

*A journal of
legal theory
and practice
“to the end
that human
rights shall
be more
sacred than
property
interests.”*

—Preamble, NLG
Constitution



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Alan W. Clarke

It should go without saying that human sexuality is rife with complexity and mystifying contradictions. It's a puzzle palace from which all sorts of behaviors—routine, bizarre, and sometimes dangerous—can emanate. Yet our criminal laws and procedures regarding sex crimes respond to this swirling welter of incomprehensible impulses with stubborn and self-defeating simplicity. We choose to punish that which we fear to understand, as if learning what motivates the behavior is to show a little too much sympathy and solidarity with “perverts,” toward whom only contempt can be shown. As with suspected terrorists since 9/11, our mercilessness leaves no room for anything else, not even enlightened self-interest.

I can think of no area of the criminal law, except perhaps international terrorism, into which contemporary American society has terrified itself into more ignorance than this. One of the guiding principles of western philosophy, etched in the same Greek language spoken by Socrates and Plato into Apollo's shrine at Delphi, is the maxim “Know Thyself.” When it comes to the darker side of human sexual conduct, we'd rather not. To do so will almost certainly force us to reckon with the fact that many of us aren't the neat and tidy sexual beings we've convinced ourselves we need to be.

For a dangerous minority, certain impulses emanating from this darker side—dark in the twofold sense of being both dangerous and unknown—result in obvious and devastating social harms, especially against children. Such atrocities against the innocent and vulnerable inevitably cause panic and fury among adults charged with protecting them. However understandable these emotions are among those victimized by these crimes, allowing them to form the bases of our law and policy can only be self-defeating. The proper

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NATIONAL LAWYERS GUILD REVIEW, formerly GUILD PRACTITIONER, is published quarterly by the National Lawyers Guild, a non-profit institution, at 132 Nassau Street, # 922, New York NY 10038. ISSN 0017-5390. Periodicals postage paid at New York, NY and at additional mailing offices. Subscription rates are \$75/yr for libraries and institutions; \$25/yr for lawyers; \$10/yr for legal workers/law students; \$5/yr for incarcerated persons; add \$5/yr for overseas; \$6.50/single copy, and should be sent to: 132 Nassau Street, # 922, New York NY 10038. POSTMASTER: Send change of address to: NATIONAL LAWYERS GUILD REVIEW, 132 Nassau Street, # 922, New York NY 10038. Address all editorial correspondence and law-related poems, criticisms, articles and essays to: Editor-in-Chief, NATIONAL LAWYERS GUILD REVIEW, 132 Nassau Street, # 922, New York NY 10038. Unsolicited manuscripts will not be returned unless accompanied by return postage. NATIONAL LAWYERS GUILD REVIEW is indexed/abstracted in Westlaw, PAIS-Public Affairs Information Service, The Left Index, the Alternative Press Index and in A MATTER OF FACT.

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response to these harms is to harness the spirit of inquiry and problem-solving to discern their ultimate causes so as to better prevent them.

The drafting and enforcement of our criminal sexual conduct laws, particularly those targeting crimes against children, are driven by a powerful collective feeling of visceral revulsion. Our shared emotional response to these crimes has created self-defeating policies, unconstitutional laws, and cruel punishments. We aren't reasoning toward justice and prevention. We're raging toward vengeance—and are abandoning basic constitutional values in the process. We suffer from a problem as ancient as it is apparently incurable—how to prioritize enlightenment over prejudice and devise a system capable of fairly judging a small and intensely hated minority.

Only in this instance the problem is especially acute because the rancor toward the minority group is especially virulent. Sex offenders are the safest and easiest people to hate. Politicians, a category that certainly includes judges, never lose by condemning them and never win by coming to their defense. To argue too forcefully even for core legal protections afforded in other types of criminal cases is, in many contexts, to risk ostracism and raise suspicion. For this reason, politicians routinely lapse into self-serving demagogy, often deploying morally charged and unhelpful metaphysical terms like “evil” as substitutes for scientific or clinical concepts that might inform and enlighten. Demonizing sex offenders has become a reliable and effective campaign strategy in judicial elections. To appear “soft” toward a sex offender is to draft a campaign ad for one's next opponent.

