persecution*, 76 N.Y.U. L. REV. 1562, 1591 (2001).

²² See CHARLES GORDON ET AL., 3-33 IMMIGRATION LAW AND PROCEDURE §§ 33.05[3][b][iii], 34.02[11], 34.02[12][d].

²³ Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

²⁴ The specific flaws in the DOJ regulation are discussed in more depth in another part of this Article. See *infra* Part II.C.

Part II of this Article surveys the current state of U.S. asylum law and identifies the sources of problems for women seeking asylum on gender-based grounds. Part III investigates the theoretical underpinnings of power and gender. Part III concludes that, if redrafted statutory or administrative materials are to advance the position of women refugees, they must take into account the most current understanding of issues underlying the inequitable treatment of women seeking asylum. Domestic or personal violence must be understood as essentially political because of the power relations implicated between men and women in patriarchal societies. Part IV considers proposed solutions to the problem of gender disparity in asylum decisions and evaluates their potential to create a more egalitarian system of asylum adjudication.

II. Asylum Law in the United States

In order to understand the quandary of women making gender-based asylum claims, it is necessary to understand, in some detail, the underpinnings and mechanics of asylum law. Asylum and refugee law must incorporate aspects of international law into domestic law in a manner that adheres to the mandates of each. The BIA described the essential purpose of this body of law as “provid[ing] surrogate international protection where there is a fundamental breakdown in state protection.”²⁵ The federal courts are, in a sense, standing in for an international tribunal.²⁶

²⁵ *In re R-A-*, 22 I. & N. Dec. at 912.

²⁶ Of course, wherever international law informs, or attempts to inform, domestic law, a jurisdictional tension is created

Generally, U.S. asylum law could benefit from a re-examination of the principles of international law from which it arose, as well as how those principles

between the two. *See generally* BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW* (4th ed. 2003); LORI F. DAMROSCH ET AL., *INTERNATIONAL LAW* (4th ed. 2001). *See also* Andrew L. Strauss, *Where America Ends and the International Order Begins: Interpreting the Jurisdictional Reach of the U.S. Constitution in Light of a Proposed Hague Convention on Jurisdiction and Satisfaction of Judgments*, 61 ALB. L. REV. 1237, 1248 n.63 (1998) (quoting *Murray v. The Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)) (“[A]n act of congress ought never to be construed to violate the law of nations, if any other possible construction remains.”); Lisa Cox, Comment, *The Legal Limbo of Indefinite Detention: How Low Can You Go?*, 50 AM. U. L. REV. 725, 753 n.164 (2001) (noting that a properly-enacted, constitutional domestic law will displace a conflicting international law if the purpose of enacting the new domestic law is specifically to supersede the international law); W. Fletcher Fairey, Comment, *The Helms-Burton Act: The Effect of International Law on Domestic Implementation*, 46 AM. U.L. REV. 1289 (1997).

The charge upon the immigration courts, then, is to adjudicate asylum petitions with regard to both domestic and international mandates by giving appropriate consideration to each. According to some scholars, this relative independence of U.S. federal and international law can be beneficial for refugees. For example, Deborah Anker, described the relationship between the international and domestic law characteristics of refugee law as uniquely suited to “avoid[] controversies that have been most sensitive and divisive in debates concerning . . . cultural relativism in general.” Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 146 (2002). Professor Anker lauds the fact that refugee law “does not attempt to set a corrective agenda, tell another country how to act, or propose plans for eradicating particular practices,” thereby avoiding “debates within the [international] human rights community [that] have been, at times, almost immobilizing, reflecting an unresolved theoretical standoff.” *Id.*

have been fleshed out in case law in a manner that has perpetuated some of the gender biases inherent in the underlying international instruments²⁷ and the cases themselves.²⁸ First, though, it is necessary to understand how the law of asylum operates.

A. History of Refugee Status Based on Gender

The first step toward a grant of asylum is proving that one meets the legal criteria of a refugee. Although proving refugee status by itself is an insufficient basis for asylum, establishing such status is a prerequisite for a successful asylum application. The Refugee Convention of 1951²⁹ was the first international treaty to include a definition of “refugee.” According to Article 1A(2) of the Refugee Convention, the term “refugee” applies to:

[Any person who] owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that

²⁷ See *supra* note 2.

²⁸ Nancy Kelly points out that the development of asylum law has taken place primarily through the cases of male applicants, meaning that most existing case law involves the examination of activities traditionally dominated by males. Kelly, *supra* note 2, at 636.

²⁹ The Refugee Convention of 1951, July 28, 1951, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 150 (hereinafter “Refugee Convention”).

country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.³⁰

It is important to note that, despite comprising the majority of refugees in the world,³¹ women are not mentioned anywhere in this definition. Not only do they not appear as a protected class, reference to gender does not even merit inclusion as a pronoun. This oversight was not unusual for the 1950s, a time during which patriarchal culture was well entrenched and little questioned in most of the world.³² Nonetheless, many of the current problems women face during the asylum process can be attributed, at least in part, to the fact that a definition created without regard for the gendered reality of refugee situations has become the model for so many others.³³

Although the United States is not a signatory to the Refugee Convention, the United States did sign the 1967 Protocol Relating to the Status of Refugees, which required the implementation of the

³⁰ *Id.* at Art. 1A(2). The 1951 Convention applied only to people affected by events taking place before January 1, 1951.

³¹ See *supra* note 2.

³² “[The drafters of the Refugee Convention] did not deliberately omit persecution based on gender—it was not even considered.” Judith Kumin, *Gender: Persecution in the Spotlight*, 2:123 REFUGEES 12 (2001), available at <http://www.unhcr.ch/1951convention/gender.html> (last visited May 19, 2004).

³³ Andrea Binder, *Gender and the “Membership in a Particular Social Group” Category of the 1951 Refugee Convention*, 10 COLUM. J. GENDER & L. 167, 170 (2001); Condon, *supra* note 6, at 214; Kelly, *supra* note 2, at 627.

language of the Refugee Convention in U.S. domestic laws.³⁴ It was not until thirteen years later, when Congress was in the process of revising the procedure of admitting refugees into the United States, that language resembling the Refugee Convention's definition of "refugee" was incorporated into the Immigration and Nationality Act³⁵ via the Refugee Act of 1980 (hereinafter "Refugee Act").³⁶

B. The Current Landscape of U.S. Asylum Law

The language used in the Refugee Act is similar to that used in the Refugee Convention,³⁷ meaning

³⁴ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 8791 (hereinafter "Protocol"). The Protocol was drafted in response to the Refugee Convention's failure to protect people who became refugees as a result of events taking place after January 1, 1951. It made the Convention's provisions applicable to displaced persons regardless of the date of the displacing events. *Cf.* note 29.

³⁵ § 101(a)(42)(A) (codified as amended at 8 U.S.C. §§ 1101(a)(42)(A)(2004)).

³⁶ The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in various sections of 8 U.S.C.).

³⁷ The term "refugee" is defined in the Refugee Act as:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or

that the U.S. standard conforms with the international standard and shares in its benefits as well as its shortcomings. Having an asylum decisionmaker determine that an asylum applicant fits within the definition of "refugee" is only a preliminary step toward attaining asylum under U.S. law.³⁸ Successful applicants must also prove that they are unwilling or unable to return to their home country because they have suffered past persecution or have a well-founded fear of future persecution on account of one of the five protected characteristics, race, religion, nationality, political beliefs, or membership in a particular social group.³⁹ Further, applicants must show that their persecution was either directly caused or indirectly condoned by the government of that country.⁴⁰

1. Persecution requirement

To gain asylum, it is not sufficient to demonstrate that conditions in the applicant's country of origin are generally oppressive. An applicant must also demonstrate that she has been persecuted in the past or that she has a "well-

political opinion.

