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# COLUMBIA UNDERGRADUATE LAW REVIEW

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VOLUME III ISSUE 1 • SPRING 2008

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*VOLUME III ISSUE 1 · SPRING 2008*

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## MISSION STATEMENT

The goal of the Columbia University Law Review is to provide Columbia University, and the public, with an opportunity for the discussion of law-related ideas and the publication of undergraduate legal scholarship. It is our mission to enrich the academic life of our undergraduate community by providing a forum where intellectual debate, augmented by scholarly research, can flourish. To accomplish this, it is essential that we:

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Dear Reader,

We are happy to present to you the third issue of the Columbia Undergraduate Law Review.

Our Spring 2008 issue features five exciting papers. The first, written by John Cioschi, is an analysis of the reasons for which the United States waited until 1992 to ratify the International Covenant on Civil and Political Rights. Cioschi presents wonderful insight into the convergence of American politics, international law, and human rights during the Cold War and highlights the essential conditions that influence the United States' willingness to ratify international human rights treaties.

John DeSerio has written an article analyzing the relationship between the Federal Bill of Rights and several Student Bills of Rights from public universities. The paper demonstrates that Student Bills of Rights are beneficial to both institutions of higher education as well as the undergraduates that they are designed to protect. During a time when questions regarding student rights are becoming increasingly crucial, the impact of this conclusion is especially relevant.

The next article, written by Emma Kaufman, explores the relationship between motherhood and the law as established in the case *Bailey v. Lombard*. The case holds important implications for the influences of the law on individuals' lives, and in particular, on the role of motherhood.

In our fourth paper, Ashley Baker explores the intricacies of the right to life and the ways in which society's views of this right evolves as medical technology advances. Through a review of the case of Terri Schiavo, Baker emphasizes the importance of addressing these changing ideas.

Our last paper, written by Constantino Díaz-Durán, raises the question of the constitutionality of hate crime legislation. By studying the results of several court cases, including the Supreme Court decisions in *R.A.V. v. St. Paul* and *Wisconsin v. Mitchell*, Díaz-Durán arrives at important conclusions regarding the effects of hate crime legislation on the freedom of speech.

We hope you enjoy the articles.

Sincerely,

Katherine Zhang

Moran Baldar

*Co-Editors-in-Chief*



# **From Rejection to Ratification: The International Covenant on Civil and Political Rights and the United States**

*Jon Cioschi*

## **Abstract**

In the following pages, I provide two possible, interconnected explanations for why the U.S., despite its “venerable [...] tradition of support for human rights” and “exceptional leadership in promoting human rights” waited over 25 years to ratify the International Covenant on Civil and Political Rights (ICCPR), one of the two foundational covenants of the international human rights system.

I argue that a series of interrelated factors including a lack of Presidential and Congressional interest in participating in the international human rights system, vocal and numerous critics of international law in Congress and powerful organizations, and a preoccupation with defending America’s strategic interests during the Cold War often at the expense of human rights worked to prevent ratification until 1992. Correlatively, I argue that the ICCPR was ratified in 1992 because its ratification was seen as a necessary precondition for the realization of Bush’s “New World Order” and for legitimating the U.S. as its leader and to appease increasingly numerous and vocal critics of Bush’s seeming lack of concern for human rights abuses perpetrated by the Chinese government.

The conclusions reached reaffirm two often held contentions concerning American government. First, the President and Senate will push for the ratification of human rights treaties when they imagine these institutions to be compatible with or necessary for the realization of their foreign policy goals. Second, trenchant and widespread public criticism that threatens to ruin the good reputation on which so many politicians rely for support can effectively pressure government actors to appease their critics by any means necessary.

## **Introduction**

On December 16, 1966, the International Covenant on Civil and Political Rights (ICCPR) was adopted and opened for signature, ratification, and accession by the United Nations General Assembly.<sup>1</sup> The ICCPR was created to define and codify the civil and political rights embodied by the Universal Declaration of Human Rights in a multilateral treaty that would establish international obligations for respecting, promoting, and implementing human rights.<sup>2</sup> On March 23, 1976, less than ten years later, the ICCPR entered into force after thirty-five states had ratified it.<sup>3</sup>

The United States, however, was not one of the thirty-five state parties to the treaty in March 1976. Despite its “venerable [...] tradition of support for human rights” and “exceptional leadership in promoting international human rights,” the United States failed to ratify the ICCPR until April 2, 1992, when the Senate ratified it through a unanimous vote.<sup>4</sup>

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Why, after nearly twenty-six years, did the United States ratify a human rights treaty it had until then almost entirely neglected? Certainly, the story of the ICCPR is typical of American exceptionalism in human rights, “the paradox of being simultaneously a leader and an outlier.”<sup>5</sup> However, no simple theory of American exceptionalism can thoroughly explain the history of the ICCPR in the United States.

In attempt to provide a fuller explanation of this history, I develop a response to one primary question in this essay: Why did the United States ratify the ICCPR in 1992? This question necessarily involves another, related question, which I also address: Why didn’t the United States ratify the ICCPR before 1992?

With respect to the latter question, I demonstrate that a combination of relatively interdependent and interrelated factors – a lack of presidential interest in ratification; a preoccupation with defending America’s strategic interests during the Cold War, often at the expense of human rights; a largely imagined tie between communist internationalism, the United Nations, and all of its products; vocal opposition from factions in Congress and influential organizations; and the absence for some time of equally vocal human rights advocates in Congress or influential non-governmental organizations – worked to prevent ratification until 1992.

In response to the primary question, I show that two seemingly contradictory forces worked together to help realize ratification in 1992. First, President Bush urged the Senate to reconsider the ICCPR in late 1991, as ratification would support the establishment of his visionary plan for a ‘new world order’ and, more importantly, as the main impediment to the realization of this ‘new world order’ – the Soviet Union – was on the verge of collapse.<sup>6</sup>

Second, in the face of overwhelming and trenchant censure from Congress, the press, the public and human rights organizations for his neglect of Chinese human rights abuses from 1989 to 1991, Bush pushed for the ratification of the ICCPR as a symbol of his support for human rights in order to appease these critics and perhaps to distract their attention from his foreign policy in China, which he was clearly reluctant to change.<sup>7</sup>

Generally, then, I show that a combination of (a) presidential support for the ICCPR and at least rhetorical support for international human rights and (b) Congressional (especially Senatorial) support for an improvement in U.S. human rights policy, and (c) pressure from non-governmental sources – like the media and human rights organizations – worked to realize the ratification of the ICCPR in 1992.

### **A Simplified Version of the Treaty Ratification Process**

Several actors are involved in the United States treaty ratification process. Understanding each actor’s role and the power s/he wields therein are necessary for understanding how and why the ICCPR was ratified in 1992.

The President is the most powerful of the actors in the process. First, he must sign a particular international agreement for the ratification process to begin. Next, he decides if it will be handled as a treaty under the Constitution, meaning that he is empowered to choose whether or not he will seek “the advice and consent of the Senate.”<sup>8</sup> Moreover, even after the Senate has given its “advice and consent” to a treaty by a two-thirds majority vote of approval, the President may choose to stop the ratification process.<sup>9</sup>

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Natalie Kaufman's research further confirms the President's power in this process. Interviewing several members of the Senate Foreign Relations Committee (SFRC), she found that presidential support was critical in motivating the Senate to approve treaties; one Senator responded that in order for a treaty to pass, "the President would have to be behind [it]."<sup>10</sup>

After the President sends a treaty to the Senate, it arrives before the SFRC, which discusses the treaty and often holds hearings to which representatives of concerned organizations, academics, and others are invited to voice their opinions.<sup>11</sup> A simple majority vote of approval in Senate Foreign Relations Committee determines if a treaty will be sent to the Senate for its "advice and consent."<sup>12</sup>

With the approval of the SFRC, the Senate receives the treaty, discusses it, and votes on it. If the treaty receives the approval of two-thirds of the Senate, it has been effectively ratified.<sup>13</sup> Before the treaty becomes the 'supreme law of the land,' however, the President must grant his approval once more and then deposit the instrument of ratification.<sup>14</sup>

Accordingly, the President, the Senate Foreign Relations Committee, and the Senate wield considerable power in determining the fate of treaties in the United States. Without the approval of all three of these actors, a treaty cannot become the 'supreme law of the land.'<sup>15</sup>

It is also important to consider the influence of non-governmental actors in this process. Through a variety of methods and for a variety of reasons, they may pressure actors in the Senate or the Administration to push for the ratification of a particular treaty; in other words, neither the Senate nor the President is immune to external pressures. And, as the history of the ICCPR and human rights treaties in the United States shows, their efforts have been far from insignificant. Correlatively, it is essential to regard such public pressure, the President's decision to pursue ratification, and the Senate's machinations in the context of current social, political, and economic conditions and events.

### **A Tortuous History: From the Postwar Moment to the Cold War's Demise**

To understand why the U.S. did not ratify the ICCPR until 1992, one must review the peculiar history of human rights treaties in the United States during the post-World War II period. Several variables, including lack of presidential support, widespread opposition among the Senate and non-governmental organizations, and the perceived exigencies of the Cold War worked to stall ratification of the ICCPR until 1992.

In the Bricker Amendment Controversy of 1950-1955, vocal, conservative members of the Senate with the aid of the American Bar Association rallied against the Eisenhower Administration's proposals for ratification of human rights treaties, including the Genocide Convention and the Covenant on Human Rights. In the coming years, the Covenant would develop into the ICCPR and the ICESCR (The International Covenant on Economic, Social, and Cultural Rights).<sup>16</sup>

Motivated by fears that the Covenant and all human rights treaties "would diminish basic rights [guaranteed by the Constitution], abrogate states' rights, enhance Soviet and Communist influence, and imperil U.S. Sovereignty," Senator John Bricker (R-OH), with the aid of like-minded Senators and members of the American Bar Association, drafted a constitutional amendment designed to nullify the legal ef-



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fect of treaties in the United States and thereby discourage treaty ratification altogether.<sup>17</sup> These opposing forces understood the United Nations and all of its products, including these human rights treaties, to be products of the Soviet Union – the United States’ principal enemy in the Cold War – and its communist ideology. They were thus convinced that any involvement in the U.N., including ratification of human rights treaties, would make the U.S. more susceptible to communist infiltration and thereby threaten its interests, security, and power in the Cold War.

After the Senate voiced its approval of the Bricker Amendment, President Eisenhower and Secretary of State John Foster Dulles mounted significant opposition to the Amendment.<sup>18</sup> In so doing, Eisenhower successfully defeated the Amendment, but not without significant and lasting costs.<sup>19</sup> Understanding that the Bricker Amendment supporters were “primarily motivated by opposition to human rights treaties [the most dangerous of which was considered to be the Covenant on Human Rights],” Eisenhower and Dulles announced that the United States would cease all efforts to ratify any international human rights treaties or conventions and withdrew the United States from participation in the drafting process of the Covenant on Human Rights.<sup>20</sup> Shortly thereafter, the Bricker Amendment was put to rest in the Senate by a 52-40 vote.<sup>21</sup>

The sacrifices Eisenhower made to appease his opponents effectively terminated U.S. involvement in the development of the international human rights regime for some time. The drafting of the Covenant proceeded despite U.S. absence, and, on December 16, 1966, the ICCPR was unanimously adopted by the U.N. General Assembly.<sup>22</sup>

Until Jimmy Carter’s presidency, Presidents and the Senate showed little interest in ratifying human rights treaties. President Kennedy submitted the Convention on the Political Rights of Women, the Supplemental Slavery Convention, and the ILO Convention on Forced Labor to the Senate, yet they were only ratified after significant delays.<sup>23</sup> President Lyndon B. Johnson submitted no human rights treaties to the Senate. President Richard Nixon submitted only one, the Genocide Convention, but it did not gain the two-thirds majority vote necessary for ratification.<sup>24</sup> Like Johnson, President Gerald Ford submitted no human rights treaties to the Senate. Clearly, no President before Jimmy Carter submitted the ICCPR to the Senate or advocated for its ratification.

On October 5, 1977, less than ten months into his first year in office, President Jimmy Carter signed the ICCPR.<sup>25</sup> The language of Carter’s inaugural address indicated his dedication to human rights: “[o]ur commitment to human rights must be absolute.”<sup>26</sup> Despite such proclamations from the President himself and substantial support for human rights in Congress and, the Carter administration failed to develop a “binding and comprehensive human rights strategy,” largely as a result of persistent opposition within the foreign policy bureaucracy to adopting an “active human rights policy that many felt would threaten strategic interests of regional bureaus in the State Department” in the Cold War.<sup>27</sup> From early on, the Administration refrained from supporting human rights “whenever political costs were to be paid.”<sup>28</sup>

Since human rights occupied such a tenuous place in Carter’s policy, it is not surprising that he ceased to advocate for them once international developments threatened American security and interests. In 1979, the year after Carter submitted the ICCPR to the SFRC, two crises erupted that effectively distracted Carter from pushing for ratification of the ICCPR and focusing on human rights.<sup>29</sup>

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In the wake of two international crises, Carter adopted “an assertive and confrontational foreign policy” in which “the Cold War became a priority” and human rights were de-emphasized. In Iran, the revolutionary forces of Ayatollah Khomeini took sixty-nine diplomats hostage at the American embassy on November 4, 1979. It took Carter over a year to convince the forces to release the American hostages.

Shortly after the hostage crisis began, more than eighty thousand Soviet troops invaded Afghanistan to prop up the government of leftist Babrak Karmal.<sup>30</sup> Carter defined the invasion as ‘the most serious threat to peace since World War II,’ as it was the first ‘use of military power by the U.S.S.R. in a nonaligned country’ since 1945.<sup>31</sup> Deeming Soviet actions a grave threat to United States interests, Carter proclaimed that he was prepared to repel the invading forces ‘by any means necessary.’<sup>32</sup>

Just after the Iran Hostage Crisis began and just before the Soviet invasion, the SFRC conducted hearings on the ICCPR and three other human rights treaties from November 14-19, 1979.<sup>33</sup> Testimony was given from “a wide range of witnesses from concerned organizations and circles,” including Amnesty International, the ACLU, Lawyers’ Committee for International Human Rights<sup>34</sup>, Helsinki Watch<sup>35</sup>, and others.<sup>36</sup> The majority of the witnesses, including the Departments of State and Justice, voiced their support for ratification of the ICCPR, arguing that U.S. attempts to promote human rights internationally have been seriously impaired by its failure to ratify these treaties.<sup>37</sup>

Despite broad support for the ICCPR, the SFRC did not move to a vote on it.<sup>38</sup> In fact, the covenant remained before the Committee until President George H.W. Bush urged its ratification once more in 1991.<sup>39</sup> Although the historical record is somewhat unclear, it appears that Carter’s preoccupation with Iran and Afghanistan successfully distracted him from pushing the Senate Foreign Relations Committee to come to a vote on the ICCPR. Likewise, the SFRC might have been so overwhelmed with the events in Iran and Afghanistan that coming to a vote on the ICCPR seemed to be a needless and costly distraction at a time when American security interests were gravely threatened abroad.

More cynically, it is possible that both Carter and the Senate Foreign Relations Committee saw that ratifying the ICCPR would constrain the United States’ ability to formidably challenge the Soviet Union. Moreover, unlike Presidents Ronald Reagan and George H.W. Bush after him, Carter did not face nearly insuperable domestic criticism for his human rights policy that would have increased the incentive to further pressure the Senate to ratify the ICCPR or other human rights treaties as a means of placating his critics.<sup>40</sup> In any case, the perceived necessities of the Cold War distracted Carter from pressuring the SFRC to move forward with the ICCPR and prevented the Committee from coming to a vote independently. Perhaps William Korey, who was actively involved at the time with the Ad Hoc Committee for the Ratification of the Human Rights and Genocide Treaties, was correct in saying that “Carter’s problem was that he had so many other problems.”<sup>41</sup>

Since President Ronald Reagan did not push for its ratification, the ICCPR remained before the SFRC throughout his presidency.<sup>42</sup> Reagan’s general distaste for human rights was manifested in the debate over the Genocide Convention. The details of this episode provide help to explain why Reagan did not advocate for the ICCPR.

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Reagan supported the Genocide Convention only after the public, human rights, Jewish, legal and even veterans organizations, some adamant Senators like Willam Proxmire (D-WI), and even the Soviet Union vehemently criticized him for refusing to visit Holocaust memorials on a trip to West Germany's Bitburg Cemetery to commemorate the fortieth anniversary of World War II.<sup>43</sup> As former Justice Department Attorney Harold Koh remarked, prior to the Bitburg controversy, "[t]here was zero interest in getting the Convention passed [in Washington]."<sup>44</sup> "Bitburg," Koh asserted, "wasn't a reason for the shift [...] it was the only reason."<sup>45</sup> In the face of intolerable discontent that was a product, in part, of his controversial behavior, Reagan agreed to urge ratification of the Genocide Convention to deflect growing and trenchant public criticism and to appease influential social factions.

The story of the Genocide Convention under Reagan thus shows the great extent to which domestic factions can influence the President's posture on the ratification of human rights treaties. Considering the absence of similar pressure for the ICCPR during the Reagan years and before, it is no surprise that the ICCPR had only reemerged once in American politics since the Eisenhower years.

### **The Plan for a New World Order, the Fall of the Soviet Union, and Ratification**

In the postwar period, the Cold War and its diverse struggles proved to be formidable impediments to American involvement in the blossoming international human rights movement. When President George H.W. Bush entered office in January 1989, the Soviet Union would collapse in less than three years.<sup>46</sup> In light of developments signaling the end of the Cold War and the elevation of the United States to the position of sole global superpower, President Bush announced and began taking affirmative steps to realize a plan for the establishment of a 'new world order.' In this section, I defend the hypothesis that President Bush urged the Senate to reconsider the ICCPR in late 1991, since (a) it would support the establishment of his visionary 'new world order' and (b) the main impediment to the manifestation of this 'new world order' – the Soviet Union – was nearer than ever to its demise.