2014 was perhaps the best year yet for cynical judicial campaign ads showing how inflexibly punitive incumbent judges have been toward sex offenders. In my own state, Michigan, a television ad ran on behalf of two sitting state Supreme Court justices, Brian Zahra and David Viviano, entirely devoted to convincing viewers that the justices have “thrown the book at child predators” and that they will “keep affirming tough sentences.” Sex crimes represent a tiny fraction of that court's docket, but the ad would have you think that Zahra and Viviano together composed the state's only bulwark against an onslaught of slavering pedophiles.

In “Disgust, Dehumanization, and the Courts' Response to Sex Offender Legislation,” Alexandra Stupple argues that the fears such ads engender and exploit are radically out of proportion to the actual dangers we face. Friends and family members are far more likely to sexually abuse children than strangers are. Stranger child predator cases are actually quite rare, especially when measured against public perception, and recidivism rates are lower for these types of crimes than those for many other violent offenses. The popular image of the lurking child molester is largely a “myth . . . which

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serves to distort perceptions of everyday risks.” This isn’t to say that such attackers don’t exist or that they don’t inflict incalculable pain and anguish when they strike. But stranger sex crimes, including those against children, don’t occur with the kind of epidemic frequency one would expect given the hysterical laws and practices that have been created to combat them. Stoking panic this way helps judges and legislators get elected. Stupple explains the psychological underpinnings that have caused and continue to sustain the moral panic against child sex offenders.

Just because politicians luxuriate in chest-thumping rhetoric against sex offenders doesn’t mean that they don’t take their own message seriously. Stupple argues that the “disgust” legislators and judges feel toward sex offenders has led to their dehumanization in our courts. This dehumanization has in turn resulted in a failure in the courts’ essential function of protecting the individual liberties of criminal defendants. The more despised the accused, the more vital it is to our constitutional scheme that courts protect him or her from any temptations legislators might feel toward circumventing their rights. The failure of the courts in this regard has resulted in the continuation of a host of inhumane and ineffective punishments. These include massive, over-inclusive sex offender registries, which do far more to stigmatize and shame offenders, many of whom pose only a minimal recidivism threat, than protect the public. In many instances, inclusion on the registry is simply an internet-friendly method of public branding, what puritan judges would’ve done to Hester Prynne had laptops been available.

Judges have also imposed and upheld a vast array of behavioral and residency restrictions on released sex offenders. They’re applied broadly and on a massive scale, often in purely punitive ways that make assimilation back into society even more difficult. Perhaps most troubling, both ethically and constitutionally, is the rise of civil commitment laws that redirect inmates who have served their sentences into mental institutions. These laws often function as de facto sentence-extendors. They turn medical professionals into jailers and punish the same individual twice, and the second time indefinitely, for the same offense. Stupple doesn’t deny that there are a certain number of repeat-offending sexual psychopaths from whom society must be protected. Rather, she argues that the response to this threat has been hysterical, disproportionate, and emotional rather than rational and effective. It has inflicted the double harm of exacerbating old problems, such as mass ignorance, fear, and the reinforcement of stereotypes, while creating new ones, including a metastasizing system of widespread overpunishment. Our legislatures and courts have promoted myths, exaggerated bogeymen, and recklessly fanned the flames of thoughtless rage and panic.



In “Bound by the First Amendment and Gagged by Permit Schemes: The Constitutional Requirement for Free Speech on University Campuses” Dana Humrighouse focuses on restrictions imposed by the University of Alabama’s permit scheme, which, she argues, typifies how colleges and universities regulate “speech activities.” Speech isn’t free on public college and university campuses in the United States. Our storied traditions of student protests and on-campus demonstrations have been imperiled by repressive regulatory schemes that allow higher education administrators to crack down on student assembly and expression. The UA scheme requires organizers to obtain a permit for expressive gatherings of any kind, however small and benign. The waiting period for these permits can be up to 10 days, rendering spontaneous assembly—in response to a particular event or time-sensitive issue—impossible. Violators of these permit schemes are subject to arrest and punishment from the school. In 2013, Humrighouse informs us, students were threatened with arrest simply for passing out leaflets on UA’s campus. The article argues for reforms that will increase speech rights for students and employees on campus. Humrighouse makes the case that these campus permit schemes uniquely burden political speech of the kind the First Amendment most especially protects. For this reason they should be subject to strict scrutiny, the standard courts use to measure content-based and viewpoint-based censorship, despite being facially content-neutral. She also proposes new, more speech-protective, policies and procedures to open up our campuses in ways more consistent with our best traditions of free and fearless on-campus expression.