INA § 101(a)(42)(A). The resemblance to the language of the Refugee Convention was a deliberate decision of Congress, which explicitly stated its intent to adopt the Convention's definition. See H.R. CONF. REP. NO. 96-781, at 19 (1980).

³⁸ See *INS v. Cardoza-Fonesca*, 480 U.S. 421, 443 (1987) (stating that "an alien who satisfies the applicable standard under § 208(a) does not have a *right* to remain in the United States; he or she is simply *eligible* for asylum, if the Attorney General, in his discretion, chooses to grant it") (emphasis in original).

³⁹ INA § 101(a)(42)(A).

⁴⁰ *Id.*

founded fear of persecution” for the future.⁴¹ If an applicant bases her claim on past persecution, she may still have to demonstrate that she would be in danger if she returned to her home country.⁴² This breaks down into two elements that must be proven in order to meet eligibility requirements: (a) a “well-founded fear” and (b) “persecution.”

a. Well-founded Fear

The United States Supreme Court has set out a two-pronged test for the “well-foundedness” of an applicant’s fear, which involves both an objective and subjective component.⁴³ The subjective component requires the applicant to establish to the adjudicator’s satisfaction that the applicant actually experienced fear. If actual fear is established, the objective component requires that the adjudicator assess the reasonableness, or well-foundedness, of

⁴¹ *Id.* See also 8 C.F.R. § 208.13(b)(1). When an applicant demonstrates past persecution, she is eligible for asylum. Asylum may still be denied as a matter of the adjudicator’s discretion, however, if it does not appear that the applicant is very likely to suffer further persecution if she returns to her home country. The B.I.A. held in *In re Chen*, 20 I. & N. Dec. 16 (1989), that an asylum adjudicator can be justified in exercising a favorable grant of discretion for humanitarian reasons even when the likelihood of future persecution is slim.

⁴² The regulations interpreting the INA indicate that an applicant who has suffered persecution in the past will be presumed to have a fear of future persecution “unless a preponderance of the evidence establishes that since the time the persecution occurred conditions in the applicant’s country . . . have changed to such an extent that the applicant no longer has a well-founded fear of being persecuted if he or she were to return.” Aliens and Nationality, 8 C.F.R. § 208.13(b)(1)(i) (2003).

⁴³ *Cardoza-Fonesca*, 480 U.S. at 431.

the applicant's fear. An applicant's petition may be granted only when she has adequately demonstrated both components.

The objective component involves an inquiry as to the essential rationality of the applicant's fear⁴⁴ based on evidence presented by the applicant.⁴⁵ The adjudicator must find that a reasonable person would be fearful in similar circumstances.⁴⁶ Acknowledging the difficulties applicants may encounter in attempting to provide objective, corroborative evidence, several courts have held that it is not necessary to demonstrate actual persecution in order to show objectively rational fear.⁴⁷ If the applicant can demonstrate that she is

⁴⁴ *Id.*

⁴⁵ The applicant's proof must show that:

- the applicant possesses a characteristic or belief that a persecutor seeks to overcome in others by means of punishment (the evidence need not show that the persecutor actually harbors "punitive" or "malignant" intent);
- the persecutor is already aware, or could become aware that the applicant possesses this belief or characteristic;
- the persecutor has the capability of punishing the applicant; and
- the persecutor has the inclination to punish the applicant.

GORDON ET AL., *supra* note 21, at § 33.04[1][b][ii][B][II] (citations omitted).

⁴⁶ *In re Mogharrabi*, 19 I. & N. Dec. 439 (B.I.A. 1987).

⁴⁷ See, e.g., *INS v. Stevic*, 467 U.S. 407, 425 (1984) ("The well-founded-fear standard is more generous than the clear-probability-of-persecution standard."); *Cordon-Garcia v. INS*, 204 F.3d 985, 990 (9th Cir. 2000) ("A well-founded fear may be based on no more than a ten percent chance of actual persecution.") (citing *Velarde v. INS*, 140 F.3d 1305, 1310 (9th Cir.1998)); *Aguilera-Cota v. INS*, 914 F.2d 1375, 1383-

similarly situated to others who are “routinely subject to persecution,” her fear can be deemed objectively rational.⁴⁸

If the applicant’s fear is found to be objectively rational, the adjudicator then must move to the subjective prong of the Supreme Court’s test and determine whether the applicant actually experienced fear related to her persecution.⁴⁹

Because discerning an applicant’s subjective state of mind is necessarily a more speculative endeavor than determining the facts of country conditions, the courts have given some guidance on what does and does not qualify as a subjective experience of fear. For example, the United States Supreme Court has held that failing to apply for asylum in countries through which an applicant has passed—or even in which an applicant has resided and worked—on the

84 (9th Cir.1990) (holding that the petitioner’s testimony of a threat of persecution is sufficient to establish a well-founded fear of persecution). *See also* *M.A. v. U.S. INS*, 858 F.2d 210 (4th Cir. 1988), *rev’d on other grounds*, 899 F.2d 304 (4th Cir. 1990).

⁴⁸ *M.A.*, 858 F.2d at 214. The Ninth Circuit also observed that proof of a well-founded fear is not necessarily precluded by:

- (1) the absence of a showing that either the applicant or any family member has actually been harmed or harassed for political activities;
- (2) the fact that he or she was able to obtain a passport or exit visa; or (3) the fact that in fleeing persecution, the applicant has sought sanctuary in a country where he or she believes the opportunities will be best.

GORDON ET AL., *supra* note 21, at § 33.04[1][b][ii][B][II] (citing *Garcia-Ramos v. INS*, 775 F.2d 1370, 1374-75 (9th Cir. 1985)).

⁴⁹ *Cardoza-Fonesca*, 480 U.S. at 431.

way to the United States does not conclusively prove an applicant's lack of fear.⁵⁰

b. Persecution

The INA contains no definition of "persecution," but rather leaves the meaning of that term to be determined on a case by case basis. Not surprisingly, courts have formulated somewhat conflicting definitions of what constitutes persecution. The Board of Immigration Appeals has held that a punitive or malicious intent is not required for an act to constitute persecution.⁵¹ The Ninth Circuit found that cumulative experiences may add up to persecution.⁵² In one of the more precise definitions, the Seventh Circuit deemed persecution to be "punishment or the infliction of harm for political, religious, or other reasons that this country does not recognize as legitimate."⁵³

Several courts have agreed that one of the characteristics distinguishing persecution from merely annoying or harassing conduct is its egregiousness. The Seventh Circuit wrote that "the conduct in question need not necessarily threaten the petitioner's life or freedom; however, it must rise above the level of mere harassment to constitute persecution."⁵⁴ The Ninth and Third Circuits

⁵⁰ *Sale v. Haitian Centers Council*, 509 U.S. 155 (1993).

⁵¹ *Kasinga*, 21 I. & N. Dec. at 365.

⁵² *Korablina v. INS*, 158 F.3d 1038, 1045 (9th Cir. 1998).

⁵³ *Mitev v. INS*, 67 F.3d 1325, 1330 (7th Cir. 1995) (quoting *DeSouza v. INS*, 999 F.2d 1156, 1158 (7th Cir. 1993)).

⁵⁴ *Sofinet v. INS*, 196 F.3d 742, 746 (7th Cir. 1999) (internal quotations omitted). The Ninth Circuit Court of Appeals similarly opined that "persecution does not require bodily harm or a threat to life or liberty." *Singh v. INS*, 134 F.3d

similarly noted that “[p]ersecution is an extreme concept that does not include every sort of treatment our society regards as offensive.”⁵⁵

2. The “On Account Of” Requirement

Even if an applicant makes a sufficient showing of well-founded fear, the applicant’s petition can succeed only when she can prove that she was targeted for persecution “on account of” her race, religion, nationality, political opinion, or membership in a particular social group.⁵⁶ If an applicant is unable to demonstrate that the persecution was directed toward her because she possessed or was perceived to possess⁵⁷ one of the

962, 967 (9th Cir. 1998) (citing *Desir v. Ilchert*, 840 F.2d 723, 726-27 (9th Cir. 1988)).