In his 1990 State of the Union Address, President Bush labeled the events of the past year as 'the Revolution of 1989.'<sup>47</sup> In this statement, he alluded primarily to the democratic revolutions that dethroned communist regimes and Soviet control in many Eastern European countries and the reunion of East Germany and West Germany.<sup>48</sup> Indicating his awareness that these events signaled the demise of Soviet Union and the end of the Cold War, Bush remarked that "the common frame of reference [...] of the postwar era we've relied upon to understand ourselves; " in other words, the oppositions between the United States and the Soviet Union and between freedom and totalitarianism were ceasing to exist.<sup>49</sup> In short, this "Revolution" ushered in "the beginning of a new era in world affairs."<sup>50</sup>

In this 'new era in world affairs,' the United States would occupy the position of the sole superpower. With the absence of the Soviet Union, its communist ideology, and a legion of satellite states under its control, the United States would be empowered to take control of, work through and with, as well as reshape the United Nations to suit its needs and interests. Alluding to a declining Soviet influence at the United Nations, Bush remarked

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[t]he U.N. is moving closer to the ideal... The possibility now exists for the creation of a true community of nations built on *shared interests and ideals* – a *true community*, a world where *free governments and free markets* meet the *rising desire of people to control their own destiny, to live in dignity, and to exercise freely their fundamental human rights*.<sup>51</sup>

In short, the deterioration of the Soviet Union and the consequent proof of the bankruptcy of its communist ideology created a “possibility” for the U.S. to remake and lead the world in its image of free markets and human rights.

In the wake of the U.N. Security Council-approved Iraqi invasion of Kuwait (August 1990), Bush outlined his visionary plan for the American leadership in the construction of a “new world order,” “where the rule of law, not the law of the jungle, governs the conduct of nations.”<sup>52</sup> Inspired by the victories of democracy in Latin America and Eastern Europe as well as the deterioration of Soviet power, this ‘new world order’ would be grounded on the principles of the ‘founders’ of the United States, i.e. democracy, freedom, and the rule of law.<sup>53</sup> Embodied by the United States, such principles were proven valuable and powerful in their recent ‘triumph[s]’ over autocracy and communism.<sup>54</sup>

While, in Bush’s vision, the United States would be the source of principle in and leader of this ‘new world order,’ it would not act unilaterally. Instead, the United States would participate in world affairs through democratic means and institutions, working under the ‘full authority’ of the United Nations to construct a world order based on “security, freedom and the rule of law.” In general, the nearing collapse of the Soviet Union and the rise of democracy throughout the formerly communist world enabled Bush to envision “a new partnership of nations that transcends the Cold War,” one based “on consultation, cooperation, and collective action.”<sup>55</sup>

Shortly after the conclusion of the Iraq crisis, another crisis was brewing in the Soviet Union that would result in its demise only a few months later. In August 1991, Boris Yeltsin, president of the Russian Federation, the democratic opposition party, successfully prevented the military, the Communist Party, and the secret police from mounting a coup d’état to overthrow Gorbachev. With the “unqualified support” of President Bush, Yeltsin put an end to Communist power in the Soviet Union over the next few months.<sup>56</sup> On December 25, 1991, Gorbachev resigned as the last president of the Soviet Union, and a week later, the Soviet Union ceased to exist.<sup>57</sup>

It was in this context that the ICCPR reemerged on the American political agenda. In August 1991, the same month that Yeltsin and his forces were laying waste to Soviet communism, President Bush urged the Senate to reconsider the ICCPR.<sup>58</sup> The Senate Foreign Relations Committee acceded to Bush’s demands and, in November 1991, held hearings on the treaty as the Soviet Union was crumbling.<sup>59</sup> Most of those who testified or submitted statements to the Committee unequivocally supported ratification.<sup>60</sup>

Testifying on behalf of the Bush Administration, Assistant Secretary of State for Human Rights and Humanitarian Affairs Richard Schifter provided Bush’s professed reasons for urging ratification of the ICCPR in August 1991. A close analysis of these reasons reveals that the imminent fall of the Soviet Union coupled with the design of Bush’s “new world order” made ratification appear quite beneficial at that time.

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In general, Bush contended that ratification would both enhance the credibility of the U.S. in its promotion of human rights, democracy, and the rule of law abroad and enable the U.S. to affirm its leadership in constructing a “new world order” on these principles.<sup>61</sup> Bush’s rationale suggests that he deemed the covenant to be compatible with and even integral to his larger goal of establishing a “new world order.”

First, Bush declared that ratification would emphasize America’s commitment to promoting “democratic values through international law.” Second, ratification would further empower America to “influence the development of appropriate human rights principles in the international community.” And third, as Bush asserted, ratification would enable the United States to pressure “problem countries” to adhere to human rights and respect “fundamental freedoms.” Attaining a seat on the Human Rights Committee<sup>62</sup>, Schifter asserted, would be “the most significant practical result of the covenant,” as it would allow the United States to “enhance the effect of the Human Rights Committee as a watchdog body, operating to identify and curb human rights violators.” In several respects, then, ratifying the Covenant would enable the United States to better promote respect for “internationally recognized human rights by all countries,” a “major foreign policy goal of the United States government.”<sup>63</sup>

Suggesting the importance of ratification to Bush’s “new world order,” Schifter proclaimed that the United States had reached a

time in world history where [it had] [...] been presented with new opportunities [...] to support to every possible degree the spread of democracy and the strength of the rule of law, and respect for human rights in the aftermath of the Communist collapse in Eastern Europe.<sup>64</sup>

Ratification would bolster the establishment of the “new world order” by providing the U.S. with a seat on the Human Rights Committee, by serving as concrete evidence of its support for human rights, and by demonstrating its respect for the United Nations. Bush’s plan for a “new world order” involved a strengthened United Nations and the spread of democratic values could only be credible if the United States itself at least rhetorically supported human rights principles and the United Nations. By ratifying an integral human rights treaty produced by the United Nations and previously ratified by many democratic and even non-democratic states, the Bush Administration sought to demonstrate such support. that

Certainly, ratifying the covenant would increase the credibility and efficacy of the Bush Administration’s assistance in democratization efforts abroad, as Schifter suggested in his testimony.<sup>65</sup> However, such assistance had been ongoing well before late 1991.<sup>66</sup> Further, Bush declared his plans for a ‘new world order’ about a year prior to pushing the Senate to reconsider the ICCPR. Ratification of the Covenant, then, would have ostensibly been similarly valuable to Bush’s foreign policy goals before August 1991. So, in order to understand why Bush pushed for ratification in August 1991, it is necessary to examine his actions in light of major events that had recently occurred or were occurring at the time.

In February 1991, the Bush Administration did not support the ratification of the ICCPR.<sup>67</sup> When pressed by Senator Claiborne Pell (D-RI) to explain why he and the Administration pushed for its ratification only six months later, Schifter indicated that the ongoing and tumultuous events in the Soviet Union that began in the summer

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encouraged the Administration to change its position. Previously, the United States was “continually tied up in a struggle with the Soviet Union in the United Nations.”<sup>68</sup> Since the ICCPR and its Human Rights Committee were both products of the United Nations, Schifter and the Administration assumed that the United States would confront similarly frustrating struggles with the Soviet Union as a member of the Human Rights Committee. The coup against Gorbachev and the rise of Yeltsin to power in Russia signaled to Bush that the Soviet Union was nearing its collapse. Consequently, Soviet challenges in the United Nations would soon vanish. Without these challenges, the U.S. could assume control of the U.N. and make its “bodies,” including the Human Rights Committee, “operate the way they were intended.”<sup>69</sup>

By confirming the end of the Soviet challenge in international relations and at the U.N., the events of the summer of 1991 in the Soviet Union encouraged the Bush Administration to support the ICCPR. Interpreting its ratification as instrumental to both the success and credibility of the “new world order” as well as controlling and reshaping the United Nations, the Bush Administration urged the Senate to reconsider ratifying the ICCPR when it could be sure that the U.S. would no longer confront significant challenge from the Soviet Union on the Human Rights Committee or in the U.N. While the overthrow of communist regimes in Eastern Europe may have indicated that the Soviet Union’s power was diminishing, Bush did not support the ICCPR until he could confirm that the Soviet Union’s collapse was imminent and inevitable.

With presidential support confirmed, only the Senate had to signal its approval of the ICCPR. Indicating its support for ratifying the ICCPR as an instrument to facilitate the realization of the ‘new world order,’ the SFRC, in its report recommending the treaty to the Senate, wrote that “historical changes in the Soviet Union and Eastern Europe have created an opportunity for democracy to grow and take hold,” so, ratification “can enhance its [America’s] ability to promote democratic values and the rule of law.”<sup>70</sup> By granting its unanimous approval to the ICCPR, the Senate likely found this argument persuasive.<sup>71</sup> However, the ‘new world order’ story does not fully explain why the entire Senate backed the ICCPR in 1991; for a more complete explanation, we must turn to President Bush’s China policy.

### **Chinese Human Rights Abuses, “Constructive Engagement,” and Ratification**

As Natalie Kaufman learned from her interviews with members of the Senate Foreign Relations Committee, presidential support may very well be one of the most important factors in deciding whether or not the Senate ratifies a particular human rights treaty. However, as history proves, presidential support has been insufficient on numerous occasions. In the 1950s, for instance, President Eisenhower promised that the United States would neither ratify human rights treaties nor participate in the drafting process of the U.N. Covenant on Human Rights as a result of vehement and widespread pressure from opposition forces both in and outside Congress.

In the Bricker Amendment case, the Senate and non-governmental groups thus played an important role in deciding the fate of human rights treaties in the United States. During the debates over ratification of the Genocide Convention in the 1980s, civil society groups, vocal actors in the Senate, and a critical media, as Samantha Power argues, bore most of the responsibility for convincing Ronald Reagan to

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support ratification of a convention in which he previously showed no interest.

To determine why the United States ratified the ICCPR in 1992, it is necessary, therefore, to examine the involvement of actors other than the President. In this section, I argue that President Bush also urged the Senate to reconsider the ICCPR to appease powerful domestic actors – including the vast majority of Congress, human rights groups, the press, and the general public – who had increasingly and in growing numbers criticized his decision to disregard egregious human rights abuses in China in order to maintain stable, friendly relations with the Chinese government.

In early 1989, Chinese students and activists garnered international attention to their protests for democracy in Beijing's Tiananmen Square. After Chinese troops opened fire on and killed several thousands of these activists, Bush responded in such a way as to avoid damaging U.S.-Chinese relations.<sup>72</sup> While the Administration immediately halted American trade in military goods with China, Bush refused to impose non-defense related economic sanctions, to adopt harsher rhetoric for criticizing Chinese actions, and to openly criticize individual leaders for their involvement in the repression.<sup>73</sup>

Such leniency towards Chinese human rights abuses in favor of maintaining friendly relations with the Chinese government characterized Bush's subsequent foreign policy towards China. Over the coming years, Bush extended Most Favored Nation Status – the maintenance of normal trade relations – to the Chinese government without holding it accountable to the human rights standards that such status requires.<sup>74</sup> All the while, Bush vehemently defended his China policy as a means, albeit an indirect one, for improving human rights conditions in China. Responding to critics of his policy, Bush remarked

[s]ome argue that a nation as moral and just as ours should not taint itself by dealing with nations less moral, less just. But this counsel offers up self-righteousness draped in a false morality. You do not reform a world by ignoring it.

According to this theory, then, engaging in normal trade relations with China would improve its human rights record in the long run by encouraging economic, social, and political prosperity and by giving it a friendly model of respect for human rights in the United States. “[C]onstructive engagement” with China, Bush reasoned, would yield greater improvements in Chinese human rights policy than castigation or avoidance.<sup>75</sup>

Although it was largely ineffective in encouraging respect for human rights in China, Bush continued to adamantly support this policy over the coming years. Meanwhile, his critics grew more vociferous and numerous. In less than three years time, major press outlets, human rights organizations, and the vast majority of Congress would become vehement critics of Bush's disregard for Chinese human rights abuses.

Initial patience notwithstanding, Congress became increasingly outraged by the Chinese government's human rights abuse and consistently called for tough sanctions. Shortly after Tiananmen Square, Congress relentlessly opposed the Bush Administration's efforts to (a) grant MFN status to China and (b) block legislative efforts to protect Chinese students who had fled to the United States in fear of persecution.<sup>76</sup> By the summer of 1990, the House and Senate introduced legislation that mandated both the suspension of Most Favored Nation status and, generally, stricter sanctions against the Chinese government if its human rights record did not improve.<sup>77</sup> Addi-

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tionally, Congress overrode the President's veto of legislation intended to provide a safe haven for Chinese students in the United States by a vote of 390 to 25.<sup>78</sup> Around the same time, the Bush Administration dismissed congressional demands by refusing to issue statements elaborating the human rights standards that China must meet to retain MFN status.<sup>79</sup> Unsurprisingly, the Administration's meager efforts to placate Congress were generally fruitless.<sup>80</sup>

By 1991, according to Human Rights Watch, China's legion human rights violations had become "a persistent indictment of President Bush's approach towards that country."<sup>81</sup> Congressional criticism remained incessant and continued to grow. While the Bush Administration still argued that "constructive engagement" with China would better promote human rights than economic sanctions, its critics in Congress asserted that MFN had not produced significant human rights improvements.<sup>82</sup> True to its policy, the Administration made it clear that it would oppose the attachment of any additional human rights conditions on MFN with China. However, just before Bush urged the ratification of the ICCPR, Congress pressed ahead with deliberations and passed legislation attaching "nonwaivable human rights conditions on MFN status." Proving that a strong bipartisan consensus had developed in opposition to Bush's China policy, the House and Senate passed a bill that included this legislation in October of 1991 with a vote of 409 to 21.<sup>83</sup>

Simultaneously, the press leveled significant criticism of Bush's China policy. From the aftermath of Tiananmen onward, significant press outlets criticized the administration's extension of MFN status to China despite its egregious and widespread human rights abuses.<sup>84</sup> Such press indictments were abundant throughout the spring of 1991, just before the ICCPR reappeared on the president's agenda.<sup>85</sup>

Perhaps the most trenchant of press indictments came around the time Bush began advocating for the ICCPR. After Asia Watch discovered that the Chinese government had been promoting the use of forced labor of more than a million prisoners to make profitable export goods, Congress began to take legislative action to force the Bush Administration to pressure the Chinese government to curb this behavior in the summer of 1991. At the same time, major American press outlets, including *Newsweek*, began to publicize these abuses. However, only after CBS's "*Sixty Minutes*" aired a program on September 15 depicting transactions between American and Chinese distributors of goods produced by forced labor and containing footage of prisoners slaving away in miserable conditions did the Bush administration take steps to exclude Chinese forced-labor exports from the United States. In short, by September 1991, political pressure from Congress, Human Rights organizations, and the press had reached such "intolerable levels" that the Bush Administration was forced to adopt a harder posture towards Chinese human rights abuses and to demonstrate its general support for human rights.<sup>86</sup>

In his opening remarks during the Senate Foreign Relations Committee's hearings on the ICCPR in November 1991, Senator Jesse Helms (R-NC) remarked "[n]ow to be frank, I cannot comprehend why the sudden rush to approve a convention that has been lying around this place for a quarter of a century."<sup>87</sup> However, given the incisive and increasingly widespread criticism of President Bush for his disregard of China's human rights abuses leveled by the vast majority of Congress, major press outlets, and human rights organizations, it is no surprise that "suddenly, President Bush [was]...pushing hard [for the ratification of the ICCPR]" at the end of 1991.<sup>88</sup> Perhaps in a way similar to the Bitburg controversy with Reagan, the *Sixty*



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*Minutes* documentary may very well have forced Bush to recognize that he must either change his China policy or demonstrate support for human rights in some other way. Thus, he likely reasoned that ratifying a critical human rights treaty would, for some time, quiet the critics of his posture towards China by demonstrating at least rhetorical support for international human rights. With support for a stricter human rights policy towards China throughout the vast majority of Congress, Bush recognized that urging the ratification of the ICCPR would be a relatively costless way of appeasing some of his most vehement critics whose confidence was essential for maintaining a cooperative and supportive legislature. Further, with *Newsweek* and especially “*Sixty Minutes*” raising awareness of his disregard of Chinese human rights abuses throughout the public on whose support he relied, Bush undoubtedly recognized the need to take positive steps towards indicating his support for human rights. Similarly, Bush might also have reasoned that urging the ratification of the ICCPR would enable him to maintain a similar foreign policy towards China and thereby continue to neglect its human rights abuses. In any case, Bush’s abrupt change in policy in late 1991 suggests that growing criticism for his China policy likely played a role in this transition.

Whatever the underlying justification, Bush, in part, pushed for the ratification of the ICCPR as a means of demonstrating at least token support for international human rights at a time when he could no longer resist the criticism of persistent, powerful, and vocal domestic factions for neglecting flagrant human rights abuses in China. In light of bi-partisan Congressional criticism of Bush’s posture towards China, it was not surprising that the SFRC voted to send the ICCPR to the Senate and that the Senate ratified it unanimously.<sup>89</sup> As the SFRC asserted, “[...] [r]atification will remove doubts about the seriousness of the U.S. commitment to human rights.”<sup>90</sup> With extensive support for human rights in Congress, the press, and non-governmental organizations, a significant impediment to ratification was lifted. Coupled with Bush’s support, it was not surprising that the ICCPR was ratified in 1992.