At some point Jose Rodriguez Jr. must have realized that his career supervising torture on behalf of the most powerful government on earth might result in a big payday. Since the publication of his memoir, *Hard Measures*, he’s been doing his best to cash in. Rodriguez enjoyed a long and upwardly mobile career in the darkest regions of the CIA’s amoral underbelly for 31 years, including a lengthy stint in the agency’s Latin American Division, where he and his colleagues meddled in the internal affairs of nations south of the U.S. border, destabilizing governments, aiding political kidnappers, and encouraging death squads. Rodriguez himself nearly got in some hot water as a young agent during the Iran-Contra scandal in 1987, about which he was interviewed by the FBI. His experience in the Latin American Division would serve him well as director of the agency’s Clandestine Service after 9/11, where he helped refine political kidnapping (“extraordinary rendition”) and torture (“enhanced interrogation techniques”) into a depraved fine art. Rodriguez and his colleagues operated a global network of secret prisons

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known as “black sites,” into which suspected terrorists were disappeared and tortured.

Rodriguez became famous not long after his retirement from the CIA in 2007 when it was revealed that, as head of the CIA's Clandestine Service, he ordered the destruction of a torture-porn library of video tapes depicting the interrogations of two suspected members of Al-Qaeda, Abu Zubaida and Adb al-Rahim al Nashiri, both of whom are currently being held indefinitely in Guantanamo Bay. The tapes reportedly showed the detainees being water-boarded and subjected to other Inquisition-style techniques condoned by the Justice Department's Office of Legal Counsel. While many, including current CIA Director John Brennan,¹ have stated that Rodriguez ordered these tapes destroyed to protect members of the CIA from future prosecution, Rodriguez has repeatedly and publicly insisted that he did so to forestall Jihadist acts of vengeance against the agents shown on the tapes. That he makes this claim in the context of promoting a book detailing and defending his own role as a leader of these same torturers is an irony as amusing as it is obnoxious.

Hard Measures was published in 2012, yet Alan W. Clarke's review in these pages could hardly be more timely, for now, two years after its publication, we can see the book for what it really is—an essential step in the transition from torturer to celebrity torture apologist. The book was co-written by Bill Harlow, a CIA PR-man with a knack for being on-hand to help recently retired high-ranking agency men collect checks from big-time publishers. A few years earlier, Harlow had helped pen the sanitized and self-advocating memoirs of former CIA Director George Tenet, who, during the run-up to the Iraq invasion, had assured George W. Bush that proving Sadaam Hussein possessed weapons of mass destruction was a “slam dunk.” Now Rodriguez is a regular on the professional speakers' circuit, represented by multiple agencies and charging honoraria and luxurious accommodations for the gift of his gab. According to the page promoting Rodriguez on the Premiere Speakers Bureau website, the man whose abductees travelled across continents on “ghost planes” to hidden CIA detention centers in jumpsuits with bags on their heads “requires First class airfare for (1) one, plus lodging, meals, ground transportation & transfer fees”² in addition to his principal payment. His page on the “Great American Speakers” website, which likewise heavily boasts *Hard Measures* as a credential, describes the charm and edification one can enjoy after purchasing “an evening with Jose Rodriguez.”³ “His presentation was packed with information and created quite a stir [sic] as we kick off for our convention,” raves an anonymous “client.” “He was informative, engaging, witty, entertaining . . . everything one would want for a keynote speaker.”⁴

Here we see most plainly the revolving door connecting state power at its most brutal and modern capitalism at its most cynical. The stern, unforgiving visage on the cover of *Hard Measures* has the look of a new American fascism.