⁵⁵ *Ghaly v. INS*, 58 F.3d 1425, 1431 (9th Cir. 1995); *Fatin v. INS*, 12 F.3d 1233, 1243 (3d Cir. 1993).

⁵⁶ These five categories together constitute the so-called “protected categories.” Although the meaning of each of these five categories has been litigated, the “social group” category has been the subject of far more attention than the others. See discussion *infra* Part II.B.4.

⁵⁷ Because the prevailing concern is whether the asylum applicant was actually in fear, the Supreme Court suggested in *I.N.S. v. Elias-Zacarias*, 502 U.S. 478, 482-83 (1992), that protection may be warranted even when a persecutor has falsely or mistakenly imputed a political opinion to the asylum applicant. Numerous Circuit Courts of Appeals have subsequently affirmed the “imputed political opinion” doctrine. See, e.g., *Ravindran v. I.N.S.*, 976 F.2d 754, 760 (1st Cir. 1992) (“An imputed political opinion, whether correctly or incorrectly attributed, may constitute a reason for political persecution within the meaning of the Act.”) (quoting *Alvarez-Flores v. INS*, 909 F.2d 1 (1st Cir. 1990)); *DeBrenner v. Ashcroft*, 388 F.3d 629, 635-36, (8th Cir. 2004) (considering that “the political views the persecutor rightly or in error attributes to [a] victim[]. If the persecutor attributed a

five characteristics explicitly set forth in the statute, she is ineligible for asylum.⁵⁸ The causal relationship required between the protected characteristic and persecution has frequently been referred to as the “nexus” requirement, and the problems inherent in attempting to demonstrate a persecutor’s state of mind have been the subject of much scholarly attention.⁵⁹

political opinion to the victim, and acted upon the attribution, this imputed view becomes the applicant's political opinion as required under the Act.”) (quoting *Sangha v. I.N.S.*, 103 F.3d 1482, 1489 (9th Cir. 1997)). See generally Joseph J. Bassano et al., *Political Opinion Imputed to Alien by Persecutor*, AM. JUR. ALIENS § 1248 (2004).

⁵⁸ Some courts have recognized that even when an applicant is unable to demonstrate a nexus between one of the protected characteristics and the persecution, she may still be entitled to some protection under the United Nations’ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85, art. 3, available at <http://ohcr.org/english/law.cat.htm> [hereinafter “Torture Convention”]. See, e.g., *Kamalthas v. INS*, 251 F.3d 1279, 1280 (9th Cir. 2001) (“The inability to state a cognizable asylum claim does not necessarily preclude relief under the Convention Against Torture.”). See also the INS application of the Torture Convention at 8 C.F.R. § 208.16(c) (2005).

⁵⁹ See, e.g., Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Convention*, 23 MICH. J. INT’L L. 265 (2002) (examining different standards of causation in refugee law; comparing them to those in tort, equity, and anti-discrimination law; and concluding that the standard’s inadequate definition has led to inconsistent asylum determinations); James C. Hathaway, *International Refugee Law: The Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. INT’L L. 207 (2002) (proposing rules by which to interpret the nexus requirement); Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms*, 15 MICH. J. INT’L L. 1179, 1182 (1994) (contending that the nexus requirement “places an

The nexus test first set forth by the United States Supreme Court in *INS v. Elias-Zacarias*⁶⁰ has been called “one of the most demanding” in the world for the burden it places on asylum applicants.⁶¹ The two-part test first requires the applicant to show that she actually possesses the protected characteristic on account of which she alleges she was harmed.⁶² Next, the asylum applicant herself must establish that her persecutor was motivated by that characteristic.⁶³ This second

unrealistic evidentiary burden on the applicant, who must divine the motivation of her persecutor and then carry the burden of proof on this issue”).

⁶⁰ 502 U.S. 478 (1992).

⁶¹ Karen Musalo, *Beyond Belonging: Challenging the Boundaries of Nationality: Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence*, 52 DEPAUL L. REV. 777, 786 (2003).

Numerous countries have had to contend with this requirement because of language in the Refugee Convention defining refugees as those persecuted “for reasons of race, nationality, religion, membership of a particular social group or political opinion.” Refugee Convention, *supra* note 29, Art. 1A(2). In interpreting the Convention’s language, courts in other countries have developed tests that leave room for the meaning of “nexus” to differ based on circumstances of the case. These range from “sole cause” to “but-for” to “contributing cause.” Still other nations have left the term’s definition open entirely. Musalo, *Beyond Belonging*, *supra* at 789, n.68.

⁶² *Elias-Zacarias*, 502 U.S. at 483.

⁶³ *Id.* *Elias-Zacarias* was a young Guatemalan man who feared he would be killed by anti-government guerrillas because he had refused to join and fight with them. The Supreme Court rejected his claim on grounds that he had not proven that he would be killed or otherwise harmed by the guerrillas on account of his political beliefs rather than his refusal to participate in their fight. In effect, the court required *Elias-Zacarias* to offer proof of his persecutor’s state of mind, a requirement that has been criticized for its unrealistic

part of the *Elias-Zacarias* test effectively limits the court's analysis to the relationship between the individual perpetrator and the applicant.

Although the regulation proposed in the wake of Rodi Alvarado's case has not been approved, its implications for the nexus requirement bear mention.⁶⁴ The proposed regulation would require applicants whose persecutors may have had mixed motivations in persecuting them (such as domestic abusers) to demonstrate that the persecutor was primarily motivated by one of the enumerated grounds under the INA.⁶⁵ Trying to prove the state of mind of a domestic abuser would create numerous complications for an applicant's case.⁶⁶

expectation that an asylum applicant can mobilize such proof. See Shayna S. Cook, *Repairing the Legacy of INS v. Elias-Zacarias*, 23 MICH. J. INT'L L. 223 (2002); Musalo, *Irreconcilable Differences*, *supra* note 61, at 1182.

⁶⁴ See 65 Fed. Reg. 76588 (Dec. 7, 2000). Attorney General John Ashcroft did state in testimony before the Senate in March of 2003 that he would personally be reviewing this regulation, so it may be enacted or rejected in the near future.

⁶⁵ *Id.* at 76592. The commentary accompanying the rule describes the mixed motives requirement as follows:

[The proposed regulation] allows for the possibility that a persecutor may have mixed motives. It does not require that the persecutor be motivated solely by the victim's possession of a protected characteristic. It does, however, require that the victim's protected characteristic be central to the persecutor's decision to act against the victim. For example, under this definition it clearly would not be sufficient if the protected characteristic was incidental or tangential to the persecutor's motivation.

Id.

⁶⁶ For discussion of these potential complications, see Condon, *supra* note 6, at 235-38; Christina Glezakos, *Domestic*

3. The State Action Requirement

In order to meet the “state action” requirement, an applicant must demonstrate that agents of her country’s government, or a person or group the government is unwilling or unable to control, actually persecuted or threatened her with persecution.⁶⁷ The requirement of state involvement is thus directly bound up with the definition of persecution. A government is said to be “unable or unwilling to control” actions taken against a citizen when, among other things, an asylum applicant can demonstrate a pattern of

Violence and Asylum: Is the Department of Justice Providing Adequate Guidance for Adjudicators?, 43 SANTA CLARA L. REV. 539, 562-63 (2003).