### **Conclusion**

In this paper, I have shown how two ostensibly contradictory but mutually supportive forces worked together to enable the ratification of the ICCPR in the United States in 1992. On one hand, I hypothesized that the Bush Administration advocated for the ratification of the ICCPR as a means of fortifying its plan for a ‘new world order’ based on democracy, rule of law, collective security, and human rights, when the main impediment to the realization of this ‘new world order’ was on the verge of extinction. On the other hand, I hypothesized that the Bush Administration urged the ratification of the ICCPR as a means of appeasing raucous, numerous domestic critics of its disregard for human rights abuses in China. Thus, we have the master visionary of the ‘new world order’ – a plan based in part on respect for human rights and in general on principle and morality – exemplifying blatant disregard for human rights abuses when such behavior seemed necessary to secure other economic and political prerogatives.

Nonetheless, in both cases, the Bush Administration had a significant incentive to ratify the covenant as a symbol or concrete evidence of its support for human rights. With respect to the “new world order,” it could not push for democracy, human rights, and rule of law as credibly in other parts of the world without having ratified one of the most integral international human rights treaties. And with respect to

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China, it had little choice but to act to prove its support for international human rights – those principles which it aimed to embody, protect, and spread – when confronted by nearly unavoidable pressure from domestic factions whose support Bush valued and may well have needed.

The story of the ICCPR, then, provides some valuable lessons for the ratification of human rights treaties in the United States. Most obviously, it shows that presidential and senatorial support for a particular treaty is a necessary condition for its ratification. More importantly, however, it suggests that forces outside of the Executive Branch, e.g., the media, Congress, human rights organizations, and, possibly, the public, can effectively persuade those in power to change their behavior. Indeed, the story of the ICCPR in particular and the stories of human rights treaties in the Senate in general demonstrate that such pressure might even be necessary in this respect.

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## The Student Bill of Rights

*John DeSerio*

*“Perhaps the best advice that can be given is that it is safer to err on the side of giving students too many rights, rather than too few.”<sup>1</sup>*

### Abstract

This paper is on the relationship between the Federal Bill of Rights and the Student Bills of Rights, and how their shared rights affect US citizen students in public institutions of higher education. I will show how constitutional rights apply to students in the university setting and how institutions of higher education have the legal responsibility to maintain a safe learning environment on campus. I conclude that it is in the best interest of institutions of higher education to pass Student Bills of Rights as a medium to better protect their students’ rights.

Citizens of the United States have certain inalienable rights granted to them in the Constitution under the federal Bill of Rights. Students of higher education in the United States who are pursuing an education at public institutions with a Student Bill of Rights, are provided with certain protections and services granted by their respective Student Bill of Rights. In this paper I will explore if the rights of citizens covered in the Bill of Rights, and the rights of students of higher education covered under a college or university’s Student Bill of Rights intersect, and whether these common rights are protected and enforced in higher public education. The recognition of these shared rights from both the Bill of Rights (BOR) and Student Bills of Rights (SBORs) by public educational institutions will determine the universality of constitutional rights to all citizen students in the United States.

As the political environment on American college campuses grows more hostile, the rights of students on these campuses become more precious and important to protect. By formalizing student rights into a SBOR, colleges and universities can clarify the position of students on campus, by both notifying the students of the rights available to them and by encouraging them to exercise their rights. There has been a gap in research of SBORs, with the most recent work having been done in the 1960s and 1990s. As of late, the importance of student fundamental rights like freedom of expression (speech and, the press), privacy, equal opportunity, and due process has been relatively absent from the social conscience. Due process violations, as in the case of the Jena 6, are a wake-up call for Students Rights. My research will be a comprehensive look at all four of these rights at the public university or college level and how they relate to both a SBOR and the Bill of Rights. It is important to see that the rights of the two Bills don’t exist separately, but simultaneously within each other because they represent rights that are similar and complementary.

SBORs can vary in substance and structure; however, many SBORs (like the examples from the three groups used in this paper) are similar in substance and structure because they contain similar fundamental constitutional rights. Other works on this topic are either too old, or fail to incorporate the similar rights of the two Bills. These works focus primarily on only one right and don’t address the package of common rights present in the two Bills. By showing that the two Bills have overlapping rights, these common student rights are automatically recognized as universal rights for all citizen students because of their relation to the BOR, and thus provide a legal frame-



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these common student rights are automatically recognized as universal rights for all citizen students because of their relation to the BOR, and thus provide a legal framework for public universities to observe them in a suitable fashion. Since public universities have a legal responsibility to enforce the BOR, my research will show that they also have a legal responsibility to protect and enforce corresponding student rights in SBORs.

A SBOR is a formalized set of student rights in an educational setting. SBOR are accepted by all parties involved and recognized as guidelines in institutions of lower and higher education. For the purpose of this paper I will be focusing primarily on SBORs in higher education. In 1967, in order to create an environment that would promote students' "independent search for truth", the United States National Student Association, in a joint effort with members from a number of organizations including the American Association of University Professors, and the Association of American colleges, compiled and drafted a SBOR named the "Joint Statement on Rights and Freedoms of Students." [3] This statement would be the benchmark for all SBORs to come. Universities and colleges followed the ideology of the "Joint Statement" and drafted SBORs of their own, whether out of recognition for the importance of formalizing student rights or out of necessity due to legal action.

In order to create a representative base of the rights included in SBORs, I have chosen to use SBORs drafted from three representative groups: 1) students through their student body governments; 2) professionals and administrators through their universities; and 3) a collaboration of all three, students, professionals, and administrators through the United States National Student Association.

### **Common Student Rights among the Three Groups:**

- 1) Freedom of Speech, Expression, and the Press
- 2) Right to due process in disciplinary procedures
- 3) Equal opportunity of education
- 4) Right to privacy and security from search and seizure

All **educational institutions, universities, and colleges** in this paper are public, not private, unless stated otherwise. Private educational institutions are subject to different laws because private institutions are not bound by federal, state or local government laws unless they accept federal, state or local government funds. I have chosen to focus on public institutions of higher education in my research in order to create a consistent element of mandatory compliance with federal, state, and local government regulations.

All **court cases** in this paper decided concerning public high schools are deemed applicable to public institutions of higher education because some students of high school age are both similar in age range and share potential rights with college age students. **Rights** will be defined as guaranteed privileges by their respective institution. Rights stated in the US Constitution and BOR are the rights of all US citizens, determined by the Supreme Court decision in *Dred Scott v. Sandford*.<sup>2</sup> For Akhil Reed Amar, a professor of Constitutional Law at Yale University, it is an "ordinary, everyday understanding" that the BOR protects all US citizens. [12]

For the purpose of this paper, it is understood that students and universities enter into a **contractual agreement** with one another. The rules and regulations are both voluntary and binding to both parties, and the contractual responsibility is agreed upon and entered into by both parties once a student has matriculated. While a viola-

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tion of the agreement by either party will terminate the voluntary agreement, both parties are bound by rules and regulations until the violation has been committed. Additionally, each party, due to the nature of their roles as universities and students in the agreement, is contractually bound in different ways. Universities are required to be accountable for reasons surrounding dismissal, and students have the right to the evidence concerning a valid dismissal under the mutual agreement.

In line with this understanding of contract theory, institutions of higher education that adopt SBORs are knowingly entering into a contract with their student bodies, and are required to fulfill the rights included in their SBORs for the duration of the student's studies. Correspondingly, if institutions of higher education do not uphold their SBORs and violations occur, according to basic contract law and Justice Sears in *Anthony v. Syracuse University*<sup>3</sup> universities can be held accountable for their actions or lack thereof, due, in turn, to the violation of the initial contractual agreement between student and university entered into upon matriculation. Thus, the rights of students will not be unjustly dismissed by universities, and will be subject to a level of legal accountability.

*Loco Parentis* means "in the place of the parents" [14] and established the institution of higher education or school as parental guardian, empowering it with control over "the moral, intellectual and social activities of the student." [3]

In 1960, the United States National Student Association (USNSA) and now the United States Student Association officially condemned "the tradition of in *loco parentis* and the educational habits and practices it justifies." [3] The USNSA's declaration of disapproval of *loco parentis* goes on to characterize it as a complete limit on student academic growth and a means to allow unquestioned student submission to the University.

[*Loco parentis*] permits arbitrary and extensive repression of student pursuits and thereby impairs the total significance of the university as a center for the conflict of ideas...the unexamined acceptance of authority which is often appropriate to the child-parent relationship must be replaced in the universities by the encouragement of a critical and dialectical relationship between student and his community. [3]

As reflected in the USNSA declaration against *loco parentis* the historical role of the university as a parental actor was no longer acceptable. The student of the 1960's strove for more equality with administrators in decisions concerning the academic environment of their universities. The USNSA hoped that by promoting equality among students, faculty, and administrators they would stimulate the creation of a positive learning environment.

Roland Liebert, USNSA director of education affairs in 1984, asked why a first class citizen outside of school should be a second class citizen inside the classroom. [3] Additionally, for the purpose of this paper *loco parentis* does not apply to students eighteen years of age and older, due to the fact that after 1971 the ratification of the twenty-sixth amendment gave all citizens age eighteen and over the right to vote, thus qualifying them as responsible adults.

Not only are college students recognized as mature decision-making adults, but even as children students are protected under the Constitution. Guy Leekley, a professor of Law at Lewis University, in his book "Schooling and the Rights of Children" [15] states that children are already protected as "person(s)" under the Constitution, which I believe Leekley has deduced from the "any person" language of the

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Fourteenth Amendment (p.122). Leekley goes on to say that “psychological findings” in the gauge of competence levels in children, cannot determine whether or not a child deserves basic human rights protections (p.111). I follow and extend Leekley’s logic of universal children’s rights to college students in that the psychological competence levels found in students at the university level, cannot determine whether or not their rights as students are protected.

The first right found in common among all three categories of established SBORs is the right to freedom of speech, expression, and the press, which corresponds to the First Amendment in the BOR.

The First Amendment of the US Constitution states:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The right to freedom of speech, expression, and the press as found in the SBOR drafted by the student council at the University of Georgia:

1. Students have the right to a peaceful, healthy learning environment in which free discussion is encouraged in the common interest of the pursuit of knowledge. 2. Students have the right to pursue and discuss any inquiry and to communicate any point of view publicly or privately.[6] (emphasis added)

The right to freedom of speech, expression, and the press as found in the SBOR drafted by faculty and administrators at the University of Georgia:

F. Freedom of Expression. Students have a right to examine and communicate ideas by any lawful means. Students will not be subject to academic or behavioral sanctions because of their constitutionally protected exercise of freedom of association, assembly, expression and the press. [9] (emphasis added)

The right to freedom of speech, expression, and the press as found in the USNSA Joint-Statement which was drafted by students, faculty, and administrators. “2) A. Protection of Freedom of Expression.” [11]

Each of the three SBOR examples not only shares the nature and meaning of the First Amendment, but the BOR and each SBOR example share similar wording with the First Amendment. In comparing freedom of expression rights and how they appear in the BOR and each SBOR example their similarities in content, meaning, and wording can be observed. By observing these similarities, I conclude that a student’s right to freedom of speech, expression, and the press is constitutionally protected in the university setting by SBORs.

The first case in an academic setting involving freedom of expression was the Supreme Court case *Tinker v. Des Moines Independent Community School District*.<sup>4</sup> In 1968, a 13-, 15-, and 16-year-old were all suspended for wearing black armbands. The armbands were to protest the Vietnam War and the students felt their right to freedom of speech was violated. The Supreme Court found it was unconstitutional and against the students’ First Amendment rights to be suspended by the principal of the school for wearing armbands. The court found the principal could not give enough evidence that armbands contributed to an inappropriate learning environment. This is also an example of the courts recognition of maturity in high school age students. It

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demonstrates that if a certain maturity level is present in high school students then the same level can be expected in college age students. Additionally, that since this type of activity wasn't inappropriate for high school students then it couldn't be found inappropriate for college students.

In the case *Plaintiffs v. Discipline Committee of East Tennessee University*<sup>5</sup> another case involving freedom of expression in the academic setting the outcome of the case was essential in setting the limits of a student's right to freedom of expression on campus. In 1969, students were suspended by the university committee for "distribution of allegedly false and inflammatory materials" (p.1). The students filed suit on the basis of their constitutional rights being violated. The US court of appeals for the sixth circuit ruled that although the students' right to freedom of speech is protected under the Constitution that right was denied when the court determined that the students created a dangerous environment. In cases involving First Amendment rights, the court asking if,

Whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree. (p.2)

The court's method of determining whether an action is protected under freedom of expression is evaluated by whether or not it creates a negative or dangerous environment on campus. The decision in this second case set the precedent that it was up to the discretion of universities to limit the right of freedom of expression on campus. Universities now had the legal authority to limit students' constitutional rights in circumstances where it deemed the atmosphere on campus was threatened.

The second right found in common among all three categories of established SBORs is the right to due process which corresponds to the Fifth and Fourteenth Amendment of the BOR.

The right to due process as found in the Fifth and Fourteenth Amendment of the BOR:

V. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. (emphasis added)

XIV. Section 1. ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added)

The right to due process as found in the SBOR, drafted by students of the Illinois State University student council.

I. The right to due process and appeal with an established University judicial system in all matters which can result in the imposition of sanctions for misconduct. [5] (emphasis added)

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The right to due process as found in the SBOR, drafted by the East Tennessee State University faculty and administrators:

7. The right to due process. The Tennessee Board of Regents grants additional rights including: 1. The right to due process in disciplinary procedures of the university, including written notification of charges, an explanation of procedures, and a hearing before an appropriate administrator or committee.[10] (emphasis added)

The right to due process as found in the USNSA Joint-Statement, drafted by students, faculty, and administrators: “6) Procedural Standards in Disciplinary Proceedings, procedural safeguards, procedural fairness.” [11] (emphasis added)

Each of the statements from the SBORs examples and the BOR represent in similar wording and nature, the protection of a student’s right to due process in the university setting. By observing these similarities in each SBOR and the BOR, I conclude that a student’s right to due process is constitutionally protected in the university setting by SBORs.

Jason Bach, in his article, “Students have Rights Too” [16] presents the first college student due process case. The first case involving due process was heard in 1961, where the fifth circuit court of appeals heard the case *Dixon v. Alabama State Board of Education*<sup>6</sup> involving nine African American students who were expelled from a public college without notice for participating in sit-in demonstrations at the public courthouse lunch counter. The court found that the students were entitled to due process, and required them to be provided a hearing by the school board or school officials before they could be expelled from a State tax supported school. The court also ruled that colleges could not “circumvent” a student’s right to due process by having them intentionally give up that right upon admission, which was commonly exercised (p.6). Bach presents *Dixon v. Alabama State Board of Education* as the historical building block for student’s right to due process in schools of higher education disciplinary action. The *Dixon* case ruling established that students clearly have a right to protection and preservation of their constitutional right to due process in the college or university setting.

Guy Leekley in “Schooling and the Rights of Children” [15] shows that state schools are responsible when there is a failure to provide due process rights to their students. He presents the case of *James v. Gillespie*<sup>7</sup> where ninth grade students suspected of robbery were suspended without a hearing. The court of common pleas in Philadelphia upheld the precedent set in *Dixon v. Alabama State Board of Education* by guaranteeing the students’ right to a hearing in all disciplinary matters and by setting specific guidelines for implementation. The court required state school districts to provide a hearing prior to suspension and to adopt a set of procedures and regulations. These included, the creation of hearing committees, providing notice of disciplinary action to the administrators and students involved, providing notice of place and time of hearing, the submission of evidence involved in the case, all within five days (p.125). Leekley shows that state school districts are not only accountable for the enforcement of due process student rights in their schools, but school districts are required to formalize a specific set of procedural guidelines to guarantee student due process rights in the school’s disciplinary process .

If state supported high schools are responsible for the protection of due process rights in the high school setting, then state supported universities are responsible

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for the protection of due process rights in the university setting. In this instance, the guardianship role of *in loco parentis* in the academic setting is applied in favor of the protection and preservation of constitutional student rights. *In loco parentis* helps with the establishment, not removal of student rights in the high school and university setting, once again showing that the constitutional rights of students are upheld in academic settings.

The procedural and due process rights guarantees awarded to students in the *Dixon* and *James* cases were weakened by institutional implementation responsibilities of the universities. In “Upholding Students Due Process Rights,” [17] Simone Marie Freeman explores the 1975 Supreme Court *Goss v. Lopez*<sup>8</sup> decision. The court ruled that the African American students involved in the lawsuit were entitled to their due process rights. However, the court also ruled that the actual implementation and enforcement of those procedural due process rights were left in the hands of the state legislators in “the form of States and local school district administrative rules”(p.1). Freeman states that a student’s right to due process is left unprotected and its enforcement inadequate due to the Supreme Court’s ruling which leaves enforcement and implementation to state and local officials (p.4). Freeman’s argument could be seen as a compelling reason for the drafting of SBOR by educational institutions as a means of setting their own due process policy and not depending on state or local actions. In the absence of due process procedural disciplinary guidelines being implemented and enforced at the state and local level, universities will be left to decide on implementation of student due process rules and procedures on their own. Thus SBOR would internally clarify due process procedural policy and solidify students’ rights at the same time.

The third right found in common among all three categories of established SBORs is the student’s right of equal access to education which corresponds to the Fourteenth Amendment of the BOR.

The right of equal access to education stems from particular language found in the Fourteenth Amendment:

Section 1. ..No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (emphasis added)

The right of equal access to education as found in a university SBOR, drafted by the students on the University of Georgia student council.