Nathan Goetting, *Editor in chief*

NOTES

1. David Martin, *The Man Who Ordered CIA's Tape Destruction*, CBS NEWS, Dec. 10, 2007, <http://www.cbsnews.com/news/the-man-who-ordered-cias-tape-destruction/>.
2. Premiere Speakers Bureau, Jose Rodriguez Biography, Motivational Speakers, http://premierespeakers.com/jose_rodriguez (last visited Dec. 9, 2014).
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4. *Id.*



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Alexandra Stupple

DISGUST, DEHUMANIZATION, AND THE COURTS' RESPONSE TO SEX OFFENDER LEGISLATION

I understand
what you want your filthy slave to be. I am
your barbarian, your terrorist;
your monster.

—Ali Alizadeh, “Your Terrorist”

On the other side of the ocean there was a race of less-than-humans.

—Jean-Paul Sartre, preface to *The Wretched of the Earth* by Franz Fanon.

I. Introduction

Sex offenders¹ have been subject to unprecedented restrictions and punishment. The government’s treatment of sex offenders is a clear example of the dangers of laws derived from and upheld because of the emotion of disgust. Disgust has led to a dehumanization of this category of people, which has led to a stripping of their constitutional rights. The law’s treatment of sex offenders is a clear example of why the law should eschew employing the emotion of disgust during all proceedings. In addition, the courts’, particularly the Supreme Court’s, treatment of the other branches’ actions regarding sex offenders is illustrative of why the law needs to insist upon empirical data in support of legislation and why the courts should not always defer to the other branches’ findings.

II. Background

Currently, a sex crime can include rape, statutory rape, fondling, coercive and noncoercive acts between adults and minors, consensual sex between adults in public, public exposure, public urination, and, until *Lawrence v Texas*, “sodomy” between two consenting adults.² Many sex offenders are juveniles.³ After the medicalization of “sexual deviance” in the 1950s, “treatments” for sexual deviance included group therapy, electroshock, and frontal lobotomy.⁴ Since the 1990s, criminal sex offenders⁵ have been placed under increasing restrictions, to be met after they have served their criminal sentences, such as civil confinement, registration requirements, residency restrictions, GPS tracking, and chemical castration.⁶ Some communities have barred sex offenders from hurricane shelters,⁷ and some jurisdictions bar sex offenders from using a computer.⁸

Alexandra Stupple is an attorney and J.D. graduate from University of California, Hastings College of the Law.

The current slate of sex offender laws has created a “permanent pariah class of uprooted criminal outcasts”⁹ whose members have been progressively stripped of their rights. This has happened through democratic means, through the making of exceptions for this category of persons. Double jeopardy, *ex post facto*, equal protection, and due process claims against statutes aimed at sex offenders have mostly failed. The main three types of statutes I will focus on are registration and notification requirements, civil commitment statutes, and residency restrictions.

Title I of the Adam Walsh Act is the Sex Offender Registration and Notification Act (SORNA; also known as “Megan’s Law”), which requires states to maintain an online registry of sex offenders.¹⁰ The retroactive application of state registration laws has been challenged on *ex post facto* and double jeopardy grounds. The Supreme Court, however, upheld Alaska’s registry law, finding that the legislature did not intend the registry as “punishment.”¹¹

In addition, nineteen states, the District of Columbia, and the federal government have all enacted “sexually violent predator” statutes that allow for the civil commitment of sex offenders after they have served their prison terms.¹² The vast majority of sex offenders appears to be held more or less permanently.¹³ The constitutionality of such statutes was upheld by the Supreme Court, which again found there was no proof of a legislative desire to punish, nor any such effect.¹⁴

Last, several states have residency restriction requirements. For instance, in California, sex offenders may not live within 2,000 feet of any public or private school or “park where children regularly gather.”¹⁵ At least 30 states have enacted such laws, and the result for sex offenders has been banishment from cities and states and, often, homelessness.¹⁶ Despite the obvious punitive nature of the laws, the courts have mostly supported them. The California Supreme Court upheld the law against substantive due process, privacy, and *ex post facto* challenges.¹⁷ Similarly, the Eighth Circuit upheld Iowa’s residency law, deferring to the state legislature’s authority to make judgments about the best means to protect the welfare of its citizens and finding no evidence that the act was meant to punish.¹⁸