⁶⁷ See, e.g., *In re Villalta*, 20 I. & N. Dec. 142, 147 (B.I.A. 1990); *In re H-*, 21 I. & N. Dec. 337 (B.I.A. 1996); *Kasinga*, 21 I. & N. Dec. at 365; *In re Acosta*, 19 I. & N. Dec. 211, 222-23 (B.I.A. 1985). These decisions are consistent with the position taken by the Handbook for determining refugee status under the Refugee Convention and Protocol, written by the United Nations High Commissioner for Refugees, as well as with the discussions that took place in Congress before passage of the Refugee Act. See Office of the United Nations High Commissioner for Refugees, *The Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* ¶ 65 (Geneva, 1979), available at <http://www.asylumsupport.info/publications/unhcr/handbook.htm> [hereinafter “UNHCR Handbook” or “Handbook”]; H.R. REP. 95-1452 at 5 (1980), reprinted in 1978 U.S.C.C.A.N. 4700, 4704 (defining “persecution” as “the infliction of suffering or harm, under government sanction”). Note that the House Report includes the state action requirement as a necessary element of persecution.

governmental unresponsiveness to her situation.⁶⁸ Although governments are not expected to safeguard each citizen from all harms at all times, they are expected “to take reasonable steps to control the infliction of harm or suffering,” as reflected in their policies.⁶⁹

4. The Social Group Requirement

The language “membership in a particular social group” was added to the INA in 1980 along with the rest of the definition of “refugee” from the Refugee Convention.⁷⁰ Social group is not defined in the INA itself, and the legislative history of the statute does not shed any light on what the legislature intended the term to mean.⁷¹ The courts, therefore, have been left to determine the legal contours of the

⁶⁸ *Mgoian v. INS*, 184 F.3d 1029, 1036 (9th Cir. 1999). *See also In re S-A-*, 22 I. & N. Dec. 1328, 1335 (B.I.A. 2000) (holding that attempts to seek protection from the government were unnecessary to a successful petition for asylum where applicant demonstrated that such attempts would be not only futile, but also potentially dangerous).

⁶⁹ 65 Fed. Reg. 76588, 76591 (Dec. 7, 2000) (quoting § 208.15(a)(1) of proposed rule). Country conditions and applicants’ circumstances may bear on what constitutes adequate access to government protection. In some countries, for example, a woman who is abused by her husband may be able to gain state protection when she has the support of other family members, whereas a woman without such support would be able to obtain only more limited protections. Asylum adjudicators are instructed to consider such circumstances in their evaluations of whether a state is complicit in the persecution. *Id.*

⁷⁰ INA § 208(a)(1), 8 U.S.C. § 1158(a)(1).

⁷¹ *See Fatin*, 12 F.3d at 1239 (discussing the lack of legislative history on social group).

term on a case-by-case basis, resulting in somewhat incongruent definitions of "particular social group."

For example, the Seventh Circuit case of *Bastanipour v. INS* defined a social group as a people targeted because of their disloyalty to the ruling regime.⁷² The First Circuit, however, adopted a broader definition and held that social groups are comprised of people sharing "a characteristic that either is beyond the power of an individual to change or . . . that it ought not be required to [change]."⁷³

The size or potential size of a social group has been given some attention as a basis for defining the group. The Ninth Circuit, for example, concluded that "[m]ajor segments of the population of an embattled nation, even though undoubtedly at some risk from general political violence, will rarely, if ever, constitute a distinct 'social group' for the purpose of establishing refugee status."⁷⁴ Some jurists argue that a group ceases to be a "social group" if it is comprised of too large a segment of the population.⁷⁵

⁷² *Bastanipour v. INS*, 980 F.2d 1129, 1132 (7th Cir. 1992). Note that this definition resembles that in the UNHCR Handbook, *supra* note 67, at ¶¶ 77-78, which states that social group membership may be the reason for persecution when the group's ideology conflicts with that of the government.

⁷³ *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1st Cir. 1985).

⁷⁴ *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1577 (9th Cir. 1986).

⁷⁵ *See, e.g., In re H-*, 21 I. & N. Dec. at 350 (Board Member Heilman, dissenting) ("For all intents and purposes, the majority has concluded that all persons who have been harmed or who fear harm due to civil war will be entitled to asylum in the United States Indeed, if one pursues the majority's logic, all warring sides persecute one another, and this means that all civil wars are nothing more than acts of persecution.").

The most concerted effort to define “social group” occurred in *In re Acosta*.⁷⁶ The *Acosta* court examined the other four bases of persecution in the INA, and found that each of them was either impossible for the individual to change or “so fundamental to individual identity or conscience that it ought not to be changed or required to be changed.”⁷⁷ Using the doctrine of *ejusdem generis*,⁷⁸ the Board of Immigration Appeals held:

[The social group category encompasses] persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic

See also Fatin, 12 F.3d at 1242-43 ; *Safie v. INS*, 25 F.3d 636, 640 (8th Cir. 1994). In both *Fatin* and *Safie*, the courts rejected asylum applications from Iranian women at least in part on grounds that the social group comprised of Iranian women persecuted under the ruling regime was too broad a group definition.

However, it is worth noting that the majority opinion in *In re H-* rejected the position that a social group cannot be defined so as potentially to render enormous numbers of people eligible for asylum, noting that every member of a social group, no matter how large, must individually prove his eligibility for asylum. 21 I. & N. Dec. at 343.

⁷⁶ 19 I. & N. Dec. 211. The case involved a Salvadoran taxi driver who claimed he was a member of a taxi cooperative targeted for violence by guerrillas after he and his fellow drivers refused to participate in a strike.

⁷⁷ *Id.* at 233.

⁷⁸ *Ejusdem generis* is a canon of statutory construction defined as follows: “When a general word or phrase follows a list of specific persons or things, the general word or phrase will be interpreted to include only persons or things of the same type as those listed.” BLACK’S LAW DICTIONARY 535 (7th ed. 1999).

might be an innate one such as sex, color or kinship ties, or in some circumstances it might be a shared past experience such as military leadership or land ownership.⁷⁹

In 1996 the BIA explicitly recognized that gender may constitute an element of a social group with *In re Kasinga*.⁸⁰ In that case, the INS agreed with the applicant's characterization of female genital mutilation (hereinafter "FGM") as "based on the manipulation of women's sexuality in order to assure male dominance and exploitation,"⁸¹ even though the practice could be construed from one perspective as having "subjectively benign intent."⁸² The court held that FGM was a form of persecution

⁷⁹ *Acosta*, 19 I. & N. Dec. at 233.

⁸⁰ 21 I. & N. Dec. at 365-66. See B.J. Chisholm, Comment, *Credible Definitions: A Critique of U.S. Asylum Law's Treatment of Gender-Related Claims*, 44 HOW. L.J. 427, 432 n.19 (2001) (citing FAUZIYA KASSINDJA, DO THEY HEAR YOU WHEN YOU CRY (1998)). The Chisholm Article refers to the woman by the proper spelling of her name, Fauziya Kassindja (which was misspelled by the immigration judge and the BIA), but to the case by its codified misspelling. Kassindja was a young woman who fled her native Togo because she was afraid she would soon be subjected to the female genital mutilation (FGM) common to the women of her tribe. The perpetrators of the feared harm in this case were the tribal elders who would perform the rite, which posed a problem vis-à-vis the *Elias-Zacarias* nexus test insofar as the elders ostensibly did not intend to harm Kassindja, per se. Instead, they believed that they were helping her take part in a culturally important rite of passage.