4. Students have the right to the opportunity to participate in student government, athletics, student organizations and to be a member of the University community as a whole free from harassment or exclusion due to race, ethnicity, nationality, religious creed or lack thereof, gender, handicap, age, economic status, or sexual orientation. Students shall not be denied the opportunity to participate in any organization so long as they are willing to adopt the stated purposes and fulfill the stated obligations of the organization. No University-recognized organization shall conduct any business either on or off campus that does not abide by these tenets of inclusiveness.[6] (emphasis added)

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The right of equal access to education as found in a university SBOR, drafted by faculty and administrators at the University of Utah:

E. Freedom from Discrimination and Sexual Harassment. Students have a right to be free from illegal discrimination and sexual harassment. University policy prohibits discrimination, harassment or prejudicial treatment of a student because of his/her race, color, religion, national origin, sex, sexual orientation, age, or status as an individual with a disability, as a disabled veteran, or as a veteran of the Vietnam era.[9] (emphasis added)

The right of equal access to education as found in the USNSA Joint-Statement, drafted by students, faculty, and administrators. “(1) Freedom of Access to Higher Education.” [11]

Each of the three SBORs and the BOR statements represent the illegality of denying students access to an education on a discriminatory basis. By observing these similarities, I conclude that a student’s right to equal access in education is constitutionally protected in the university setting by SBORs.

The first case I present involves denial of a student’s access to education on the basis of sexual and racial discrimination. In Paul Englin’s book “Freedom of Access to Higher Education” he discusses discrimination and establishing equal access to higher education institutions. Englin presents the Supreme Court case *Regents of the University of California v. Bakke* as precedent against discrimination in state funded schools. The court found discrimination based on sex or race present in the California state schools’ admission process unconstitutional and violation of the Fourteenth Amendment. Englin emphasizes the significance of the *Regents* case because of Justice Powell’s statements on the value of diversity in higher education. Englin goes on to state that, Justice Powell’s favor of diversity in State institutions “continues to influence” other courts enforcement of equal protection of women and minorities in state universities and colleges (p.27). The Supreme Court in *Regents of the University of California v. Bakke* created a legal framework against discrimination in higher education and Englin emphasizes this landmark case in the history of establishing pro-diversity feeling toward higher education in the courts.

In *Ordway v. Hargraves*<sup>9</sup> I again present a case that involves denial of access to education on the basis of sexual discrimination. In “Schooling and the Rights of Children” [15] Leekley shows further evidence that discrimination based on sex is unconstitutional under the Fourteenth Amendment and that students have a right to an education. He presents the Supreme Court case *Ordway v. Hargraves* where a pregnant high school student is not allowed to attend classes because of her condition. This case involves a high school student yet it is relevant to college level students’ rights because the court ruled that state funded schools cannot discriminate on basis of pregnancy because all students have a right to an education (p.122). The *Ordway* case is further evidence of the court’s protection of the Fourteenth Amendment and the illegality of discrimination against college students resulting in a denial of their right to education at state institutions of higher education.

The fourth right found in common among the three categories of established SBORs is a student’s right to privacy and protection from search and seizure, which corresponds to the Fourteenth Amendment in the BOR.

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The right to privacy and protection from search and seizure as found in the Fourteenth Amendment.

IV. The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. (emphasis added)

The right to privacy and protection against search and seizure as found in the university's SBOR, drafted by the students in the University of Georgia student council:

10. Students have the right to privacy of their person and belongings. The fact that a student resides on campus does not imply consent to search the student's person, belongings, or residence by anyone except a representative of the University in possession of probable cause that the student is engaged in activity that violates the Code of Conduct or is likely to cause harm to his or her own person or that of others. [6] (emphasis added)

The right to privacy and protection against search and seizure as found in the university's SBOR, drafted by the faculty and administrators at University of Utah:

G. Privacy and Confidentiality. Students have a right to privacy and confidentiality subject to reasonable University rules and regulations. ... Students have a right to be free from unreasonable search and seizures. [9] (emphasis added)

The right to privacy and protection against search and seizure as found in the USNSA Joint-Statement, drafted by the students, faculty, and administrators: "2) C. Protection Against Improper Disclosure." [11]

Each of the three SBOR and the BOR examples demonstrates a similar wording and protective nature toward a student's right to privacy and protection from search and seizure. By observing these similarities, I conclude that a student's right to privacy and protection from search and seizure is constitutionally protected in the university setting by SBORs.

In the case *Griswold v. Connecticut*<sup>10</sup> the Supreme Court ruled that areas of privacy do exist, and the right to privacy in those areas is protected by the Constitution. Although the case involves marital rights, the case is essential in the establishment of a person's right to privacy under the Constitution. The Court found that "penumbras" or zones of privacy exist and incorporate rights contained in the Fourteenth and the first nine Amendments. The court ruling connected the rights contained in the Fourth and Ninth Amendment with the reach of the rights given in the Fourteenth Amendment. The Fourth Amendment's protection from search and seizure of person and property, and the Ninth Amendment's empowerment of rights that "shall not be construed to deny or disparage others are retained by the people", are incorporated in the Fourteenth Amendment's protection of all State citizen's right to pursue "life, liberty, or property." I believe that the essence of the decision in *Griswold v. Connecticut* not only encompasses State citizens' right to privacy but their right to be protected from search and seizure.

All three SBOR categories: student drafted, administration drafted, and the combination of the two, identify a student's right to privacy and protection against



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search and seizure of their person and property. However, the Supreme Court has dealt with student's protection from search and seizure by universities in a number of cases ranged from allowing it under *in loco parentis* and to narrowing the allowance of search and seizure to only when there is a warrant present.

In *Moore v. Student Affairs Committee of Troy State University*<sup>11</sup> the rights of students against unwanted search and seizure directly relates to how the court sees the students, whether they are seen as mature adults or dependent children. The case involves the search of a dorm room based on an anonymous tip and without a warrant at a state university. The student, *Moore* was indefinitely suspended for a small amount of marijuana found in the search and sued the University for violating his Fourth Amendment rights to protection against search and seizure. He asked for reinstatement on the basis that evidence was taken without a warrant and he did not waive his Fourth Amendment rights. The District Court of Nassau County found that college students were only entitled to qualified protections under the Fourth Amendment. Judge Johnson found that colleges had,

An 'affirmative obligation' to promulgate and enforce reasonable regulations designed to protect campus order and discipline and to promote an environment consistent with the educational process. The validity of the regulation authorizing search of dormitories thus does not depend on whether a student 'waives' his right to Fourth Amendment protection or whether he has 'contracted' it away; rather its validity is determined by whether the regulation is a reasonable exercise of the college's supervisory duty. (emphasis added)<sup>12</sup>

The District Court and Judge Johnson ruled that college students don't have the same protections from search and seizure as ordinary citizen do under the Fourth Amendment. The Court empowered the university to regulate the campus atmosphere and denied students their right to protection under Fourth Amendment because public institutions of higher education have an *in loco parentis* type paternal relationship with their students.

Ratliff in "Constitutional Rights of College Students" comments on the infringement of students' search and seizure rights involving an *in loco parentis* parental university. He states that the intruding parental role in search and seizures in high school may be logical seeing that students are younger and less independent. [13] However, according to Ratliff, at the college level the intruding parental role of universities is difficult to justify since college students are adults and more independent. [13] This is a valid point, because the courts are walking a fine line in their decisions concerning search and seizure of college students and on what rights universities have even if they begin to impede on the constitutional rights of students. As Judge Johnson and Ratliff point out that universities have a role that is based on *in loco parentis* and parental authority but must be monitored in order to protect from any further encroachments on their students' Fourth Amendment rights.

After drawing the connection between the BOR and SBORs, and how they share various constitutional rights which apply to students in the university setting, and how institutions of higher education have the legal responsibility to maintain these rights to ensure a safe learning environment on campus, I will now address the need for SBORs in institutions of higher education. My argument is based on the desire of the Founders to ensure individual rights and the BOR in the drafting of the US Constitution. Although Alexander Hamilton did not believe in the need to include a

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BOR in the Constitution, he and James Madison both believed in protecting government and individual rights by delegating certain powers to both the government and individual citizens. The Constitution limited powers of government by enumerating certain powers to the various branches of government and reserved other powers to the people. This same ideology can be applied to the framework of university administrations and students in that the formalization and delegation of both administrative and student powers in the form of a SBOR preserves and protects certain rights of the university and its students.

The formalization of government rights in the form of enumerated powers for each branch of government resulted in limitations on the powers of government and ensured rights retained by the people. The first three articles of the US Constitution set the framework for a systematic balance of power between the three branches of government: Executive, Legislative and Judicial. According to Madison in Federalist No. 51, the first articles of the Constitution laid “a due foundation for the separation and distinct exercise of the different powers of government, which to a certain extent, is admitted on all hands to be essential to the preservation of liberty.” Madison continues in Federalist No. 51 to state that this “foundation” will be the “means of keeping each other in their proper places.” Separation of powers between the branches of government prevented each branch from infringing on the rights and powers of the others and according to Hamilton; the delegation of rights within the first three articles of the Constitution also prevented the government from infringing on the rights of the people.

In Federalist No. 84, Hamilton explicitly states that individual rights of the people are present in the body of the US Constitution; hence there was no need for a formal BOR. Hamilton references the writ of *habeas corpus* of Article I. Section 9, clause 2, the protection from *ex post facto* laws from Article I. section 9, clause 3, and trial by jury from Article III, Section 2. clause 3, as some of the individual rights present in the Constitution.<sup>13</sup> He continues by stating that the Constitution not only includes specific protections of individual rights but adds that all rights of the people of the US are reserved by the people and refers to the Preamble to the Constitution. Hamilton wrote,

the people surrender nothing, and as they retain every thing, they have no need of particular reservations. ‘WE THE PEOPLE of the United States, to secure the blessings of liberty to ourselves and our posterity, do *ordain* and *establish* this constitution for the United States of America.’<sup>14</sup>

Hamilton saw no need for a formal BOR because he believed that protections for individual rights were already represented in the overall nature of the Constitution and specifically identified by the delegation of powers section, Articles I-III of the Constitution.

According to Amar the essence of the American Revolution which led to the formation of the Constitution was the protection and coexistence of the rights of States and individual rights of citizens. [12] Amar does not believe as Hamilton does in the structural problem of the Constitution where the inclusion of formalized individual rights would cause a power imbalance. He believes that the structural problem of the Constitution was that there were too few rights given to individual citizens. Amar believes the BOR solved the Constitutions lack of individual protection for citizens. According to Amar it was not the job of the federal government to protect the rights of individuals in States, but the job of the BOR to protect the individual rights of citizens

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from the abuse of the federal government. Amar states that the BOR fixed the lack of individual protection for citizens and created structural balance because it allowed “ordinary citizens” access to the federal administration of justice and their “sovereign right of majority” power to “abolish government and thereby pronounce the last word on constitutional questions.”<sup>[12]</sup> Hamilton believed an increase in formalized individual rights for citizens in the form of the BOR would cause a power imbalance and constitutional failure. Amar believes the Constitution was flawed and would have been a failure if an increase in individual rights for citizens in the form the BOR had not been added. The BOR was included in the Constitution to protect the rights of States and the rights of individual citizens. Whether one accepts the Hamilton or Amar argument, the eventual adoption of the BOR and the ensuing increase in individual rights did not cause a power imbalance or constitutional structural failure.

The need for a SBOR in institutions of higher education relates to the reasons for and against the inclusion of a BOR in the US Constitution. Hamilton argued that there was no need for a BOR because protections of individual citizen rights were already present in the Constitution. However, there is a lack of school constitutions or their equivalent at the university and higher education level, especially constitutions that include protections for individual student rights.<sup>15</sup> Therefore, Hamilton’s argument can be turned back on itself in order to make the plea for a SBOR at institutions of higher education. Hamilton believed in protecting individual rights and was only against the inclusion of a BOR in the Constitution because he felt protection for individual rights were already included in the structure of the Constitution. However, if individual protections were not included in the Constitution, I conclude that Hamilton would have been in favor of the inclusion of individual rights protections. Relating this argument to the university setting, I conclude that Hamilton would endorse protection of individual student rights within a constitution-less system. Hamilton would also have endorsed a formalized set of individual rights like in a SBOR because they share similarities with the formalized individual rights of *habeas corpus*, *ex post facto* clauses in Article I, and trial by jury of Article III. Since individual student rights are not already protected in university Constitutions, according to arguments set forth against the inclusion of a BOR in the Constitution, individual student rights must be protected by a set of formalized rights like a SBOR.

Another argument for SBOR incorporation at institutions of higher education stems from Hamilton’s Federalist Paper No. 9. To justify the rights and protections of the Constitution Hamilton, in his essay, gives the example of how the new federal government would exist just as a state government system would, but with an “enlarged orbit.” His argument can also justify formalized rights and protections of students in the university setting. However, in the university setting, there would not be an “enlargement” of government as in the federal situation, but a shrinking of orbit, where all the rights and protections of individuals that exist at the federal and State level would apply at the university level. Hamilton argued for federal power as a concept of state powers on a larger level. Hamilton’s logic can apply to a change of government size in the opposite direction, that the structure of rights found at a larger level of government, like a constitution or BOR, can be applied to the smaller university level in the form of a school constitution or SBOR.

The Bill of Rights and Student Bill of Rights exist separately but simultaneously because they share similar and complementary inalienable rights. The similarities and overlap of the two Bills allow Student Bills of Rights the ability to protect

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constitutional rights in the university controlled campus setting. In 1967, the United States National Association of Students drafted the first Student Bill of Rights with the help of students, faculty, and administrators in order to promote independent student thought and action on campus. However, as the political environment at American institutions of higher education grows more hostile with the recent incidents of hate crimes, student rights have become more and more important to establish and protect on college campuses.

Student Bills of Rights do not only clarify the rights and the role of students in the university setting, but allow universities a higher degree of autonomy from the federal and state government. Student Bills of Rights provide more autonomy and independence because they are a vehicle. Universities can use Student Bills of Rights to promote internal self-sufficiency through the hypothetical containment of volatile issues that government intervention could conceivably result in negative ramifications for the university, like bad publicity, student applicant loss and financial hardship. As the beginnings of the Student Bill of Rights at the University of Utah reminds us, the threat of legal action and financial hardship can force the creation of Student Bills of Rights on college campuses.

The commonality and practicality of the four corresponding rights found in both the Bill of Rights and each example of the Student Bill of Rights, which are; freedom of expression, the right to due process in disciplinary procedures, equal opportunity of education, and the right to privacy and security from search and seizure, have promoted public interest and established Student Bills of Rights on many college and university campuses. Through my method of finding the commonalties among the Bill of Rights and each Student Bill of Rights, I also establish the contractual and *in loco parentis* relationship between students and their universities. Whatever their historical context these two principles have increased university's accountability to their students.

Alexander Hamilton and Akhil Amar make arguments for the protection of individual rights in the US Constitution, which is evidence of the importance of protecting individual student rights through Student Bills of Rights in the university setting. If we are to enlarge the sphere of student rights in the university setting, it is essential to heighten public awareness to the urgency and benefits of Student Bills of Rights on our college campuses. Through the study of the Bill of Rights, established Student Bills of Rights and activities of public and non-governmental organizations like the United States National Association of Students, and American Civil Liberties Union, the concepts and values of the Student Bill of Rights will hopefully not be forgotten.

### **Endnotes**

1. Fox, Karla H., "Due Process and Student Academic Misconduct", American Business Law Journal, 671,700. p.25, 1988
2. 60 U.S. 393 (1857)
3. 224 App.Div. 487,231 N.Y. Supp.435 (1928)
4. 393 U.S. 503 (1969)

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5. 419 F.2d 195; 1969 U.S. App. LEXIS 9885
6. 294 F. 2d 150 (5. th. Cir. 1961)
7. Court of Common Pleas, Philadelphia, April 22, 1970
8. 419 U.S. 565 (1975)
9. 323 F. Supp. 115 (1971)
10. 381 U.S. 479 (1965)
11. 284 F. Supp. 725 (M.D. Ala. 1968)
12. 284 F. Supp. 725 (M.D. Ala. 1968)
13. Federalist Papers No.84
14. *ibid*

15. Constitutions are considered a set of formalized and enumerated powers at the University and higher education level. Universities and schools have conduct codes and polices but these are not considered constitutions of delegated or distributive powers between parties within an institution.

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## Rehabilitating Motherhood: The Rhetoric and Politics of Breastfeeding in *Bailey v. Lombard*

Emma Kaufman

### Abstract

In 1979, Debra Bailey was twenty-four, a mother of five, and an inmate serving two sentences in Monroe County Jail in Rochester, New York. These facts collided in September of that year, when Bailey sued the County for custody of her one-month old daughter, Tamara. The ensuing case set the guidelines for inmate custody decisions, changing the lives of mother, daughter, and prisoners across the country. Motherhood and crime are topics that occupy the ambiguous and much debated moment when our interrelations become legal and ethical obligations. Mothers who commit crimes are thus dually implicated—and interesting—when touched by the law. Springing from the intersection of political ideology, shifting legal precedent, and an intense cultural debate about the meaning of good motherhood, the decision in *Bailey v. Lombard* offers us a picture of the complexity of life in the shadow of the law. This paper examines how Debra Bailey's role as a mother is at once silenced and delineated by the law. Looking to the strategies mounted by her counsel and the rhetoric employed by the court, I explore how *Bailey v. Lombard* frames the question of good motherhood. This exploration leads us down several historical trajectories, which for Bailey's case occur at key moments in prison reform, criminology, and the centuries-old debate on the merits of breastfeeding. Ultimately, this study will reveal that motherhood and crime converge around the notion of rehabilitation, and that this convergence motivates a simultaneous emphasis and effacement of mothers in the law.

### In the Shadow of the Law: Debra Bailey, mother

Debra Bailey's custody case was not her first interaction with the law. Born in 1955, Bailey had three children by 1973. The Department of Social Services began to monitor her one year later, when Bailey's two and a half year-old son Samuel was rushed to the hospital after swallowing Drano. According to Social Services Records, Debra Bailey visited Samuel irregularly during his month-long recovery in the hospital, and eventually consented to his being placed in foster care for the duration of his recuperation.<sup>1</sup> Bailey visited Samuel infrequently during his time in foster care, and at the end of October 1974 Social Services filed an abandonment petition to permanently terminate her parental rights. It appears from scant records that Debra Bailey moved to Florida sometime just before or during Samuel's recuperation, while her other two children stayed with her mother.