III. Risk assessments and emotions

A. Actual risk and effective prevention

The unusually severe sex offender laws have grown out of the public’s perception, and that of Congress, that there is a grave risk to children posed by strangers out to rape and kidnap our children and that such strangers usually re-offend.¹⁹ In contrast to this, however, are the data that show most sex offenses are committed by those close to the victim, not strangers, and that

few offenders re-offend. In reality roughly 4 percent of cases of sexual abuse against children under twelve were perpetrated by strangers, compared to 50 percent by acquaintances and 46 percent by family members.²⁰ One federal study found that only 5.3 percent of all sex offenders released from prison are re-arrested for a sex offense within 3 years of their release.²¹ Meanwhile, same-crime recidivism for burglary is 31.9 percent; for larceny, 33.5 percent; and for drugs, 24.8 percent.²² Although it could be argued that this low recidivism rate could be linked to the extreme measures taken to track, banish, and stigmatize sex offenders, the data do not show this (see below). It also must be pointed out that the 5.3 percent comprises the sex offenders who re-offend by perpetuating a sex crime against a stranger, which presumably is a very small fraction based on first-time offenses.

Despite the data, the popular image of the sex offender is that of a sexually violent predator, one whose sexual predation is an inherent trait that is bound to be repeated.²³ The media have perpetuated this myth through sensationalist stories of rare events, which serves to distort the perceptions of everyday risks.²⁴ Legislatures, in enacting many of these laws, site faulty statistics about how sex offenders have the highest rates of recidivism of all criminals and if let loose are bound to repeat their crimes.²⁵

Preventing violent sexual assault has many obvious benefits. Every violent sex offense imposes physical and psychological harm, often permanently, and creates economic losses for the victim and society.²⁶ However, there is ample evidence that registry requirements and residency restrictions do not work to reduce sex crimes, particularly stranger-on-stranger sex crimes.²⁷ Studies have found that residency requirements even tend to exacerbate, rather than mitigate, reoffending.²⁸ And the economic costs of enforcing the laws are high.²⁹

While such laws may make people feel better by creating the illusion that their political system is working, the harsh reality is that their costs greatly outweigh their benefits.

B. Irrational risk assessment and moral panic

Why has panic about a relatively small threat like stranger sexual assault taken such hold of the United States? A benign explanation could be that the human brain does not readily perceive risk in a rational way. Thousands of times a day, the human brain makes split-second binary choices: good-bad, safe-unsafe, friend-foe.³⁰ Generally, that kind of decision-making serves us well. However, because this part of the brain is so old and so automatic, there is a danger that the newer part of the brain, the prefrontal cortex, responsible for what we term “rational” thought and which takes longer to make decisions, is overruled, unfairly, by this “automatic” part of the brain, creating

specious categorizations or risk-assessments.³¹ This automatic part of the brain may be termed “common sense.”

The human brain tends to react more strongly to improbable but scary risks versus more probable but less scary or less random risks in violation of the base rate. Media amplify this saliency tendency by saturating the public with stories about events that are unlikely but carry large consequences.³² Stories about sexually violent strangers targeting children are examples of this. While a child is more likely to be hit by lightning than sexually assaulted by a stranger,³³ the specter of the unknown child molester looms large in the public imagination.

Disdain for sex offenders is exacerbated during a moral panic. Current sex offender laws are part of a trend of moral panics concerned with sex that have consumed the country off and on since the 1930s.³⁴ These panics result in the punishment and institutionalization of “sexual deviants,” the definition of which continues to change over time.³⁵

A moral panic is an irrational public fear that exists when the official reaction to a person or group is out of all proportion to the actual threat offered.³⁶ The danger the group poses is in “large measure constructed, as are their danger-bearing characteristics.”³⁷ In moral panics “experts” tend to perceive the threat in identical terms and talk with “one voice” of rates, diagnoses, prognoses, and solutions. Media stress “sudden and dramatic” increases and novelty above what can be supported by empirical evidence.³⁸

Moral panics require the creation of social facts.³⁹ For instance, the words *pervert*, *pedophile*, *psychopath*, and *predator* have changed over time and depend upon an assumption of facts that are not necessarily empirically correct.⁴⁰ The sex psychopath of the 1940s would not be diagnosed as such by psychiatrists today.⁴¹ The facts underlying these morally loaded terms, at the time, seem self-evident and impervious to doubt. They seem like “common sense.” Yet, in retrospect, they appear contingent and temporary,⁴² as if one reality has been replaced by another.