⁸¹ *Kasinga*, 21 I. & N. Dec. at 366 (quoting Nahid Toubia, *Female Genital Mutilation: A Call for Global Action* 9, 42 (Gloria Jacobs, ed. 1993) (quoting Raqiya Haji Dualeh Abdalla, Somali Women's Democratic Organization)).

⁸² *Id.* at 367.

directed at Kassindja on account of her membership in a social group comprised of “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”⁸³

Despite the fact that FGM is imposed on all the girls in the Tchamba-Kunsutu tribe precisely because they are female, the BIA declined to find that the social group targeted for persecution was comprised simply of the tribe's female members. This is another example of the courts' enforced gender-blindness which has compelled asylum litigators to craft ever more intricate descriptions of persecuted groups to attempt to fit persecution against women into the statutory requirements.⁸⁴ It is the same error the court would later repeat in the case of Rodi Alvarado. But a recent case from the Ninth Circuit may signal broader recognition of gender-based persecution as grounds for asylum. The case of *Mohammed v. Gonzales*⁸⁵ was the first to expressly recognize that *all* female citizens of a country can comprise a particular social group under U.S. law, at least when persecution against females is “deeply imbedded in the culture throughout the nation and performed on approximately 98 percent of all females.”⁸⁶ The

⁸³ *Id.* at 368. The Ninth Circuit recently rejected the requirement that an applicant demonstrate opposition to FGM in order to be eligible for asylum, writing that FGM is inflicted on women not because of women's opposition to the practice, but because of their femaleness. *See Mohammed v. Gonzales*, 400 F.3d 785, 797 n.16 (9th Cir. 2005).

⁸⁴ *See infra* note 86.

⁸⁵ 400 F.3d 785 (9th Cir. 2005).

⁸⁶ Somali national Khadija Mohamed applied for asylum on the basis that she had been forced to undergo FGM. Her attorneys crafted a definition of social group based on the

Ninth Circuit's reasoning in this recent decision may herald a shift toward broader recognition of gender-based persecution as grounds for asylum, and at the least will permit more realistic descriptions of groups of persecuted women.

C. Limitations of Gender as a "Particular Social Group"

Once they have overcome the hurdle of proving persecution, most refugees seeking asylum on gender-based grounds have argued that the treatment to which they were subjected was directed at them on account of their gender. To be able to bring a claim under the INA, an asylum seeker must show that the perpetrators of the mistreatment would direct their actions toward anyone in the group of which she is a member. This means that such asylum seekers have had to argue that women comprise a social group, usually within certain social or political confines.⁸⁷

definition from *Kasinga* involving her status as a female member of her particular tribe, but the court explicitly rejected the narrower description, favoring a social group defined simply as females from Somalia. "Although we have not previously expressly recognized females as a social group, the recognition that girls or women of a particular clan or nationality (or even in some circumstances females in general) may constitute a social group is simply a logical application of our law." *Id.* at 797 (footnote omitted).

⁸⁷ See, e.g., *In re R-A-*, 22 I. & N. Dec. 906, 918 (BIA 2001) (holding that the group comprised of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" is not a legitimate social group under the INA); *Kasinga*, 21 I. & N. Dec. at 368 (holding viable the social group comprised of "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and

The inconsistent results engendered by this approach prompted the Director of the INS Office of International Affairs to issue a memorandum to Asylum Officers in 1995 “to provide the INS Asylum Officer Corps with guidance and background on adjudicating cases of women having asylum claims based wholly or in part on their gender.”⁸⁸ These guidelines do acknowledge that women “may . . . have had experiences particular to their gender,” and directly state that “rape (including mass rape in, for example, Bosnia), sexual abuse and domestic violence, infanticide and genital mutilation . . . may serve as evidence of past persecution on account of one or more of the five grounds.”⁸⁹ However, they do not give any substantial guidance on how adjudicators should frame gender-specific violence in terms of the protected categories, nor do they give any guidance for avoiding stereotyping of gender-based claims.⁹⁰

who oppose the practice”); *Fatin*, 12 F.3d at 1241 (suggesting that the group comprised of “Iranian women who refuse to conform to the government’s gender-specific laws and social norms” may constitute a social group). *But see In re D-K-*, at § V. ¶ 7, *available at* <http://www.uchastings.edu/cgrs/law/ij/117.html> (interpreting the *Fatin* case to contain dicta that “gender, in and of itself, may be the defining characteristic of a particular social group”).

⁸⁸ Memorandum from Phyllis Coven, Office of International Affairs, U.S. Dep’t of Justice, to All INS Asylum Office/rs *Considerations for Asylum Officers Adjudicating Claims from Women* 1 (May 26, 1995), *available at* <http://www.uchastings.edu/cgrs/law/guidelines/us.pdf> (last visited on May 21, 2004) [hereinafter “DOJ Guidelines”].

⁸⁹ *Id.* at 4.

⁹⁰ See Diana Saso, *The Development of Gender-Based Asylum Law: A Critique of the 1995 INS Guidelines*, 8 HASTINGS WOMEN’S L.J. 263, 282 (1997) (contending that the DOJ

Perhaps the most important aspect of the DOJ Guidelines, however, is the fact that they are non-binding against any court or adjudicator. The memorandum's author subsequently testified before the House Committee on International Relations that the Guidelines "do not enlarge or expand the grounds for asylum that were specified by Congress and the understanding the courts have reached about those grounds."⁹¹

Also problematic is the courts' focus on the size of the group implicated in particular definitions of "social group."⁹² The courts' decision to reject definitions of social groups which, in their view, include too many people has been especially burdensome to women fleeing domestic abuse or other violence because of their gender.⁹³ Women in those types of situations have the most difficulty meeting the evidentiary requirements to prove they qualify for asylum under the INA due to the nature of the crimes committed against them.

While the courts' reluctance to open the proverbial floodgates is understandable, the concern that acknowledging gender-based violence as a ground for asylum would result in a flood of

Guidelines fail to educate officers as to why women's gender-based claims are susceptible to unfair stereotyping, such as the assumption that sexual violence against a woman is caused by the woman); Condon, *supra* note 6, at 217.

⁹¹ *Victims of Torture: Hearing Before the House Comm. on Int'l Relations, Subcomm. on Int'l Operations and Human Rights*, 104th Cong. (May 8, 1996) (testimony of Phyllis A. Coven, Director of International Affairs, Immigration and Naturalization Service). Available at 1996 WL 10164383.

⁹² See *supra* notes 76-77 and accompanying text.

⁹³ For discussion of the different forms of violence against women, see *infra* Part III.

immigrants is misplaced.⁹⁴ As discussed above, even when an asylum applicant meets all criteria for a grant of asylum, asylum remains a discretionary remedy under U.S. immigration law.⁹⁵ Moreover, courts should be evaluating cases based on their individual merit, not on the total number of people potentially affected. If the evidence shows that men in a particular country abuse their wives on account of their gender, the courts should recognize that conclusion.⁹⁶ Ignoring such a fact would mean adjudicating asylum cases based on the number of refugees implicated rather than on legitimate interpretation of the INA.⁹⁷ If, despite current trends, an increase in the number of asylees becomes a legitimate concern, Congress should address the issue by enacting new measures applicable to all asylum applicants, rather than immigration judges on a case-by-case basis.⁹⁸

⁹⁴ Canada, for example, recognizes gender-based persecution as sufficient for membership in a particular social group, yet it has not experienced a surge of asylees claiming such. See Arthur C. Helton & Alison Nicoll, *Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of In re Fauziya Kasinga and Prospects for More Gender Sensitive Approaches*, 28 COLUM. HUM. RTS. L. REV. 375, 387 (1997).

⁹⁵ See *supra* note 22, at 34.02[12][d].

⁹⁶ See Condon, *supra* note 6, at 232.