It was in Florida that Bailey would have her first experience in criminal court. After using a stolen credit card, Debra Bailey was arrested and sentenced to six months in Polk County Jail on January 29, 1975. She returned to New York upon release from the Florida jail, and gave birth to her fourth child, Terrence, in 1975. Social Services monitored her motherhood regularly from 1975 until 1976, when the state placed Bailey's twins in foster care. Bailey was arrested for the second time on



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the 17<sup>th</sup> of November 1977 after she assaulted a man with a .22 caliber pistol in a bar-room fight. In December of the following year, she became pregnant for the fifth time. At this point, the record of Bailey and her four children goes silent until 1979, when Debra returned to criminal court on charges of criminal possession of a forged instrument in Buffalo, New York. Debra pled guilty both to this charge and to the prior assault charge at this time, and began two concurrent one-year sentences in Monroe County Jail later that month. On August 24, 1979 Debra Bailey was transferred from jail to Strong Memorial Hospital, where she gave birth to her fifth child, Tamara Malika Bailey. William M. Lombard, the Sheriff of Monroe County, decidedly shortly after Tamara's birth that Debra would not be allowed to keep her daughter with her in prison. Debra promptly filed suit to compel Lombard to let her keep her infant in jail.

### **At A Crossroads: Custody Presumptions and Prison Reform in 1970's New York**

Debra Bailey sued William Lombard at a moment when the custody rights of inmate mothers were in national flux. While the legal and logistical problems posed by inmate mothers date back to the mid-nineteenth century, the 1970's was a time of unprecedented attention to the policies guiding prison motherhood.<sup>2,3</sup> Why this decade saw so much change is an interesting and complicated question. Legal scholar Leda Pojman offers one compelling response, arguing that the legislative frenzy around prison nurseries in the seventies was the product of a tri-partite reaction to feminism, civil rights, and a shifting criminology discourse.<sup>4</sup> Pojman attributes the decline in prison nurseries to the "twisted backlash" of the women's and civil rights movements, which led judges to favor deinstitutionalization and to treat female inmates harshly. Pojman also suggests that inmate custody cases were influenced by correctional experts' growing belief that female criminality was a problem of failed femininity—which made prison an inherently 'unnatural' place to raise a child.<sup>5</sup>

There are two additional historical frames worth adding to Pojman's picture. First, in 1979, northwestern New York was not even a decade past the inmate uprising at Attica, the most infamous prison riot in the country's history.<sup>6</sup> Monroe County—and Judge Myron Tillman—sat directly in the shadow of Attica when considering the rights of an inmate mother. Tillman's ruling was also positioned in a moment of legal transition as the 'tender years' presumption favoring custody for biological mothers began to give way to the gender and biologically neutral 'best interest of the child' standard in custody rulings across the country.<sup>7</sup> Crucially affected by the element of judicial discretion, then, Debra Bailey's custody case hung in the hands of a judge who sat in the eye of statewide and national storms.

### **September, 1979: Bailey v. Lombard**

Debra and Tamara Bailey's futures hinged on Judge Tillman's interpretation of Section 611(2) of New York's Correction Law, which delineates the rights of inmate mothers. Unchanged since its passage in 1909, Section 611 holds that:

A child may remain in the correctional institution with its mother for such a period as seems desirable for the welfare of the child, but not after it is one year of age...The officer in charge of such an institution may cause a child to be cared for therein with its mother to be removed from the institution at any time before the child is one year of age...<sup>8</sup>

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Then, in an addition that would prove critical to Debra Bailey's case, Section 611(3) continues, "If any woman, committed to any such correctional institution...is the mother of a nursing child in her care under one year of age, such child may accompany her to such institution if she is physically fit..."<sup>9</sup> Sheriff William Lombard argued that Section 611 gave him, as the officer in charge, "absolute and unfettered discretion" to decide that Tamara should be removed from Monroe County Jail.<sup>10</sup> Bailey countered that Lombard had no such discretion, asserting that subsection three of Section 611 gave her as a "breast feeding mother" the "absolute right" to keep her child.<sup>11</sup>

Judge Tillman disagreed with both parties, ruling that Section 611 allowed for neither the Sheriff's unfettered discretion nor the mother's absolute right. Instead, Tillman held that, "the use of the word 'may' in a statute is permissive."<sup>12</sup> Section 611 thus offered Sheriff Lombard limited but not "unbridled" discretion within the law. Given these limits, Tillman ruled that the standard for deciding custody was the welfare of the child, which he held to be "interchangeable" with the best interest standard that had risen to prominence over the last fifteen years.<sup>13</sup> He thus shifted away from the tender years presumption—under which Debra Bailey would have retained custody of Tamara—opting for a standard that made Tamara's 'interest' a central and open question in the case.

Tillman's equation of the 'welfare of the child' and 'best interest' standards cleared wide room for judicial discretion, for without a tender years presumption his own judgment of an infant's best interest was to determine Tamara's fate. This room for discretion meant that Debra Bailey's capacity to mother was relevant to the outcome of the case. In short, the best interest standard opened the door to discussion—and judgment—of Debra Bailey's past. And yet, at the same time, Tillman's use of the 'best interest of the child' standard subtly and simultaneously directed emphasis away from Debra Bailey and toward her infant daughter. Tillman's invocation of the best interest standard was then not only important in its legal-historical context; it also provides our first glimpse at the paradoxical way that custody cases erase and emphasize mothers' experience at the very same time.

Recognizing that Bailey's past records as a criminal and as a mother would be major issues in this case, Debra Bailey's counsel, Charles E. Steinberg, made a critical decision. Rather than evading the problems posed by Bailey's multiple arrests and lengthy history with the Department of Social Services, Steinberg chose to place Debra's record at the center of his advocacy. He argued that Tamara's presence in prison would be beneficial to Debra, asserting that keeping Tamara would be "a rehabilitating experience" for this "breast feeding mother." That is, retaining custody of Tamara "could well change the Petitioner's lifestyle to one which is more suitable to society."<sup>14</sup> Here, Steinberg suggested that nursing Tamara will make Debra Bailey a better—a less criminal—person. Contending that the experience of caring for an infant could make Debra a more "suitable" member of society, he drew a straight link between motherhood and good citizenship. Steinberg thus employed an odd and interesting picture of motherhood as a vehicle, perhaps even a tool, with which to enforce social norms.

This rhetoric raises a series of cultural and historical questions. Why would Debra Bailey's attorney concede that his client was an unsuitable member of society in an effort to ensure custody of her child? What about motherhood in the 1970's

made possible this picture of mothering as rehabilitative? And finally, what is the relevance of Steinberg's representation of Debra as a "breast feeding mother?" The last of these questions illuminates the former two and necessitates a brief journey into the history of breastfeeding politics.

### **Breastfeeding as Rehabilitation**

When Charles Steinberg asserted that custody could rehabilitate Debra Bailey he drew on—and situated himself within—a cultural debate that dates back to colonial America and strikes at the heart of a discourse that aligns motherhood with citizenship.<sup>15</sup> The manner in which women feed their infants has been a site of public concern and commentary for centuries. In the late seventeenth century, Puritan ministers in the United States argued that mothers who did not nurse their children were criminals.<sup>16</sup> Historian Linda Blum describes this period concisely, writing that, "maternal breastfeeding...became almost an emblem of new democratic ideals."<sup>17</sup> In a time of high infant mortality and growing concern for the 'health' of the burgeoning nation, much of this criticism was launched at white mothers who employed immigrant and African-American slaves as wetnurses.<sup>18</sup> From the start, then, breastfeeding became the theme around which notions of American citizenship were promoted, raced, and classed.

Emphasis on breastfeeding waned for a brief period in the mid-nineteenth century after Louis Pasteur's discoveries made newly invented infant formulas safer.<sup>19</sup> Bottle-feeding fell out of favor again, however, when the United States' turn-of-the-century bid for international power combined with mass immigration to motivate nationalist and often vaguely eugenicist calls for women to achieve a "higher" form of citizenship by nursing the next generation.<sup>20</sup> Maternalist social reformers of the 1920's maintained this pro-breastfeeding discourse, joining an emerging field of child psychologists to argue that nursing creates a bond between mother and child.<sup>21</sup> Post-WWII nationalism and enthusiasm for the nuclear family strengthened the maternalist agenda, which persisted and deepened amidst the formula scandals and feminist politics of the 1970's.<sup>22,23</sup>

The politics of breastfeeding thus made for an odd alliance between religion-tinted maternalist values, anti-capitalist second wave feminism, and the medicalized discourse of child psychology. Linda Blum attributes this capacity for cross-political convergence to the way that debates about breastfeeding span the public-private divide. As she explains, "these conversations...are in part about the obligation of the maternal to the larger social body...in the Western democracies breasts...symbolize the health of the body politic."<sup>24</sup> Here, in analysis which proves telling when reading the rhetoric of *Bailey v. Lombard*, breastfeeding captures—and thus comes to represent—the liminal moment when motherhood merges into citizenship.

Just as it illustrates the way that the mother-as-citizen discourse takes form, an historical perspective on breastfeeding can also reveal the complexities that this debate obscures. Both the politics of wetnursing in the seventeenth and eighteenth centuries and the maternalist reform policies of the 1920's rely on a conceptual connection between motherhood and citizenship that solidifies and sidesteps hierarchical divisions of race and class. Historian Jules Law points to a similar trend in the relationship between the breastfeeding discourse and nuclear familialism, explaining that maternalist breastfeeding advocates in 1970's "polemically place[d] a particular domestic arrangement—the nuclear family—at the heart of human sociality, and infant

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feeding at the heart of the nuclear family. In short,” Law concludes, “infant feeding becomes a synecdoche for the entire project of social reproduction.”<sup>25</sup>

Law thus suggests that the breastfeeding discourse of the 1970’s carried with it implicit (and implicitly heteronormative) judgments about the value of nuclear familial life. When Debra Bailey came to court, then, breastfeeding served as the hinge connecting the values of the state to a heteronormative model of nuclear familialism. In short, to breastfeed was to mother well, to mother well was to live in a nuclear unit, and to live in a nuclear unit was to be a good citizen. The nuclear familialism underlying the politics of breastfeeding in the 1970’s thus connected practices of motherhood to norms of citizenship. To return to Debra Bailey’s counsel’s diction, the breastfeeding discourse was what made it possible to deploy motherhood to measure how “suitable to society” one’s “lifestyle” was.<sup>26,27</sup>

Given its role as the thematic link between mothering and norms of social suitability, it is not surprising that breastfeeding became the model of choice for the maternalist program of social change. In a speech at the 1964 national convention of the pro-breastfeeding group La Leche League, Herbert Ratner, a physician affiliated with the League, argued that, “motherhood is an opportunity for growth. Three children nurture motherhood more than one. Each motherhood experience enriches.”<sup>28</sup> Situating this picture of motherhood within La Leche League doctrine, he then went on to call for “good mothering through breastfeeding.”<sup>29</sup> Here, Ratner makes explicit the belief upon which Charles Steinberg’s strategy to ensure Debra Bailey’s custody of Tamara depends: the experience of motherhood enriches the mother, and breastfeeding has the potential to bring about this experience. That is, breastfeeding has *rehabilitative* potential.

This rehabilitative picture of breastfeeding enables an analogy between social conceptions of motherhood and incarceration as a response to crime. Five years prior to *Bailey v. Lombard*, the United States Supreme Court identified rehabilitation as one of the three central objectives of incarceration.<sup>30</sup> Legal scholar Mary Deck explains the rationale behind this ruling, writing that, “rehabilitation theoretically advances society’s interests by reforming a criminal into a valuable citizen.”<sup>31</sup> When Debra Bailey stood before Judge Myron Tillman in September of 1979, then, the state had a dual interest in her both as a mother and as an inmate who might be reformed toward good citizenship.

Crime and breastfeeding thus meet in the law around the notion of rehabilitation, which now appears critically and inextricably engaged with the gendered history from which it springs. Perhaps because both motherhood and crime are concepts which bridge the gap between selfhood and citizenship, these two topics come together at the moment when we ask what it means to be deviant, and what it might mean to change. This is often a legal moment, for the courtroom is a space where ideas of rehabilitation take on practical relevance. The law thus seems to facilitate the interaction—and hence delimit the boundaries—of discourses on motherhood, citizenship, and crime.

### The Rhetoric of the Ruling

With the histories of breastfeeding, custody standards, and prison-nursery reform in mind, we are now in a position to understand—and critically assess—both Charles Steinberg’s argument and Judge Tillman’s response in *Bailey v. Lombard*. We can now

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read Steinberg's claim that nursing Tamara would rehabilitate Bailey as an extension of the historical alliance of breastfeeding, citizenship, and the maternalist notion that motherhood is an opportunity for personal growth. In a time when the custody rights of inmate mothers were being contested across the country and the tender years presumption was waning in influence, Steinberg turned to Bailey's role as a "breast-feeding mother" in the hope that a narrative aligning motherhood with citizenship could secure Debra's future with her daughter.

Given the way in which this narrative is marked, from its inception, by inequities of race and class and presumptions about the merits of nuclear familialism, we can now see that Steinberg's strategy assumes a discursive picture of motherhood that had consistently silenced women like Debra Bailey. Steinberg's argument not only conceded the relevance of Debra's deviant criminal record, but also emphasized her failure to conform to a white, middle-class, nuclear picture of good mothering practices. Even from her side of the courtroom, then, Debra Bailey's own experience of motherhood was subsumed in a larger political rhetoric that erased the way that race, class, and a reliance on communal extra-nuclear support networks may have structured her life.<sup>32</sup>

Myron Tillman was not swayed by Steinberg's strategy. In the end, Judge Tillman denied Debra Bailey custody of Tamara, instructing the Department of Social Services to find a "warm, nurturing foster mother and family" to raise the newborn infant.<sup>33</sup> He cited several bases for this decision, including the possibility that Debra would be extradited to Florida for the violation of her probation, his skepticism about the motives that Debra chose to breast-feed, and his belief that Steinberg had misinterpreted the best interest standard.<sup>34</sup> Each of these explanations deserves a second glance.

Debra's pending extradition situated this case in the context of Florida's struggle with the questions of inmate custody. As we saw earlier, Florida changed its policy on the custody rights of incarcerated mothers no fewer than three times over the course of the five years between 1975 and 1981.<sup>35</sup> Each of these shifts was increasingly hostile to mothers' custody rights, and Florida closed in nurseries for good in the last legislation in 1981.<sup>36</sup> Tillman's decision about Tamara's custody was thus made with Florida—which had expressed a definite intention not to accept infant Tamara—in mind.

Tillman also took Debra's decision to breast-feed Tamara into consideration. While he noted the "physical and psychological benefits of a breast fed infant," Judge Tillman held that Debra's "motive for breastfeeding this infant [was], at best, questionable" because she had not breast-fed any of her first four children.<sup>37</sup> Ironically, he thus adopted and even extended the depth of Steinberg's use of breastfeeding as a measure of good motherhood, for in doubting Debra's motives Tillman situated the moral validity of nursing as a question of the mother's *intent*. He thus shifted the legal emphasis on breastfeeding from the judgment of an action performed to a judgment of the mother's mental state.

Here, nursing is not conceived as a problem of women's bodies, but as a marker of their minds. Tillman's interpretation of Debra's decision to breastfeed can thus be read as part of a larger effacement of women's bodies in the law. Moreover, this erasure of the body makes possible Tillman's judgment of Debra's motherhood, for if breastfeeding were a question of action rather than intent there would be no room to doubt Debra Bailey's behavior. Myron Tillman's adoption of Steinberg's breastfeeding narrative is thus necessary to get his judicial discretion off the ground.

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This intentionalist interpretation of breastfeeding goes hand in hand with the third basis for Tillman's decision, his adherence to the best interest of the child standard. This is the point at which Tillman and Steinberg diverge, for Tillman holds that Steinberg fundamentally misunderstands the focus of this guideline. Judge Tillman explains:

While this argument [about the rehabilitative potential of breastfeeding] does not fall on deaf ears, the Court is aware that the mother's welfare is not the purpose for which this Legislation was passed, nor is it the standard laid down by the Legislature. The statutory standard is the welfare or best interests of the child, Tamara.<sup>38</sup>

Here, Tillman draws a distinction between Tamara's interests and her mother's, pitting the infant's future against her mother's past. Far from an obvious interpretation of the best interest standard, the capacity to conceive of such a division of interest between mother and child is indebted to an increasingly fetalistic, increasingly child-centric post-*Roe v. Wade* rhetoric.<sup>39</sup> One year before Ronald Reagan would win the Republican presidential nomination, magnifying this rhetoric on a national scale, Tillman's emphasis on defining Tamara *in opposition to Debra Bailey* was both product and marker of a shift toward babies and away from their mother's rights.

Though he ruled against Charles Steinberg, Judge Myron Tillman then adopted a remarkably consistent rhetoric to the one presented in the Petitioner's legal strategy: both men employed breastfeeding as the measure of good motherhood; both drew on the historical link between breastfeeding and citizenship to suggest that nursing had rehabilitative potential<sup>40</sup>; and both subscribed to a theory of mother-child bonding that was influenced by maternalist trends in criminology and child psychology. Tillman was explicit about the last point here, for he relied heavily on the testimony of the Department of Social Services' child psychologist throughout his decision and cited Debra's inability to name her children's favorite colors and toys as evidence of her failure to achieve an appropriately motherly bond.<sup>41</sup>

We are then left wondering why this rhetorical consistency between the Court and the Petitioner did not deliver a decision in favor of Debra Bailey. The answer lies in the bases for Tillman's ruling—and more specifically, in the histories from which these bases derive. When Judge Tillman joined Charles Steinberg in using breastfeeding as the measure of good motherhood, he engaged a discourse that had taken white, middle-class women as its object—and poor, African American women as its abject—since the seventeenth century. If Debra Bailey's breastfeeding of Tamara did not make a proper mother of her, it is perhaps at least in part because she was not the kind of mother for which the history of breastfeeding politics made room.