During a moral panic, “a crime is not just a crime, it is part of a dreadful social threat.”⁴³ In the federal and New York legislative debates over “Megan’s Law,” which requires certain information about registered sex offenders to be made public, lawmakers frequently stressed a rising trend of sex crimes against children.⁴⁴ Although proffered evidence of this claim was usually lacking, occasionally lawmakers would attempt to support their claims with numbers. Representative Dornan of California provides an especially dramatic example:

This is basically a male homosexual problem, and the child molesters of the heterosexual variety are usually drunken disgusting stepfathers Take out

that chunk and take out the numbers and prorate these cohorts, since there is only about three-quarters of a percent of lesbians . . . and 1 percent male homosexuals, and the rate of male pedophilia, homosexual pedophilia[,] one makes is 11 to 1 over heterosexual pedophiles.⁴⁵

Once the crisis has been established, the culprit is created: “The core attribute of a moral panic is the public’s identification and demonization of a particular person or group as a ‘folk devil,’ a morally flawed character that is the source of the crisis.”⁴⁶ This demonization was evident in the floor debate of the Adam Walsh Act: “sex offenders have run rampant in this country”;⁴⁷ the Internet “allows sick people to be able to prey on members of your family,”⁴⁸ “the best way to protect people is having these sex offenders behind bars rather than lurking in a parking garage or trying to lure young children.”⁴⁹

C. Disgust

One economical way of reaching this demonization is through the use of the emotion of disgust. The binary-choice part of the brain that served our ancestors so well by quickly determining, for instance, whether something was safe or dangerous, also plays a part in the creation of phenomena like racism and genocide.⁵⁰ The brain quickly and convincingly creates “us” and “them.” Disgust is an especially visceral emotion that warns of possible “incorporation of a contaminant.”⁵¹ It involves a quick reaction to stimuli deemed loathsome.⁵² This can be a useful emotion when around dangerous objects, such as toxic substances or other objects that can cause bodily harm if ingested or touched.

However, disgust also plays a part in the creation of criminal and regulatory systems that foment ostracism, banishment, and even violence against groups of people.⁵³ Disgust has been the key emotion in the moral panic around sex offenders. As one senator said during the Adam Walsh Act debate, “As it should all of us, the thought of what these predators do to our innocent children literally makes me sick to my stomach.”⁵⁴

Although I do not argue that persons who sexually assault children or adults are not worthy of anger and contempt based on the harms that they cause, disgust is a dangerous emotion because at its core is the fear of contagion and pollution avoidance.⁵⁵ Contamination focuses on the *object*—here, the person—and not an *act*.⁵⁶ This is dangerous with regard to criminals, because the *person* becomes the object to be reckoned with, not their bad deeds, which means there is no desire to rehabilitate the offender, only to contain the toxin they represent.⁵⁷ This disassociation with a group, which will be discussed more below, has led to the idea that sex offenders are incurable, inherently different from us, and have no free will.

Another danger of disgust is that it is a powerful emotion that tends to incorrectly identify what is worthy of it: disgust is “insensitive to information about risk, and not well correlated with real sources of harm.”⁵⁸ It is an emotion often based on incorrect beliefs⁵⁹ and, with regard to sex offenders, is also an *unreasonable* emotion because the beliefs are not only incorrect, they are not based on evidence (i.e., evidence that sex offenders are incurable contaminants that must be contained).