⁹⁷ See Rex D. Khan, *Why Refugee Status Should Be Beyond Judicial Review*, 35 U.S.F. L. REV. 57, 71-74 (2000) (arguing that the United States justifies the number of refugees it admits based on political interests rather than humanitarian concerns).

⁹⁸ See Condon, *supra* note 6, at 233-34 ("Allowing judges to turn a blind eye to valuable evidence of motive is not a fair solution to fears of opening the refugee floodgates and would deny women with significant motive evidence equal access to refuge.").

III. Linking Gender and Persecution

In perhaps every human society, social status equates to power. Social standing is derived from a complex combination of factors that may include, *inter alia*, length of time or “establishment” in a community, wealth, family, religious preference, or political opinion. By any such measure, most women refugees arriving in the United States fall at the bottom of the social pile—among the most disempowered of the disempowered. Observing the workings of immigration courtrooms, one study concluded that power differences can account for bias in immigration courts and law.⁹⁹ The following discussion of gender and power theory will shed light on why certain women who are fleeing situations of gender-based violence are being denied asylum, and also why the decision to deny them the protections of U.S. asylum law is illogical and unacceptable.

A. Categories of Violence

In all parts of the globe, women are subjected to gender-based violence, but different types of violence against women have potentially different ramifications for the law. The most important distinction to understand is that “[t]he concept of women being persecuted as women is not the same as women being persecuted because they are

⁹⁹ Nancy Ann Root & Sharyn A. Tejani, Note, *Undocumented: The Roles of Women in Immigration Law*, 83 GEO. L.J. 605, 607 (1994).

women.”¹⁰⁰ To put it another way, some acts of violence may be specific (if not exclusive) to one gender without being inspired by the victim’s gender. Such violence fits into one of a few basic categories: harm that can be done only to women,¹⁰¹ harm that is more commonly inflicted on women than on men,¹⁰² and harm inflicted on women because they are women.¹⁰³ Legislatures and courts address each category of violence somewhat differently.

The first type of violence, which involves harm that can be done only to women’s bodies, is relatively easy to recognize as being committed based on gender. The U.S. government

¹⁰⁰ Binder, *supra* note 32, at 167 (quoting the Refugee Women’s Legal Group, *Gender Guidelines for the Determination of Asylum Claims in the UK* § 1.11 (1998)). See also Lawyers’ Committee for Human Rights, *Refugee Women at Risk: Unfair U.S. Laws Hurt Asylum Seekers* (2002) (“Around the world women often suffer persecution just because they are female, and experience persecution differently because they are women.”).

¹⁰¹ Examples of harms that can only be inflicted upon women are practices such as female genital mutilation and forced abortion. Also included would be domestic violence directed against uniquely female parts of the body, such as the abuse to the genitalia suffered by Rodi Alvarado. See *supra* note 13 and accompanying text.

¹⁰² Types of violence that are more common, but not exclusive to, women include domestic violence, trafficking, rape, and other forms of sexual assault.

¹⁰³ This sort of violence includes the overt enactment and enforcement of state policies directed toward gender subjugation such as those formerly practiced by the Taliban in Afghanistan. However, this category also includes the subtle acceptance of unwritten social policies or traditions that demand gender dominance and submission, such as the practice of honor killing or the routine killing of female infants.

acknowledges acts such as forced abortion and FGM as problematic for women. However, this recognition was given only once the U.S. culture became more familiar with these practices.¹⁰⁴ Both FGM and forced abortion have been addressed in the INA, but the attention that these practices have received has been insufficient to substantively impact asylum seekers.¹⁰⁵

¹⁰⁴ While cultural unfamiliarity with certain practices against women has sometimes been used to justify grants of asylum, *see* Sinha, *supra* note 21, at 1565-66, such unfamiliarity has at other times meant an uphill battle in getting U.S. law to recognize these practices as persecution. Female genital mutilation is such an example. Until the case of Fauziya Kassindja, fear of FGM was not considered a basis for asylum. *Kassinga*, 21 I. & N. Dec. 357. While it is difficult to speculate as to why a defacing practice that is by no means a recent development would take so long to be widely recognized, scholarly debates over the relativism of cultural mores certainly played a role. Some have advanced the argument that the fact that because FGM is accepted by the dominant factions within the cultures in which it is practiced, it ought not necessarily be construed as persecutory against members of that culture. For an evaluation of such arguments, including the tension between imposing international human rights standards and respecting the cultural implications of FGM, *see* Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1 (1995); Sinha, *supra* note 20, at 1585.

¹⁰⁵ FGM was incorporated into the INA by means of Pub. L. 106-386, Div. B, Title V, § 1513(a) (Oct. 28, 2000), which allows for illegal immigrants to obtain legal status at the Attorney General's discretion if they were victims of FGM. This law only applies, however, if the act was committed on U.S. soil and if the victim agreed to help prosecute the perpetrator. *Id.* Such a provision obviously has no impact on applicants for asylum who are subjected to or threatened with FGM in their home countries, and who have to rely on the *Kassinga* decision.

The second type of violence involves harms that are inflicted more frequently against women, but which also can be done upon men. U.S. law has criminalized many of these forms of violence, but the law has not always recognized them as being gender motivated. Acts of this type, such as rape, are not always gender motivated, but it is generally agreed that they spring at least in part from the exercise of a power differential.¹⁰⁶ The fact that men may be victimized in similar ways demonstrates that gender cannot be isolated as the motivation for such violence. In societies that are still largely patriarchal, however, the power

Forced abortion was included in the INA via Executive Order No. 12,711, 55 Fed. Reg. 13897 (April 11, 1990), codified as 8 U.S.C. § 1101, Note, which directed the Secretary of State and the Attorney General to give special consideration to any alien who expressed fear of forced abortion or coerced sterilization in her home country. However, the case of *Dong v. Slattery*, 84 F.3d 82 (2d Cir. 1996), held that the Order did not have the force of law, thus precluding its enforcement in the courts.

¹⁰⁶ See, e.g., Linda Kelly, *Stories from the Front: Seeking Refuge for Battered Immigrants in the Violence Against Women Act*, 92 NW. U. L. REV. 665, 666-67 (arguing that lawmakers must recognize the dynamic of power and control in domestic violence to enact effective solutions to it); Nancy Kelly, *supra* note 2, at 640-41, 641 n.75 (identifying two of the most pervasive problems in women's asylum cases as adjudicators' difficulty conceptualizing forms of sexual abuse as violence and their propensity to attribute personal motivations to perpetrators of sexual persecution); Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 868, 892-96 (1996) ("Rape as power refers to the ways men use sex and sexuality to establish dominance."). See also Special Rapporteur's Violence Against Women Report, 1995/85, at 7 PP 23, 14, 53 UN Doc. E/CN.4/1996/53.

differential may frequently translate into violence committed by men against women.

The third type of violence, harm caused to women *because* they are women, refers to embedded cultural practices of violence against women by which patriarchal structures are reinforced. These types of situations, such as the pervasive hostility toward Afghani women created by the Taliban, are perhaps the most easily conceived of as political for purposes of the INA. Violence of this sort is, however, susceptible to arguments of cultural relativism,¹⁰⁷ and its pervasiveness sometimes makes it more difficult to combat. The practice of systematic, mass rape in the context of armed conflicts of recent decades is another example.¹⁰⁸

¹⁰⁷ See Lewis, *supra* note 104.