Judge Tillman also expressed deep concern that Tamara, and not her mother, should be the focus of the case. His use of the best interest standard to this end then doubly abjected Debra, for neither the rhetoric of breastfeeding nor the legal standards adopted by the Court were concerned with the specificity of her experience as the mother in this case. Instead, Tillman offered a picture of good motherhood straight out of the politics of breastfeeding: a good mother would know her children's likes and dislikes, would not be separated from her child for long periods of time, would breastfeed all of her children *for the right reasons*, would function as a "nurturing parent," and, most importantly, would put the needs of her child above her own.<sup>42</sup> At

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the close of the trial, Tillman admonished Debra on this last failure in particular. He ruled:

Somehow, a woman already the mother of four children must be accountable for her actions when she admittedly assaults another in a barroom and commits other crimes against society. All of Debra Bailey's children, in some manner or other, will be affected by her actions. *The misfeasance, malfeasance or nonfeasance of Debra Bailey is magnified in human consequence by the number of her children.* The addition of criminal acts, if nothing more, insures longer incarceration and separation from those for whom she is bound legally and morally to have responsibility. A loving parent takes these risks with due notice of the consequences (my emphasis).<sup>43</sup>

Echoing the logic professed by Dr. Herbert Ratner of La Lache League, Tillman contends here that a mother's crime is increased in degree by the number of children she has. Motherhood, deployed so often and so centrally in this case, is represented here as a moral magnifying glass for the mother's actions. It is then both the measure and multiplier of a woman's goodness or badness, a standard of judgment which inevitably makes that judgment more harsh.

As a legal standard, motherhood thus has the odd effect of both ignoring the context of Debra Bailey's experiences and emphasizing her responsibility. This is perhaps the most jarring—and certainly the most subtle—aspect of *Bailey v. Lombard*; though Tillman insists that we are to think about Tamara, he spends all of his time thinking about, and judging, Debra Bailey.

### **Conclusion**

On September 25, 1975, Judge Myron Tillman denied Debra Bailey's petition for custody. After the ruling, her one month-old daughter Tamara was removed from Monroe County Jail and sent into foster care. Debra returned into custody of the County, and disappeared from public record.<sup>44</sup>

Bailey's interaction with the law offers a lesson in the complicated rhetoric of motherhood. Deployed as a standard of moral judgment, breastfeeding is a cultural practice which motivates the ruling in this case. The use of this cultural measure links this case to its historical antecedent, a discourse on infant feeding created and dominated by white, middle-class, nuclear family values. The central thematic of *Bailey v. Lombard* thus bears witness to its own fractures, for it fails to encompass Debra Bailey's ethically complex, deeply intersectional experience as a mother in the world.<sup>45</sup> The Court's a-contextual adoption of this thematic situates this case outside of history. And yet, an analysis of the rhetoric and the time period of Debra Bailey's custody claim reveals its roots in a critical moment in prison reform, custody standards, and cultural conceptions of good motherhood.

### **Endnotes**

1. Few records of Bailey's life exist outside of the shadow of the law. This and other Department of Social Services' statements are cited in *Bailey v. Lombard*.

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2. A flurry of legislation and litigation makes clear that the 1970's were a period of unusual activity in the system that shaped the lives of incarcerated mothers: in 1973, New York's Tioga County Supreme Court ruled in *Apgar v. Beauter* that a mother could retain custody of her infant while awaiting trial for murder; in 1976, Virginia discontinued its policy allowing inmates to retain custody of their children until age two; and between 1975 and 1981 Florida repealed, reinstated, and again repealed inmates' rights to keep their children in prison until age one and a half. (See Pojman, Leda. 2001-2002. Cuffed Love: Do Prison Babies Ever Smile? *Buffalo Women's Law Journal*. 10 (46): 1, 5 and *Apgar v. Beauter*. 75 Misc. 2d 439.)

3. Prior to this period, prison custody policies had remained relatively stable, with the same thirteen prison nurseries open across the country since the 1950's. By the end of the decade, however, only one of these thirteen prison nurseries remained. See Pojman, Leda. 2001-2002. Cuffed Love: Do Prison Babies Ever Smile? *Buffalo Women's Law Journal*. 10 (46): 5)

4. *Ibid*, 7

5. *Ibid*, 7, 13.

6. Wicker, Tom. *A Time to Die*. New York: Quadrangle/New York Times Book Company, 1975.

7. Roth, Allan. 1976-1977. The Tender Years Presumption in Child Custody Disputes. *Journal of Family Law* 15: 432-3. I do not mean to suggest here that the best interest of the child standard is immune to gendered and biological assumptions and beliefs; rather, I mean only to note the shift away from an explicitly maternal presumption.

8. *Bailey v. Lombard*. 101 Misc. 2<sup>nd</sup> 56.

9. *Ibid*.

10. *Ibid*.

11. *Ibid*.

12. *Ibid*.

13. *Ibid*.

14. *Ibid*.

15. Blum, Linda. 1999. *At the Breast*. Boston: Beacon Press, 21. It is worth noting that debates about breastfeeding date back to before the late seventeenth century outside of the United States. See, for instance, Salmon, Marylynn. 1997. The Cultrual Significance of Breastfeeding and Infant Care in Early Modern England and America. In *Mothers and Motherhood: Readings in American History*. ed. Rima Apple and Janet Golden. 5-31. Columbus: Ohio State University Press.

16. *Ibid*.

17. *Ibid*..

18. *Ibid* .

19. *Ibid* 22, and Olson, Isabelle. 1995-1996. Out of the Mouths of Babes: No Mother's Milk for U.S. Children. *Hamline Law Review*. 19: 269-311.



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20. Blum, Linda. 1999. *At the Breast*. Boston: Beacon Press, 22.
21. Ibid. As Blum notes, regulation of infant feeding became a profitable and popular aspect of pediatric medicine during the 1920's; this was also the period when behaviorist child psychologists posited theories on "habit training" and *Parents* magazine was founded.
22. The most notable of these scandals began in 1973, when it was revealed that the Nestlé corporation, the multinational leader of the two-billion dollar formula market, was marketing its product in developing countries where formula was neither safe nor sustainable (See Law, Jules. 2000. The Politics of Breastfeeding: Assessing Risk, Dividing Labor. *Signs*. 25(2): 437. & Blum, Linda. 1999. *At the Breast*. Boston: Beacon Press, 44.)
23. Concerned with the increasing medicalization of childbirth and childrearing, feminists of the 1960's and 1970's sought to contest physician's growing control over women's bodies (See Blum, Linda. 1993. Mothers, Babies, and Breastfeeding in Late Capitalist America: The Shifting Contexts of Feminist Theory. *Feminist Studies*. 19(2): 297.)
24. Marilyn Yalom qtd. in Blum, Linda. 1999. *At the Breast*. Boston: Beacon Press, 2.
25. Law, Jules. 2000. The Politics of Breastfeeding: Assessing Risk, Dividing Labor. *Signs*. 25 (2): 436.
26. *Bailey v. Lombard*. 101 Misc. 2<sup>nd</sup> 56.
27. Sexuality was also obscured by the breastfeeding discourse of the La Leche League, which sought to frame infant feeding along a strict division between motherhood and sexuality. Indeed, the founders of the La Leche League were so concerned with this division that they struggled to find a name that did not use the word 'breast,' as, according to League founder Edwina Froehlich, "you didn't mention 'breast' in print unless you were talking about Jean Harlow." (See Weiner, Lynn. 1994. Reconstructing Motherhood: The La Leche League in Postwar America. *The Journal of American History*. 80 (4): 136o.)
28. Ibid, 1368.
29. Ibid.
30. *Pell v. Procunier*. 417 U.S. 817. The other two objectives identified in this case are deterrence and internal prison security.
31. Deck, Mary. 1987-1988. Incarcerated Mothers and Their Infants: Separation or Legislation. *Boston College Law Review*. 28: 696.
32. It is worth noting here that Debra Bailey lived with her mother and relied upon aunts and uncles to care for her twins. I want to suggest here that Steinberg's nuclear rhetoric leaves no room to consider the legitimacy of such forms of parenting. I do not mean to contend that Bailey's treatment of her children was appropriate, nor to posit any opinion on Debra's performance as a mother. Rather, my intention here is to focus on the way Steinberg never even opens the door to this discussion.
33. *Bailey v. Lombard*. 101 Misc. 2<sup>nd</sup> 56.
34. Ibid.
35. Pojman, Leda. 2001-2002. Cuffed Love: Do Prison Babies Ever Smile? *Buffalo Women's Law Journal*. 10(46):7.

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36. Ibid.

37. *Bailey v. Lombard*. 101 Misc. 2<sup>nd</sup> 56.

38. Ibid.

39. This shift in rhetoric post-*Roe* was the topic of discussion in our seminar on November 17, 2007. I draw on class notes and memory to make this general claim.

40. *Bailey v. Lombard*. 101 Misc. 2<sup>nd</sup> 56. See Judge Tillman's acknowledgement of the merit of Steinberg's claims regarding the rehabilitative potential of motherhood.

41. Ibid.

42. *Bailey v. Lombard*. 101 Misc. 2<sup>nd</sup> 56.

43. Ibid.

44. Numerous attempts to find Debra Bailey were unsuccessful. She, like Tamara, was known in and through the public record for just once brief moment in 1979.

45. By ethically complex, I want to suggest that despite my analysis of the rhetoric in the case, Debra Bailey's actions as a mother do raise serious questions about her fitness as a parent. By intersectional, I mean raced, classed, and gendered. My intention here is to suggest that Debra Bailey's story is more complicated than the breastfeeding discourse will allow. This point is made stronger (that is, more complicated) by what looks like a pattern of substance abuse in Bailey's case—months-long disappearances, crimes to attain money, and intoxicated appearances at court-mandated substance-abuse treatment. While this is an interesting and important point, there is no hard evidence of this pattern; I have thus chosen to omit it from the main narrative in this paper.

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## Collision: Old Thoughts and New Realities

*Ashley Baker*

*"We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with inherent and inalienable rights; that among these, are life, liberty, and the pursuit of happiness." --Declaration of Independence as originally written by Thomas Jefferson, 1776. ME 1:29, Papers 1:315*

### Abstract

This paper explores the core elements of the "right to life." The rights afforded to a living being need to be re-evaluated in light of new medical technologies that redefine "life." For instance, the inalienability of the right to life was once something of a given, whereas today the reality that machines can sustain life indefinitely challenge us to reconsider whether or not that right is alienable, forfeitable, absolute, or discretionary. The intricacies of establishing a general consensus of a new understanding of this right are presented through a review of the heart-wrenching story of Terri Schiavo. Her case epitomizes this struggle and demonstrates the necessity of addressing these puzzling matters.

New realities challenge old theories. The right to life, granted to all U.S. citizens through our society and law, is facing uncertainties in the wake of new technologies. Our new realities alter the very conceptions of rights and life as they were initially derived and upheld for hundreds of years. Arguably, what once defined life is no longer a good measure of living. Until rather recently one was considered to be 'alive' if he or she had a pulse and was breathing (McCloskey 1975, 116). However, with machines that can now artificially maintain respiration and pulse indefinitely, life ought to be classified differently. The United States has approached this dilemma and has shifted its definition of death to now be the absence of brain activity. (Dresser 2004, 8)

Apparently though, many, both citizens and state decision-makers, still maintain the old classification of death. For instance, those who adhere to the principles of the Roman Catholic Church will insist that we humans, including those of the medical profession, have a responsibility to keep all humans alive, using whatever means possible, as life is the gift of G-d and ought to be protected by all means. Aristotle and his disciples held these same beliefs. Those who value life on merits other than longevity find this absolute protection of life to be insulting toward their own values.

Those lacking accessibility to their autonomy such as unborn fetuses, people born with brain damage who will never mature past the mental age of an infant, and those who have unexpectedly suffered a trauma which has left them incapable of communicating or acting independently are appointed a proxy or a "durable power of attorney," often a family member, who is responsible for making the decisions for that being. (Ellman 1990, 47) That guardian, however, is not granted the same rights as the individual is granted because the guardian is merely representing that person, not taking their autonomy. This distinction between the individual and the proxy, as holding different rights, serves to protect the initial holder of the right. (Ellman 1990, 47)

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Intimate involvement of the family in making life and death decisions may be sodden in conflicts of interest. Some have turned to an unbiased third party, the court of law, to decide on familial matters of life and death. The state's role is generally to protect the lives of its citizens, particularly those who cannot protect themselves. And yet, the court often defers back to the wishes of the proxy which are not always in the best interest of the one whose life is at stake. Furthermore, a court mandate on one's life challenges the accepted parameters of state involvement in life-or-death matters and provides the potential to make culturally insensitive decisions. (Ellman 1990, 50)

Patterns of thoughts and feelings regarding life pro-longing treatment have been traced in ethnic studies. These studies have found that there are clear connections between ethnicity and life pro-longing option preferences. These differing viewpoints, particularly in multi-cultural decision-making as in between physician and patient or between patient and judge, may make life-or-death decisions all the more difficult to make and legislate. (Blackhall, Frank et al 1999, 1779)

Though these differences in viewpoints are undeniable, all must face the same questions when making their decision on the use of life-prolonging technologies: Will the mechanism actually prolong "life"? And, what rights are afforded to one with life? The blurry lines between life and death, referred to by bioethicist, Sharon Kaufman, as the "zone of indistinction," produced by life-sustaining technologies, make these prerequisite determinations a matter of debate, in a place where debate was once not an option. (Kaufman 2005, 32) This new dilemma of reconciling old perceptions of death with new technology makes the difficult decision of choosing between life and death even harder. To access the core of this current and growing clash between old theories and new realities of rights and life, those terms must first be defined—a daunting task which will be addressed humbly.

### **Rights**

The right to life is somewhat like a package deal. It comes with a number of more specific rights, both negatively and positively formatted. The most apparent is one's right for his life not to be taken by another, including the state. This right is apprehended in certain legally sanctioned circumstances such as when one takes another's life in defense of his own, under the rules of war, or when exercising capital punishment. (Wellman 1995, 247)

The right to life also affords individuals with the right that his life not be endangered by others. (Wellman 1995, 247) It is essential that society create a system which builds a certain amount of respect and trust among its members so that our vulnerabilities are not taken advantage of and so life and society can operate smoothly. Our society and laws have had to constantly adapt to the growth and innovation of technology while still maintaining the rights and liberties of its citizens. We see this pattern of ideological struggle and adaptation occurring in various domains from driving regulations, to internet regulations to medical technology regulations.

Another right included in the right to life package is the right to be rescued from the danger of death, such that all who possess the right to life are also responsible to help others whose lives are threatened to the best of their ability without sacrificing excessively. (Wellman 1995, 249) This responsibility is called to question when we consider whether that duty ought to be upheld when the one in danger of death does not want to be saved, such as a suffering patient refusing medical treatment.

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Today's legal system requires that most medical performances be consented to by the patient. Because all treatment entails a level of uncertainty which has associated potential harms from side effects or unforeseeable complications, a physician cannot rightfully treat a patient without consent and the acknowledgment of the present risks. Medical treatment without consent is an infringement on one's right to privacy because of its intrusive nature. (Wellman 1995, 260)

A medical treatment that is not consented to by the patient can be received as an act of hostility. (Wellman 1995, 260) Does the patient then has the right to launch a retaliation of harm at the doctor in response to the violation? Has the doctor honored or foregone his duty to his patient in treating him without his consent? The package deal allows one to defend his life, against a wrongful attacker, with all the force needed to do so. What defines a wrongful attacker and what constitutes life defense? Is saving one's life against that individual's will a violation of her autonomy? The answers to these questions all depend upon personal understandings of rights and life.

### **Qualitative Variations on the Understandings of Rights**

John Locke considered the preservation of life, by all available means of action and resources, to be a duty, rather than a right. According to Locke, one must preserve his own life regardless of whether or not he would elect to do so. The right to life then is considered an *absolute right* by those in agreement with Locke. (Locke 1690) An absolute right is granted without any exceptions or limitations whatsoever. The concept of absolutism is sharply debated, in general, and certainly pertains to the domain of civil rights.

Some philosophers argue that the right to life is the only absolute right. However, this is called into question when considering self-defense, capital punishment and legitimate war. Anyone who can grant exceptions for those categories does not actually believe in the absolutism of the right to life. (Feinberg 1978, 98) If the right to life were absolute it would imply that no one could threaten another's life under any circumstances regardless of motive or intent. (Feinberg 1978, 97) This is also to say that the right to life is mandatory rather than discretionary.

A discretionary right gives the possessor the ability to exercise his right or not to exercise his right so long as it doesn't interfere with the rights of others. Conversely, a mandatory right allows for no discretion. The possessor may only exercise the right in one way...by using it. The right to life then can only be exercised to protect life. A mandatory right, therefore, is not an option, possibly not even a right, but rather a duty, as Locke professed life preservation to be hundreds of year ago. (Feinberg 1978, 105)

If the right to life is mandatory or absolute, it cannot be forfeited nor waived as it can be if the right is discretionary. However, if the right to life is considered to be discretionary, as we have previously established it is due to the limitations posed by self-defense and legitimate war, does that mean the right to life is alienable?

In accordance with Webster's definitions, a distinction exists between alienating and forfeiting a right. Alienating a right is voluntarily giving it away whereas forfeiting a right is losing it due to one's fault or error. Rights are seen to be forfeited immediately and naturally when the conditions of the right are debased. For instance, one who intends to commit a murder instantly loses his rights to life, in that his life can be taken



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in another's self-defense, when he puts the other's life in danger. A forfeitable right is, by definition, not absolute in that it can be suspended or retracted due to crime or other violations of the proscribed conditions. (Feinberg 1978, 111)

A non-forfeitable right cannot be lost by one's own fault. An inalienable right is one which cannot be voluntarily given away even if one wishes to do so. (Feinberg 1978, 112) Many analysts think that the founding fathers had intended the term "inalienable rights" to be construed as rights which the state could not revoke. (Feinberg 1978, 113) The Founding Fathers could not have foreseen the predicament life-sustaining technologies would impose on the citizens and their families. Their age-old guidance may be limited in the face of new realities as life, which once was undeniably intrinsic, may not definitely be so any longer.