The dangers of disgust are evidenced by residence-restriction laws. These laws are a manifestation of disgust and its coupled need to contain the contamination posed by those convicted of sex offences. The laws disallow a registered sex offender from living, typically, within 2,000 or 2,500 feet from a school, playground, or church. These restrictions are most likely founded on disgust, because, although, as stated above, only about 3 percent of sexual abuse against children and 6 percent of child murders are committed by strangers, residence-restriction laws are aimed at containment of the stranger “predator.”⁶⁰ Residency restrictions do not clearly follow from the harm suffered, and disgust is left as an explanation: sex offenders are viewed as intruding, invading “social spheres of purity”;⁶¹ they must be contained and not allowed to cross the boundary with the pure. These laws have been held to be constitutional because “the main effect of disgust . . . is to inhibit empathy and, for this reason, to favor indirectly the infliction of punishment.”⁶²

Additional evidence that sex offender laws are based on disgust can be found in legislative histories. Such laws are often based not on empirical evidence of a threat, but rather on disgust and an erroneous supposition of certain facts. legislative histories evince “emotional expressions of disgust, fear of contagion, and pollution avoidance,” and a concern over “boundary vulnerabilities between social spheres of the pure and the dangerous.”⁶³

D. Dehumanization

Because disgust works as a dichotomy (“the categories of the disgusting and the pure”),⁶⁴ it creates an in-group and an out-group. The out-group created by disgust becomes necessary to “quarantine, separate, or destroy them to defuse their powerfully contaminating forces.”⁶⁵ This, in turn creates the tendency to dehumanize. Dehumanization is a form of self-deception, a departure from reality, and involves judging a person to be lacking whatever essence makes an individual “human”;⁶⁶ such persons have a sub-human soul.⁶⁷

In the legislative histories of sex offender laws, the language of dehumanization abounds: “predators . . . hunt children”;⁶⁸ there is a necessity to “protect children from monsters”;⁶⁹ “they cannot be trusted to be unleashed on society”;⁷⁰ “repeat offenders . . . are the human equivalent to toxic waste.”⁷¹ Further, the term “predator,” used in sex offender statutes, is a dehumanizing

term. “Predators have haunted the human imagination since the prehistoric times,”⁷² and it is a term that has been applied to out-groups throughout history.⁷³ It was used against American Indians, who were deemed to possess such predatory traits as “untamed,” “cruel,” and “bloodthirsty.”⁷⁴

Neuroscientists have found the neural underpinnings of this tendency through disgust to attribute less-than-human status to extreme out-groups (what was once termed *cultural pseudospeciation*). When interacting with the lowest members of society, the “societal” part of the brain does not engage:

[M]embers of some social groups seem to be dehumanized, at least as indicated by the absence of the typical neural signature for social cognition, as well as the exaggerated amygdala and insula reactions (consistent with disgust) and the disgust ratings they elicit. This conclusion is supported by the relative lack of mPFC activation when participants viewed pictures of low-low social groups.⁷⁵

Dehumanization is not just about a way of talking; it is a common way of thinking about the lowest of the low.⁷⁶

Because, by definition, the less-than-human is deemed to be not fully equipped with human characteristics, they are often not seen as not possessing reason and free will, which the rest of us (supposedly) have.⁷⁷ For instance, the Puritans in colonial America understood “deviant” to mean of a fixed and evil nature.⁷⁸ Because dehumanization can place a class of heinous monster criminals outside the sphere of the community’s moral universe, the question of sanity, or “sickness,” is inevitably raised.⁷⁹ “It can be a secular euphemism for evil—a moral diagnosis dressed up as a medical one.”⁸⁰ This distancing mechanism has been used repeatedly, by everyone from terrorists to political tyrants.⁸¹

It is now being employed against sex offenders. They are believed to be incapable of controlling their actions and, for that reason, after prison often find themselves subject to involuntary civil commitment in a state mental facility.⁸² The test for whether a sex offender should be civilly committed laid out in the Kansas statute, which is a typical one for many states, is whether the criminal, upon release from prison, is deemed to have a “mental abnormality” that makes it “difficult, if not impossible,” for them to control their dangerous behavior.⁸³

“As an empirical matter, this raises the question whether there could possibly be a set of people who commit violent sex offenses that clinicians would not deem ‘mentally abnormal.’”⁸⁴ Because “mentally abnormal” is a legal concept, and not a scientific one, the danger of a person using disgust to make this determination is a very real one. Because psychic reactions like disgust and dehumanization group people together so that “individuals” do

not emerge, the tendency to find “mental abnormality” in every sex offender is likely great.