¹⁰⁸ Much has been written on the use of mass rape as gender-based persecution (and even as a form of attempted genocide) in times of armed conflict. For more on this subject, *see, e.g.*, Anker, *Refugee Law, Gender*, *supra* note 26, at 142 (arguing that rape was systematically carried out against women during Haiti's 1991 coup d'état because women "played an important role in the formation of democratic institutions, because of their status and role in helping civil society, because of involvement in activities to improve local communities, because of the political activities of male relatives—and because they were left behind"); Binder, *supra* note 33, at 174 n.35 ("Forced pregnancy was part of the pervasive pattern of gender crimes in the Bosnian war."); Richard J. Goldstone, *Prosecuting Rape as a War Crime*, 34 CASE W. RES. J. INT'L L. 277 (2002) (advocating the prosecution of mass rape as a crime against humanity); Krishna R. Patel, *Recognizing the Rape of Bosnian Women as Gender-Based Persecution*, 60 BROOK. L. REV. 929, 930 (1994) (arguing that "systematic rape has become a tool of genocide and torture" in the Bosnian conflict); Mattie L. Stevens, Student Article, *Recognizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category*, 3 CORNELL J.L. & PUB. POL'Y 179,

B. Categories of Power

Scholars have increasingly looked to the connection between violence and power for answers to the fundamental questions of why certain types of violence persist. Even international legal documents have begun to recognize the connection between the degree of women's empowerment and the violence committed against them.¹⁰⁹ However, the term "power" is deployed with various meanings in various contexts, so defining it is

197-98 (1993) (quoting from a European Community investigation into the Bosnian conflict which found that rape was a "policy of terror" which could not be viewed as "incidental to the main purpose of the aggression, but as serving a strategic purpose in itself").

For a discussion of other examples of culturally embedded and sanctioned violence, including female genital mutilation, honor killing, and gender slavery, see Allen White, *Female Genital Mutilation in America: The Federal Dilemma*, 10 TEX. J. WOMEN & L. 129, 151-53 (2001).

¹⁰⁹ Although the 1979 Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 (Dec. 18, 1979) (entered into force Sept. 3, 1981) [hereinafter "CEDAW"], contained no language about power, the Declaration on the Elimination of Violence Against Women, drafted by the UN General Assembly in 1993, recognized:

[V]iolence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.

G.A. Res. 48/104 (Dec. 20, 1993) available at <http://www.un.org/documents/ga/res/48/a48r104.htm>.

critical to understanding what a particular author intends or legal document implies. Numerous useful definitions have been formulated, so it is worthwhile to examine several of them that are relevant to asylum law.

1. Dominance-Subjugation and Patriarchy

Both individual and political power can be wielded in ways that advance egalitarian ideals just as much as they can be wielded to others' detriment. To the extent that feminist jurisprudence has been concerned with power relations, it has largely focused on the type of power typical of patriarchy: power used to dominate or subjugate another or others.¹¹⁰ When men have power and dominance by virtue of societal convention, this often translates into men utilizing their power to subjugate women as a class.

One of the primary ways in which domination is enforced is through various forms of violence against women. Such violence, according to Charlotte Bunch, reinforces messages of domination:

[S]tay in your place or be afraid.
Contrary to the argument that such

¹¹⁰ For discussion of the development of feminist jurisprudence, see generally Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT'L L. 613 (1991); Deborah Rhode, *Gender and Jurisprudence: An Agenda for Research*, 56 U. CIN. L. REV. 521 (1987); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988). For discussion of feminist jurisprudence as specifically applied to asylum law, see Musalo, *supra* note 60.

violence is only personal or cultural, it is profoundly political. It results from the structural relationships of power, domination, and privilege between men and women in society. Violence against women is central to maintaining those political relations at home, at work, and in all public spheres.¹¹¹

The pervasive problem of domestic violence against women is frequently cited as a paradigmatic expression of male dominance and female submission.¹¹²

2. Relational Power

One envisioned alternative to dominance-type power focuses on the relationship between the

¹¹¹ Charlotte Bunch, *Women's Rights as Human Rights: Toward a Re-vision of Human Rights*, 12 HUM. RTS. Q. 486, 490-91 (1990).

¹¹² See, e.g., Elizabeth A. Pendo, *Recognizing Violence Against Women: Gender and the Hate Crime Statistics Act*, 17 HARV. WOMEN'S L.J. 157 (1994) (noting many attempts to reconstrue gender-motivated violence committed against women as having causes other than gender); Patricia A. Seith, Note, *Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women*, 97 COLUM. L. REV. 1804, 1843 (1997) (identifying pervasive domestic violence as a "form of social control"); Kristin L. Taylor, Note, *Treating Male Violence Against Women as a Bias Crime*, 76 B.U. L. REV. 575, 594 (1996) (remarking that violence against women is often utilized as a punishment for deviation from gender stereotypes). See generally R. EMERSON DOBASH & RUSSELL DOBASH, *VIOLENCE AGAINST WIVES: A CASE AGAINST THE PATRIARCHY* (1979); RICHARD A. STORDEUR & RICHARD STILLE, *ENDING MEN'S VIOLENCE AGAINST THEIR PARTNERS* (1989).

people involved in the power relation. The work of psychologist Carol Gilligan has demonstrated that the act of problem-solving is itself a gendered process.¹¹³ Gilligan's work with children indicates that, in solving hypothetical moral dilemmas, girls tend to employ an "ethic of care,"¹¹⁴ whereas boys tend to use an "ethic of rights."¹¹⁵ Although psychological theory traditionally privileged the type of reasoning used by the boys, some legal scholars argue that no system of law can be truly objective if it does so. It will simply reproduce traditional, male reasoning without accounting for the factors considered in "feminine" reasoning. That system will fail to reflect and regulate reality as we expect of a legal system.¹¹⁶

Philosopher Sara Ruddick, one proponent of a relational mode of thinking, states in way of definition, "To be powerful is to have the individual

¹¹³ See CAROL GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982).

¹¹⁴ *Id.* at 164. Girls in these experiments tended to explain their analyses in terms evocative of relationships, communication, responsibility, and context.

¹¹⁵ *Id.* at 164, 174. The boys' explanations of their analyses tended to focus more on abstract terms of fairness, logic, rationality, and winning, and less on relationships.

¹¹⁶ Gilligan herself writes, "The failure to see the different reality of women's lives and to hear the differences in their voices stems in part from the assumption that there is a single mode of social experience and interpretation." GILLIGAN, *supra* note 113, at 174. For an examination of the myriad ways in which feminism has informed the law, including critiques of Gilligan's position, see generally Charlesworth et al., *supra* note 110. See also Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39 (1985); Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

strength or collective resources to pursue one's pleasures and projects."¹¹⁷ For Ruddick, the ideal alternative to the dominance-subjugation paradigm is to be found in the power a mother has over her children.¹¹⁸ In illustration of her point, she notes how mothers' primary objectives for their children revolve around nurturance and protection rather than dominance and subjugation.¹¹⁹ Reconceiving our notions of what power entails to reflect the nurturing power relation, argues Ruddick, is a necessary precursor to realizing equality—not only with regard to gender, but also to race, economic standing, and other factors.

This relational understanding of power is useful for its emphasis of both the social and individual aspects of power. It also hearkens to the aim of individual empowerment as the end of positive power relations. Such an aim is consistent with the goals of the basic international documents affirming human rights, including the Universal Declaration of Human Rights,¹²⁰ the International Covenant on Civil and Political Rights,¹²¹ the International

¹¹⁷ SARA RUDDICK, *MATERNAL THINKING* 37 (1989).

¹¹⁸ For these purposes, Ruddick is focused on the function of the relationship rather than the gender of the caretaker, defining a "mother" as "a person who takes on responsibility for children's lives and for whom providing child care is a significant part of her or his working life." *Id.* at 40.

¹¹⁹ Obviously, this is an idealized portrait of motherhood, a fact Ruddick candidly admits. She is careful to acknowledge the disparity between mothers' wishes for themselves and their children, and what they actually accomplish, but ultimately focuses on the nature of the relationship rather than the result of the childrearing as most important. *Id.*

¹²⁰ G.A. Res. 217A, U.N. GAOR, 3d Sess., Supp. No. 16, U.N. Doc. A/810 (1948).