To waive one's right is not the same as alienating it. (Wellman 1995, 263) For example, many states allow healthy, capable people to appoint a durable power of attorney regarding their health care. (Wellman 1995, 266) But if the right to life is truly inalienable, how then can one give the power of that right to another? Does that defy inalienability? The debate regarding euthanasia and suicide is often based in a disagreement over the inalienability of the right not to be killed or allowed to die. The role of the durable power of attorney is also uncertainly defined as they are not in full possession of the patient's right to life if it is indeed inalienable. (Feinberg 1978, 94)

Some theorists suggests that the right to life package includes a dichotomy in its implications. On the one hand, inalienability of one's right suggests that only he can decide on his life-and-death matters. On the other, a person is supposed to do everything she can to prevent the endangerment of another's life. In the case of an ailing patient, a doctor is expected to do all she can to save her ailing patient. By withholding treatment the doctor endangers her patient's life. But, the right to life and therefore to do what he wants with his body belongs to the patient, not the doctor. How can this dichotomy be resolved without infringing on the right to life as it has been granted in the described package?

One approach to this dilemma offers the thought that just as the right to life obliges others to not kill, the right to die obliges others not to prevent one from choosing to die. The duty of others regarding one's rights to live and die are that they not interfere with one's wishes, whatever they may be. (Feinberg 1978, 120-121) Electing a durable power of attorney is essentially delegating one's decisions to be made by another. To deny the right to appoint a durable power of attorney is also to deny the right one has to be the master of his own life. By delegating or waiving one's right, he is not alienating the right, merely extending it to a certain defined person. (Wellman 1995, 246)

Though one can waive the right to not be endangered by another, that right is only waived for the legally delegated person. (Wellman 1995, 267) Waiving one's discretionary right is to exercise their power to release others from correlative duties. In the case of waiving one's right to life, one pardons another from protecting his life against all endangerment to his live being. (Feinberg 1978, 115) By waiving a right, the possessor continues to hold the right but voluntarily limits it. Waiving a right is provisional and can be altered and/or nullified at any point by the initial possessor. (Feinberg 1978, 118) And so, it is concluded that one's right to life can be waived but not alienated. (Wellman 1995, 269)

The majority of the founding fathers supposedly believed and meant to convey that the right to life was and is discretionary: to be exercised or not exercised at

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the possessor's will. The right to be one's own master is at the core of the right to life and the right to die which are seen to be two sides of one coin. It is this fundamental right, the right to be one's own master, that the founding fathers are thought to have granted to the citizens of the United States. (Feinberg 1978, 93)

## **Life**

Webster defines life to be, "the condition that distinguishes animals and plants from inorganic matter, including the capacity for growth and *functional activity*." (Emphasis added) The breakdown of these two clauses is essential in order to address the various schools of thought regarding life. Life, as distinguished in its differentiation from inorganic or inanimate matter is relatively simple to approach. Any organic matter whose existence can be terminated is considered to be alive. Does this then afford all living matter the right to life?

Some argue that sentience is the primary quality which determines whether or not one has the right to life. However, a closer look discloses that, for most, sentience is not enough of a criteria to be given rights. Sentience must be paired with rationality to be a true contender for rights possession. The right to life is intrinsically linked to individual liberty, such that one's "life and development are his to determine." (McCloskey 1975, 414)

These affirmations posit that the right to life is possessed by autonomous beings. The potentiality of autonomy, such as in infants or incapacitated adults, are not necessarily grounds enough for rights to be granted (McCloskey 1975, 414); this is the subject of unabated disagreement in which contentions usually rest in religious or philosophical subscriptions. Some believe no living beings truly have autonomy and that we live only by the will of G-d.

David Hume, using similar reasoning, countered "Nothing happens...without [G-d's] consent and co-operation...then neither does my death, however voluntary, happen without [G-d's] consent." He explained that if we are not to fiddle with G-d's will then "it would be equally criminal to act for the preservation of life as for its destruction." (Hume, ed. Miller 1985, 583)

## **Thoughts in Practice: Case Study of Terri Schiavo**

The case of Theresa "Terri" Schiavo encapsulates the ongoing debate of the meaning of the right to life and epitomizes the clash between old theories on the matter and new technologies, both in the personal and state legislative realms. Terri was 26 years old when she had a cardiac arrest on February 25<sup>th</sup> 1990. When the paramedics arrived they were able to resuscitate Terri but the lack of oxygen to her brain during the time of her arrest led to severe brain damage. Though the cause of the cardiac arrest is uncertain, it is thought to have been the result of bodily damage incurred over many years of eating disorders. In 1991, Terri's primary physician, Dr. Victor Gambone pronounced that Terri was in an irreversible persistent vegetative state (PVS). (Gostin 2005, 2404)

Although she was diagnosed with PVS by a number of doctors, Terri received neurological testing and occupational and speech therapy for three years under the support of her husband, Michael Schiavo. In 1998, after Terri had been declared to be in PVS for 8 years, Michael legally petitioned for Terri's feeding tube to be re-

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moved, which would effectively end her life. (Gostin 2005, 2404) The judge ruled that Terri's tube not be removed due to a lack of evidence of her wishes and the unclear motives of Mr. Schiavo's request of removal. (Gostin 2005, 2404)

Terri's case was brought to court again in 2001. The Florida Second District Court's Judge Greer ruled that Terri would have elected the feeding tube to be removed based on the testimonies of Michael, Michael's brother and his sister-in-law stating that Terri said she "wouldn't want to live like that," after they once watched a movie together in which one of the characters was being preserved on life-support. Her family, the Schindlers, and her best friend from childhood testified that Terri would have wanted to remain on life support because of her Roman Catholic upbringing and beliefs.

This calls to question: if we are to follow G-d's will, wouldn't maintaining life artificially be against His will? The Church would say no. The Pope announced, on Terri's behalf, that "the administration of food and water, even when provided by artificial means, *always* represents a *natural means* of preserving life, not a *medical act*." Supporters of this reasoning claimed that if food and water were to be considered 'life support,' then all humans are on 'life support.' (Hyde & McSpirtt 2007, 163) This simplistic retort fails to acknowledge the mechanics in which most humans sustain themselves which differ greatly from one attached to a feeding tube for nourishment.

The counter-argument holds that a feeding tube is a medical technology that artificially sustains life for he who cannot ingest food nor water and would suffer life-threatening injury if they were able to attempt to do so. The argument that artificial means of nourishment is different than any other life sustaining technology such as artificial respiration is difficult to win when all have the same final outcome. When discontinuing the use of the technology the patient will die. (Gostin 2005, 2405)

Removal of life prolonging mechanisms is not considered to be the true cause of death; the true cause is the underlying condition, which disables the human from nourishing herself, is the true cause. Certainly no one denies that the medical technology administers natural substances, but the means themselves are not natural. (Hyde & McSpirtt 2007, 163)

The court ruled in favor of Mr. Schiavo. On April 24th 2001, Terri's feeding tube was removed. (Gostin 2005, 2404) On April 26<sup>th</sup> 2001, the tube was reinserted due to the Schindlers' appeal. Additional testing was required by the court. Five doctors were assigned to assess Terri's case. The two Schiavo-chosen doctors and the Court-chosen doctor reported that Terri was indeed in a PVS that would not improve. (Dresser 2004, 8) Furthermore, the report showed that Terri's brain was 80% non-functional based on CAT scans and EEG scans which showed no measurable brain activity.

The two Schindler-chosen doctors reported that Terri's case was less serious than that, claiming that she was merely in a state of "minimal consciousness." To further substantiate their case, the Schindlers prepared four and a half minute video clips for the Court that were later released to the public showing Terri's cognition. These video clips were chosen from four and a half hours of footage. The full four and a half hour footage was neither submitted to the Court as evidence nor was it released to the public. (Hyde & McSpirtt 2007, 165)

After reviewing the evidence and reports, Judge Greer, again ordered the removal of the feeding tube. The majority opinion of the United States Court of Ap-

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peals for the Eleventh Circuit employed a *stare decisis* approach of following the law most literally. Their statement reads:

“...In the end, and no matter how much we wish Mrs. Schiavo had never suffered such a horrible accident, we are a nation of laws, and if we are to continue to be so, the pre-existing and well-established federal law governing injunctions...must be applied to her case. While the position of our dissenting colleagues has emotional appeal, we as judges must decide this case on the law.” (Hyde & McSpirtt 2007, 171)

With that, Terri’s feeding tube was removed once and for all. She died on March 31, 2005, more than 15 years after she suffered the cardiac arrest. (Gostin 2005, 2404)

### **An Analytical Review of Terri’s Case and Its Implications**

The moral core of Schiavo’s case is regarding the value of her life. Her husband thought that life in her state was not of value to her whereas her parents believed that she was still benefiting from life even in that condition. (Dresser 2004, 9) Advocates for the “culture of life” and countering advocates for “the right to die” brought this case into the limelight and divided the country in its morality and beliefs of what constitutes a life worth living. The debate is grounded in the previously disclosed discourse on defining rights and life. Undeniably Terri was a living organism however her capacity to function was a matter of uncertainty. Both sides of this debate intended to give Terri what they believe she rightfully deserved; some believed her life ought to be preserved at all cost while others believed she had the right to die with dignity.

Anna Quindlen commented on the Schiavo case very eloquently. She said, “There are those of us who believe that under certain conditions the cruelest thing you can do to people you love is to force them to live. There are those of us who define living not by whether the heart beats and the lungs lift but whether the spirit is there, whether the music box plays.” Hyde and McSpirtt concur, “Indeed, a music box that does not play music is just a box.”

A movement in support of the right to die with dignity was catapulted in light of Schiavo’s case. These theorists shun the prospect of “a living death” in which the individual is sustained as a living organism but not naturally. They characterized the pro-longing of life to actually be the prolonging of death. A living death can be very straining emotionally and financially on the family members. (Hyde & McSpirtt 2007, 166) Life pro-longing treatment is expensive, often prohibitively so. Public financial funds are often needed to sustain such treatment. Some states allow health care institutions to deny patients futile treatment due to costs, even if stymied treatment is against the family’s or individual’s wishes. (Gostin 2005, 2406)

Terri lived on for 15 years after experiencing a cardiac arrest, from which she was resuscitated via technological means, which caused serious brain damage due to the lack of oxygen to her brain. She lived only due to an artificial life sustainer. It kept her nourished as she was given various forms of therapy, and it kept her alive for the following 12 years while her husband and parents fought over what they thought would be best for her. During that time, Terri was breathing and her pulse was beating without any form of aid except for the feeding tube which nourished her and enabled those autonomic functions to work. Testing both when she was “living and breathing” and when she had passed on showed that the cognitive part of her brain was almost completely atrophied and non-functional.

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Her incapacity to function as an autonomous being left her right to life in the hands of her assigned proxy, her husband. He saw her right to life to be discretionary, she did not have to live on for the sole sake of living. Her parents, however, disagreed and fought for her absolute right to life. Their beliefs were deeply rooted in the morals and teachings of the Roman Catholic Church which asserts that life is to be maintained at all costs.

The Church's guiding principles are rational in context to our human history. With each passing decade, and now seemingly with each year or even month, new revolutionary technologies are invented and made available for the public to live life more easily and comfortably. When times were harder, the Church had the duty of providing the people with the strength to carry on when life seemed too difficult. The Church gave the people the strength to live and continue their duties in society. An ailing father couldn't rightfully succumb to his sickness or hardships by means of suicide when he had eight children relying on him to bake the bread they would eat. The Church played and still does play an important role in providing a sense of security for people. And while its purpose is crucial for the comfort and happiness of so many, it offers outdated principles in the face of new technologies, calling for lives that would have been taken by G-d to be sustained.

Mr. Schiavo and the Schindlers could not reconcile their differences and brought the matter to the judicial system. Justice Antonin Scalia, remarked "the federal courts have no business in this field of death and dying." Many would agree and feel uncomfortable and violated if the court were to determine our most painful decisions. But, sadly, at times it is a necessity. In Terri's case, neither side was willing to let go of their beliefs. Though all the technology showed that Terri was in PVS and not going to emerge from it, her parents' belief in G-d and trust in a system of thought sustained their fight. (<http://www.terrisfight.org>)

Schiavo's case is the third major federal case involving life-sustaining treatment without the precise preferences of the patient being known. These cases are likely to become more frequent and more convoluted as life-sustaining technologies continue to advance and become more commonplace. Eventually, life-sustaining technologies may even be able to completely restore people's lives to be as they were previously. How will this impact society? Over-population may result and consequently lead to more deaths due to a lack of resources. This is yet another struggle that lays ahead between technology and the theory of maintaining life.

If a silver lining is to be found regarding the Schiavo case it is that it provided the U.S. public the opportunity to engage in discourse regarding our fundamental rights as humans and U.S. citizens. The publicity of the case triggered the enactment of our democratic rights to question our government's authority and try to define the ways in which we want to be governed in our lives and in our deaths.

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## All Skulls Are Created Equal: Do Hate Crime Laws Violate the First Amendment?

*Constantino Díaz-Durán*

*“If the skulls of all Americans are equally valuable (i.e., if this is a democracy), why not give everyone [the same sentence] for cracking any cranium at all?”*

-John Leo, “The Politics of Hate”<sup>1</sup>

### Abstract

Since the 1980s, state legislatures and the federal government have passed laws concerning "hate" or "bias" crimes. Most hate crime laws do not punish previously legal conduct. Instead, they enhance the penalties on acts that are already deemed criminal. The constitutionality of these laws has been questioned by scholars who believe they violate the First Amendment. Several state courts have grappled with the issues raised by these statutes, and the U.S. Supreme Court has issued two seemingly contradictory rulings on the subject, in the cases of *R.A.V. v. St. Paul* and *Wisconsin v. Mitchell*. In this article, Constantino Díaz-Durán argues that hate crime legislation undermines rights guaranteed by the Constitution by directly targeting people's thoughts, and by having a chilling effect on speech.

### Introduction

Imagine a woman killing her children. One by one, drowning them in the bathtub. Infanticide is a shocking crime, not only because it goes against our most basic conceptions of human nature, but also because the murderer often claims to have done it out of love. We refuse to accept this kind of love, however, and quickly declare a murderous mother to be mentally ill. She may not go to prison, but she cannot escape the psychiatric ward. Either way, she meets justice.

Love is not an excuse for committing a crime. Suppose a priest goes on a shooting spree in his church. Would we expect a judge to show leniency if he claimed to have acted out of love—say, to usher his parishioners into heaven? Would we believe him? What kind of proof would we require in order to reduce his sentence based on this allegedly laudable motive? Which kinds of love would legislatures recognize as legitimately warranting sentence mitigation?

These questions are, of course, almost impossible to answer. Legislatures have no right to tell us what to love or what not to hate. Courts cannot take it upon themselves to determine whether we are sincere or not when we say we do not hate someone. What they can do, and are called to do, is punish all criminal offenders—mindful of the limits decreed by law.

In spite of the difficulties it presents, the government has attempted to punish certain kinds of hatred which it considers particularly heinous. The constitutionality of these laws has been questioned by scholars who believe they violate the First Amendment. Penalty enhancement statutes, they claim, undermine rights guaranteed by the Constitution by directly targeting people's thoughts, and by having a chilling effect on speech.



## **Crime and Prejudice**

Since the 1980s, state legislatures and the federal government have passed laws concerning "hate" or "bias" crimes. Defining these terms poses several problems. According to New York University law professors James Jacobs and Kimberly Potter, "hate crime is not really about hate, but about bias or prejudice... Statutory definitions of hate crime differ somewhat from state to state, but essentially hate crime refers to criminal conduct motivated by prejudice."

"Prejudice" is a broad and complex term. Taken at face value, it has become a sort of dirty word. Calling someone prejudiced is akin to calling them intolerant, bigoted or narrow-minded. Properly understood, however, prejudice seems to be an almost inescapable human trait. Whether they are conscious of it or not, most people possess several kinds of prejudice. Certain prejudices are good, many are considered harmless, and some are seen as wicked. It is, clearly, the latter which are targeted by hate crime statutes. These laws seek to punish criminals more severely when they act with the intention of harming not just their victim, but also the "group" to which the victim is perceived to belong.

This effort has come as a byproduct of the trend towards a political climate where "individuals relate to one another as members of competing groups based upon characteristics like race, gender, religion, and sexual orientation."<sup>3</sup> This trend, known as "identity politics," seeks to exalt the victimization of particular groups, thereby granting them grounds to demand special rights and protections. By enacting hate crime laws, politicians pander to these groups' lobbying efforts and send a message of moral righteousness.

Problems emerge because not everyone agrees on which groups deserve to be singled out for special protection. While most agree that racism and misogyny are deplorable, for example, not everyone is willing to place homophobia in the same category. The most common prejudices prohibited in state statutes are those based on the victim's race, color, religion, and national origin. Thirty-two states add sexual orientation to that list, with the District of Columbia going as far as to include notions as vague as "personal appearance," "family responsibility," and "matriculation."<sup>4</sup>

Most hate crime laws do not punish previously legal conduct. Instead, they enhance the penalties on acts that are already deemed criminal. Statutes vary from state to state, but most follow a similar pattern. The Montana sentence enhancement statute, for example, provides that

a person who has been found guilty of any offense ... that was committed because of the victim's race, creed, religion, color, national origin, or involvement in civil rights or human rights activities ... in addition to the punishment provided for commission of the offense, may be sentenced to a term of imprisonment of not less than two years or more than 10 years.<sup>5</sup>

Other states have adopted laws based on a model statute produced by the Anti Defamation League, which redefines previously criminal conduct as a new crime, or as an aggravated form of an existing crime. These statutes provide for new offenses of "intimidation" and "institutional vandalism."<sup>6</sup> But whether a state chooses to implement a sentence-enhancement statute, or to create a new substantive offense, the result is the same. In either case, the criminal offender will receive a harsher punishment for acting upon his alleged prejudice.

## Hate Speech

The debate over the constitutionality of hate crime laws is closely related to the concept of “hate speech.” There is no widely accepted legal definition of this term, but it could be characterized as speech deemed offensive by a class of persons who share a common identity. The first laws seeking to proscribe this type of speech were aimed at what was called “group libel.”

The United States Supreme Court upheld the constitutionality of group libel laws in 1952, in the case of *Beauharnais v. Illinois*. Joseph Beauharnais, president of the White Circle League of America, had been distributing racist leaflets in the streets of Chicago “in protest against negro aggressions and infiltrations into all white neighborhoods.”<sup>7</sup> The literature went on to state that “if persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite [it], then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will.”<sup>8</sup> Beauharnais was convicted and fined \$200 under an Illinois statute which provided that

It shall be unlawful for any person, firm or corporation to manufacture, sell, or offer for sale, advertise or publish, present or exhibit in any public place in this state any lithograph, moving picture, play, drama or sketch, which publication or exhibition portrays depravity, criminality, unchastity, or lack of virtue of a class of citizens, of any race, color, creed or religion which said publication or exhibition exposes the citizens of any race, color, creed or religion to contempt, derision, or obloquy or which is productive of breach of the peace or riots. . . .<sup>9</sup>

In a 5–4 decision, the Supreme Court found a group libel exception to the First Amendment. Writing for the majority, Justice Felix Frankfurter based this decision on the grounds that “criminal libel has been defined, limited and constitutionally recognized time out of mind,” and “if an utterance directed at an individual may be the object of criminal sanctions, we cannot deny to a State power to punish the same utterance directed at a defined group.”<sup>10</sup>

The controversial ruling in *Beauharnais* was all but abandoned by the Supreme Court, however, and it seems to be Justice Hugo Black’s dissenting opinion which carried the day: “I think the First Amendment, with the Fourteenth, ‘absolutely’ forbids such laws without any ‘ifs’ or ‘buts’ or ‘whereases.’” Jacobs and Porter assert that twelve years later, in *New York Times v. Sullivan*, the court “effectively sapped the *Beauharnais* group libel rationale of its vitality, by requiring that an individual bringing a libel suit prove the libelous statement was directed at the individual, personally, and not simply at a group to which the individual belongs.”<sup>11</sup>

With group libel laws, and other attempts to directly restrict speech, falling out of favor, would-be censors were forced to look for other ways to outlaw bigotry. Drawing a distinction between “speech,” or “thought,” and “conduct motivated by prejudice,” they have sought to circumvent the limitations erected by the First Amendment.

The constitutionality of these laws has been contested in several states. The U.S. Supreme Court has issued two rulings on the subject. In *R.A.V. v. St. Paul*, the court struck down an ordinance that made it illegal to display a symbol which one knows or has reason to know “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender.”<sup>12</sup> In *Wisconsin v. Mitchell*, the court

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upheld a sentence-enhancement statute by distinguishing between laws that punish expression per se, and laws that punish expression that is linked to criminal conduct. These seemingly contradictory opinions came within a year of each other, and have done little to clear the murky waters of hate crime jurisprudence. This is illustrated by the Ohio Supreme Court decisions in the case of *State v. Wyant*, which involved a sentence-enhancement statute similar to Wisconsin's. Following the *R.A.V.* decision, the state court struck down the statute as unconstitutional under the First Amendment. Less than two years later, however, it was forced to reverse that decision, in light of *Mitchell*.

### **R.A.V. v. St Paul and Fighting Words**

In order to understand the U.S. Supreme Court's decision in *R.A.V. v. St. Paul*, it is necessary to review the "fighting words" doctrine. The term was first used in a Supreme Court decision by Justice Frank Murphy in the 1942 case of *Chaplinsky v. New Hampshire*, in which the court affirmed the conviction of a man charged under a statute stating that

No person shall address any offensive, derisive, or annoying word to any other person who is lawfully in any street or any other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.<sup>13</sup>

The Court construed the statute to extend only to words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Further elaborating that "The statute, as construed, does no more than prohibit the face-to-face words plainly likely to cause a breach of the peace by the addressee, words whose speaking constitute a breach of the peace by the speaker."<sup>14</sup> The court has continued to uphold the fighting words doctrine, but its commitment to it appears to be mostly lip-service. Indeed, in *Cohen v. California*, the court went as far as to say that it is often true that "one man's vulgarity is another's lyric." Adding that the "verbal tumult, discord, and even offensive utterance"—which often appear to be the immediate consequence of free expression—are "within established limits, in truth necessary side effects of the broader enduring values which the process of open debate permits us to achieve."<sup>15</sup>

*R.A.V.* deals with the case of a white juvenile who, along with other teenagers, burned a "crudely made cross"<sup>16</sup> on the lawn of a black family's home. This conduct could have been punished under a number of different statutes. However, the city chose to prosecute *R.A.V.* under a St. Paul ordinance providing that

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.<sup>17</sup>

The Minnesota Supreme Court upheld the charges, narrowing the construction of the ordinance to apply only to fighting words in the spirit of *Chaplinsky*. The U.S. Supreme Court reversed the ruling in a unanimous decision. Writing the majority opinion, Justice Antonio Scalia acknowledged the State's right to proscribe fighting words.

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However, he found the statute to be unconstitutional because it prohibited only *certain kinds* of fighting words, based on the government's hostility towards the content expressed by those words. Drawing an analogy between fighting words and "a noisy sound truck," he explains that "both can be used to convey an idea, but neither has, in and of itself, a claim upon the First Amendment. As with the sound truck, however, so also with fighting words: The government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."<sup>18</sup> In other words, while the statute made it a misdemeanor to use fighting words against a person based on their "race, color, creed, religion or gender," it remained legal to use them against someone in connection with, for example, their ethnicity, national origin, or sexual orientation. This singling-out of prejudices deemed offensive by the state is unconstitutional.

### **Criminalization of Motive in *Wisconsin v. Mitchell***

The main objection to the constitutionality of hate crime laws is that "generic criminal laws already punish injurious conduct; so recriminalization or sentence enhancement for the same injurious conduct when motivated by prejudice amounts to extra punishment for values, beliefs, and opinions that the government deems abhorrent."<sup>19</sup> The Wisconsin Supreme Court advanced this view in their decision in the case of Todd Mitchell, a 19 year-old African American convicted of aggravated battery on a white teenage boy because of the victim's race.

A group of African American teenagers had gathered outside an apartment complex in Kenosha, Wis. They were discussing a scene from the movie "Mississippi Burning," in which a black boy is viciously attacked by a white man. A short time later, George Reddick, a fourteen year old white boy, approached the apartment complex. At this point, Mitchell said "You all want to fuck somebody up? There goes a white boy; go get him." Mitchell counted to three and pointed the crowd towards Reddick. They attacked him, knocking him down and beating him into a coma.

A jury found Mitchell guilty of aggravated battery, which carried a maximum sentence of two years. But because the jury also found him guilty of selecting his victim because of his race, the potential maximum sentence was increased to seven years. Mitchell was sentenced by the court to four years in prison. The Wisconsin hate crime penalty enhancer provision goes into effect whenever the defendant "intentionally selects the person against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person."<sup>20</sup>

The Wisconsin Supreme Court ruled, in no uncertain terms, that "The hate crimes statute violates the First Amendment directly by punishing what the legislature has deemed to be offensive thought and violates the First Amendment indirectly by chilling free speech."<sup>21</sup> In the court's opinion, the statute is facially invalid because it "is directed solely at the subjective motivation of the actor—his or her prejudice." And "punishment of one's thought, however repugnant the thought, is unconstitutional." They also found the statute to be unconstitutionally overbroad because it chills speech by allowing the use of the defendant's speech, both current and past, as circumstantial evidence to prove the intentional selection.

Less than a year after the *R.A.V.* decision, it seemed almost certain that the U.S. Supreme Court would affirm the holdings of the Wisconsin court. Instead, a

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unanimous Supreme Court reversed the state court's ruling, arguing that the cases are different because whereas the St. Paul ordinance was expressly directed at expression, the statute in this case is aimed at conduct unprotected by the First Amendment.

Chief Justice Rehnquist, writing for the court, rejected the argument that prejudice-based sentence enhancement statutes unconstitutionally punish a person's thoughts. Sentencing judges, he argues, have traditionally taken motive into account when determining what sentence to give a convicted defendant,

And the fact that the Wisconsin Legislature has decided, as a general matter, that bias-motivated offenses warrant greater maximum penalties across the board does not alter the result here. For the primary responsibility for fixing criminal penalties lies with the legislature.<sup>22</sup>

The court also found no merit in Mitchell's overbreadth claim, stating that "the prospect of a citizen suppressing his bigoted beliefs for fear that evidence of such beliefs will be introduced against him at trial if he commits a more serious offense against person or property... is simply too speculative a hypothesis." Furthermore, the court ruled, the First Amendment does not prohibit the use of speech as evidence of a defendant's motive or intent.

### **Ethnic Intimidation in Ohio (State v. Wyant)**

In the wake of *R.A.V.*, and the Wisconsin Supreme Court's ruling on *Mitchell*, a unanimous Ohio Supreme Court struck down that state's ethnic intimidation statute presenting a compelling case against the constitutionality of laws in which "the enhanced penalty results solely from the actor's reason for acting, or his motive."<sup>23</sup> This case was later reversed, in response to the U.S. Supreme Court's decision on *Mitchell*, but its thorough analysis of the criminalization of motive is well worth looking at.

David Wyant, his wife, and a group of relatives were being loud and obnoxious at their rented campsite at Alum Creek State Park. Their neighbors, Jerry White and Patricia McGowan, complained to park officials, who asked the Wyant party to tone it down. White and McGowan were both black. The Wyants and company were all white. Fifteen or twenty minutes after the park officials left, the Wyants turned their radio back on and Mr. Wyant was heard to say: "We didn't have this problem until those niggers moved in next to us," "I ought to shoot that black motherfucker," and "I ought to kick his black ass."<sup>24</sup> Wyant was indicted and convicted of one count of ethnic intimidation, predicated on aggravated menacing, and sentenced to one and a half years' imprisonment.<sup>25</sup>

The ethnic intimidation statute under which Wyant was convicted provides for enhanced criminal penalties when a person is found guilty of committing certain predicate offenses "by reason of the race, color, religion, or national origin of another person or group of persons." The predicate offenses on which conviction of ethnic intimidation depends are aggravated menacing, criminal damaging or endangering, criminal mischief, and certain types of telephone harassment. "Ethnic intimidation is an offense of the next higher degree than the offense the commission of which is a necessary element of ethnic intimidation."<sup>26</sup>

Writing for the court, Justice Herbert Brown points out that "the predicate offenses to ethnic intimidation are already punishable acts under other statutes. Thus, the enhanced penalty must be for something more than the elements that constitute the predicate offense." In order to trigger a conviction of ethnic intimidation, and the cor-

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respondingly enhanced penalty, then, the actor needs only to have acted “by reason of” the victim’s protected status.

According to Justice Brown, motive is not really an element of the crime. It might be used, procedurally, as evidence of guilt—or in the case of good motives, to plea for leniency. But it is not motive what is punished when judges take into account penalty-enhancing criteria. It is, he believes, other thought-related concepts—such as intent and purpose—what is used as elements of crimes or in order to enhance penalties:

There is a significant difference between *why* a person commits a crime and whether a person has *intentionally done* the acts which are made criminal. Motive is the reasons and beliefs that lead a person to act or refrain from acting. The same crime can be committed for any of a number of different motives. Enhancing a penalty because of motive therefore punishes the person’s thought, rather than the person’s act or criminal intent.<sup>27</sup>

Motive is different from criminal intent in that “intent” refers to the actor’s state of mind at the time of the act. “Intent” is determined, for example, by answering the question “Did A *intend* to kill B when A’s car hit B’s, or was it an accident?” The search for “motive,” on the other hand, presupposes an affirmative answer to that question: “*Why* did A *want* to kill B?”

Motive is also easily distinguished from a “purpose to commit an additional criminal act,” which is what is commonly seen in criminal statutes as the basis to enhance penalties or create a separate, more serious crime:

For example, burglary is a trespass “with a purpose” to commit a theft offense or felony. Purpose in this context is not the same as motive. What is being punished is the act of trespass, plus the additional act of theft, or the intent to commit theft. Upon trespassing, A’s intent is to commit theft, but the motive may be to pay debts, to buy drugs, or to annoy the owner of the property. The object of the purpose is itself a crime. Thus the penalty is not enhanced solely to punish the thought or motive.<sup>28</sup>

This is clearly the case with murder for pecuniary gain, which Chief Justice Rehnquist mentioned in *Mitchell* as an example of a motive-based penalty enhancing circumstance. What is being punished in these cases is not the murderer’s motive. It is his or her intent to commit an additional criminal act, namely theft. Unfortunately, it seems that the Chief Justice was blind to this distinction. Along these lines is another common example of an “aggravating circumstance” which in some states may increase the penalty for murder to death: acting for the purpose of escaping another offense. If a suspect kills his arresting officer in order to avoid going to jail, his sentence may be enhanced, but not because of his motive (preferring life next to his family than behind bars, for example). Rather, it is his intent to resist arrest (itself an offense) what is punished.

Committing murder for hire is another example of an aggravating circumstance. Again, though, what is punished here is not the person’s having a mercenary motive. “Hiring is a transaction. The greater punishment is for the additional act of hiring or being hired to kill. The motive for the crime (such as jealousy, greed or vengeance) is not punished.”<sup>29</sup>

Justice Brown acknowledges the fact that the government has the right to decide that acts against certain individuals are more serious criminal acts than others. For that reason, killing a peace officer or a government official, may carry a harsher penalty than killing an ordinary citizen. Under that light, he argues,

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the legislature could decide that blacks are more valuable than whites, and enhance the punishment when a black is the victim of a criminal act. Such a statute would pass First Amendment analysis because the motive or the thought which precipitated the attack would not be punished. However ... such a statute would not survive analysis under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.<sup>30</sup>

Another common defense of hate crime laws is that they are analogous to federal and state antidiscrimination laws. Says Rehnquist: “motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which we have previously upheld against constitutional challenge.”<sup>31</sup> According to Justice Brown, however, while these laws do prohibit acts committed with a discriminatory motive, they are analytically different from penalty-enhancing hate crime laws. He points out two theories by which a case can be made for employment discrimination laws, the “disparate impact” and the “disparate treatment” analyses. Motive is almost wholly irrelevant under the former because it deals with practices that, while neutral at face value, have a harsher effect on a particular group of people. Discriminatory motive is necessary to prove a case under the latter analysis, but this proof can be inferred from the difference in treatment. In either case, “it is discriminatory treatment that is the object of punishment, not the bigoted attitude per se. ... Bigoted motive by itself is not punished, nor does proof of motive enhance the penalty when a discriminatory act is being punished.”<sup>32</sup>

### **Conclusion**

The U.S. Supreme Court is yet to establish a comprehensive and consistent hate crime jurisprudence. In spite of efforts to reconcile the decision in *Wisconsin v. Mitchell* with that of *R.A.V. v. St. Paul*, the court has failed to convince critics who see serious violations of the First Amendment in statutes such as the one upheld in *Mitchell*.

The court’s main argument that motive has been traditionally used by sentencing judges falls apart once the necessary distinctions between “motive,” “intent,” and “purpose” are made. Motive, properly understood, had not been criminalized prior to *Mitchell*. Freedom of thought is enshrined in our constitution. No matter how offensive or despicable some—or even most—members of society may find certain thoughts, this freedom is one of the premier rights of every individual. In the oft-cited words of Supreme Court Justice Oliver Wendell Holmes, “If there is any principle in the Constitution that more imperatively calls for attachment than any other, it is the principle of free thought—not free thought for those who agree with us but freedom for the thought we hate.”<sup>33</sup>

The use of federal and state antidiscrimination laws as a justification for the constitutionality of hate crime statutes is disingenuous. While both kinds of laws seek to fight against bigotry and intolerance, they are rooted in different traditions and are different in nature. Antidiscrimination laws emerged from the civil rights movement of the 1960s, which sought to eliminate artificial barriers created to oppress a specific racial group. The main goal of this movement was to achieve equality by eliminating unfair privileges denied to the minority. Hate crime laws, on the other hand, have stemmed from the trend towards identity politics which grew strong in the 1980s.

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Contrary to the civil rights movement, identity politics seek to create new privileges and special protections for some chosen social groups.

Hate crime laws do not protect an individual from being targeted for a crime because of his race or sexual orientation. These laws distort justice by introducing a magnified element of vengeance at the moment of sentencing. Politicians use them to send a message of validation to members of certain groups, while ignoring the legal quagmires that these statutes create. In the end, the noble goal of spreading tolerance is undermined by the violence that these laws do to our nation's constitutional framework.

**Endnotes**

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3. Jacobs and Potter, p. 5.
4. Ibid., p. 43. For a full chart, and updated information regarding states which include sexual orientation as one of the protected prejudices, see data compiled by the Anti-Defamation League's Washington Office, at [http://www.adl.org/99hatecrime/state\\_hate\\_crime\\_laws.pdf](http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf)
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20. *Wisconsin v. Mitchell*. 1993. 508 U.S. 476
21. *State v. Mitchell*. 1992. 169 Wis.2d 153, p. 811
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