¹²¹ *Opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 51, U.N.

Covenant on Economic, Social and Cultural Rights,¹²² but, perhaps foremost, the Convention on the Elimination of All Forms of Discrimination Against Women.¹²³

3. Legal or Collective Empowerment

Lawyer and scholar Patricia Williams sees rights conferred by law as “islands of empowerment.”¹²⁴ Those who fall outside (or between the lines) of legal definitions conferring rights are the disempowered, according to this way of thinking. Williams argues:

[T]he line between rights and no rights is most often the line between dominators and oppressors. Rights contain images of power, and manipulating those images, either visually or linguistically, is central in the making and maintenance of rights. In principle, therefore, the more dizzyingly diverse the images that are propagated, the more empowered we will be as a society.¹²⁵

Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

¹²² *Opened for signature* Dec. 16, 1966, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc A/6316 (1966), 999 U.N.T.S. 3 (entered into force Jan. 3, 1976).

¹²³ CEDAW, *supra* note 109.

¹²⁴ Patricia J. Williams, *On Being the Object of Property (a gift of intelligent rage)*, in *THE ALCHEMY OF RACE AND RIGHTS* 216, 233 (1991).

¹²⁵ *Id.* at 233-34.

Williams' focus on a type of collective empowerment provides a compelling contrast to the rhetoric of individualism that pervades much discussion of power. It also comports well with the stated goals of international organizations and treaties concerned with the advancement of women.¹²⁶ In the framework suggested by Professor Williams, the goal of the legislator should be to ensure that the law, as written, accounts for the greatest number of voices possible in order to further empowerment of as many people as possible. Immigration judges in such a system would, ideally, be more conscious of the interface between generally applicable laws and individuals with their unique stories. They would be, perhaps, more conscious of how each case was contributing to a larger tapestry of case law and less moved by the potential number of people implicated by their decisions.

¹²⁶ See, e.g., United Nations Fourth World Conference on Women: Declaration and Platform for Action, *reprinted in* 35 I.L.M. 401, 407 (1996) ("Women's empowerment and their full participation on the basis of equality in all spheres of society, including participation in the decision-making process and access to power, are fundamental for the achievement of equality, development, and peace."); United Nations Inter-Agency Network on Women and Gender Equality, *Women's Empowerment in the Context of Human Security* (1999) (last visited April 18, 2004), at <http://www.un.org/womenwatch/ianwge/collaboration/finalcomm1999.htm> (recommending a general strategy of empowerment of women in order to improve human security); United Nations Office of the Secretary General, *Agenda for Development: Empowerment of Women* ¶ 124 (1997) (last visited on March 3, 2004) at <http://www.un.org/Docs/SG/women.htm> ("Empowering women is essential for achieving the goals of sustainable development centered on human beings.").

4. Other Relevant Definitions

The UNHCR has chosen to define power in terms of its effects on individuals. In its Guidelines on Gender-Based Violence, the UNHCR succinctly defines power as “the capacity to make decisions.”¹²⁷ The Guidelines go on to frame positive uses of power as those that “affirm . . . self-acceptance and self-respect [and], in turn, foster[] respect and acceptance of others as equals.”¹²⁸ The use of power to dominate “imposes obligations on, restricts, prohibits and makes decisions about the lives of others.”¹²⁹ Focusing on effects upon individual people may diminish, to some degree, the collective aspect of domination. This oversight is understandable, however, insofar as it facilitates quantification of the effects of power relations, an end which is vital to the UNHCR’s mission of monitoring refugee statistics and helping remedy refugee situations around the globe.

IV. Understanding and Utilizing Power Theory in Asylum Adjudication

If adjudicators properly understood the power dynamics inherent in many forms of persecution of women, asylum applicants fleeing forms of persecution considered to be more personal than political, and therefore outside the scope of the protection of asylum, would benefit. If stereotypes of domestic violence and rape as merely private

¹²⁷ See UNHCR Gender-Based Violence Guidelines, *supra* note 8, at 13.

¹²⁸ *Id.*

¹²⁹ *Id.*

violence were eliminated, the burden of proving the causal nexus between persecution and a protected ground would be significantly lowered for many women. If adjudicators recognized that “the context of a relationship between a man and a woman, in a patriarchal culture”¹³⁰ can, in itself, be politically charged, then courts would have no choice but to interpret certain forms of persecution that are currently deemed personal as being politically based.

To accomplish this end, some advocate adding gender to the INA as a sixth protected ground. Then, women demonstrating they had been persecuted on account of their gender would meet the criteria for asylum.¹³¹ However, the costs of pushing such an amendment through Congress would be significant, as would be the effort to adequately educate legislators for whom immigration is but one of many issues competing for attention. Furthermore, adding sex or gender as

¹³⁰ Sinha, *supra* note 21, at 1594 (quoting a letter from Karen Musalo & Stephen Knight, Center for Gender and Refugee Studies, to Director of Policy Directives and Instructions Branch, INS, at 8 (Jan. 18, 2001)) (hereinafter “CGRS comments”) (on file with the New York University Law Review).

¹³¹ For a sampling of arguments for adding gender as a sixth protected category to the INA, see Condon, *supra* note 6, at 250 (arguing that adding gender as a sixth category would eliminate definitional barriers of social group, have a psychological impact on adjudicators, and resolve the reliance on the social group category for a variety of gender-based claims); Emily Love, *Equality in Political Asylum Law: For a Legislative Recognition of Gender-Based Persecution*, 17 HARV. WOMEN'S L.J. 133, 152 (1994); Mary M. Sheridan, Comment, *In Re Fauziya Kasinga: The United States has Opened its Doors to Victims of Female Genital Mutilation*, 71 ST. JOHN'S L. REV. 433, 463 (1997).

a sixth enumerated ground would not immediately eliminate the source of the problem: the underlying gender bias in the law and its adjudicators.¹³² Adjudicators could still potentially apply stereotyped conceptions of gender-based violence to deny asylum to women even if gender were in the statute.

A more efficient and satisfactory solution would be for the Department of Homeland Security to enact a regulation, binding upon adjudicators, interpreting the existing statute to account for the fact that “private” violence can be politically motivated. Because the regulation proposed in the wake of Alvarado’s case is so deeply flawed, an entirely new directive should be drafted. That directive should eliminate the additional burdens imposed by the Alvarado regulation.¹³³ Sinha suggests that a new regulation should directly state that “opinions concerning treatment or rights based on gender, such as feminism, will be considered a political opinion.”¹³⁴ This language is a good start, but the new regulation should also educate adjudicators about how to recognize and supersede stereotypes in asylum cases involving violence against women. It should specify that violence against women is not merely a private matter but also a political one implicating power relations within a culture or society. The new regulation should also give substantive guidance on how this type of violence can qualify as political persecution.

¹³² See Anker, *supra* note 26, at 139.

¹³³ See *supra* notes 64-66 and accompanying text.

¹³⁴ Sinha, *supra* note 21, at 1594 n.176 (quoting from CGRS comments at 9).

V. Conclusion

Asylum case law contains numerous examples of how courts have failed refugee women because of their stereotyping and misconceptions about the nature of violence against women. With the benefit of regulations that account for the realities of violence committed against women, the current statutory scheme could more fairly adjudicate the cases of women who seek refuge in the United States from what has been considered “private” violence that is outside the scope of the INA. Women who risk everything to flee abusive situations deserve to have their suffering acknowledged as persecution, regardless of whether it is race, religion, or their gender, in combination with their cultural provenance, that caused them to be targeted for persecution.