The civil commitment statutes illustrate how dehumanization is a psychological lubricant that makes harsh punishment (here, essentially imprisonment after a sentence has been served), and even eradication,⁸⁵ of a group easier than it would be against “humans.” Dehumanization is therefore a dangerous tool, even in the legal realm of liberal democracies: “Because nonhuman animals cannot participate in human society, the notion of justice is inapplicable to them.”⁸⁶ To protect against this, we must prevent the use of disgust when creating and enforcing laws, thereby preventing dehumanization and the stripping of human and civil rights that accompanies it.

IV. Emotion and empirical data in the law

[T]he Courts have a duty to protect the rights of even the most despised among us. Alleged sexual predators have no social sympathy, making their rights especially vulnerable. Allowing the Government to trample the rights of one group weakens the rights of all of society. The Government cannot be permitted to establish such a precedent.⁸⁷

Although at its inception, the Constitution explicitly mentioned a dehumanized group (or at least 2/5 dehumanized), the Constitution and the Bill of Rights are now viewed by many as designed to act as a bulwark against the tyranny of the majority, i.e., it is meant to protect the out-group against the in-group. As the first justice Harlan stated in his dissent in *Plessy v. Ferguson*: “In the view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here.”⁸⁸ The Constitution should serve as a “hedge against ‘what everyone already knows,’” i.e., prejudice.⁸⁹ Therefore, when a group is widely and vehemently reviled, the law and its constitutional protections are even more important: “[T]he Constitution is tested most when its protections shield those whom we most despise.”⁹⁰

However, the history of sex offender laws has proven that if a group is hated enough the law may not very readily offer protection. The Supreme Court has repeatedly upheld the codification of disgust against this group and has allowed the dismantling of the rights to due process, equal protection, and other constitutional rights of this extreme out-group.

To ensure that a currently despised group is not stripped of constitutional rights, courts must ensure, to the best of their ability, that laws are not based on false information. With regard to sex offenders, the law, like major media and the general public, has largely ignored the empirical data. It has therefore denied this group of people constitutional rights in a way it would be hard to

imagine happening to other classes of people. Disgust—its own, that of the public, or both—has influenced the judgment of our courts.

The political and legal response to the public outcry over sex crimes, particularly repeat-offender, stranger-on-stranger sexual crimes has been one of following the public's lead. Disgust has become institutionalized. Ostracism, banishment, and a suspension of constitutional rights have been the result. Although it may be impossible to change this aspect of human nature, and not necessarily a desirable thing to do,⁹¹ it is possible to restrain the legal response to such emotional reactions. The law's enabling of the "vicious cycle" of disgust, dehumanization, and banishment would be checked if more judges (and especially Supreme Court Justices) were to depend more on empirical data than commonly accepted "knowledge" when deciding an issue.

A. Criminal context

Criminal law is based on normative judgments of what conduct is right and wrong. Using emotion to reach normative judgments is not irrational. It may be quite necessary. However, we must be wary of the use of certain emotions in criminal law. Some emotions lead to dehumanization and an unjust outcome. "If morality is just a matter of how we feel, then moral values seem to lose all their objectivity."⁹²

A "non-emotive risk managerial paradigm in crime fighting and punishment" would seem to be the best solution to avoiding moral panic and the stifling of constitutional rights.⁹³ This does not mean that all emotions must be squelched—an impossible task anyway—for the very assessment of "risk" necessarily includes a normative evaluation—that is, an assessment that includes the concept of what is moral, as well as a calculation of what is harmful.⁹⁴ I only argue that an emotive evaluation should not be based on the emotion of disgust and that we as a society be cognizant of the tendency toward and danger behind the dehumanization of classes of criminals.

There are many instances of disgust and dehumanizing language being allowed to enter criminal courtrooms. A district court judge referred to a defendant as a "predator" and a "pedophile monster."⁹⁵ The Third Circuit did not reflect on whether using such language from a judge was inappropriate, instead focusing on whether evidence existed to warrant such epithets.⁹⁶ Likewise, other courts have found that when a prosecutor uses dehumanizing language, it is allowable provided some "evidence" exists that it is true. An Illinois court held that although "[a] closing argument must serve a purpose beyond inflaming the emotions of the jury" and a prosecutor may not "cast the jury's decision as a choice between 'good and evil,'" the prosecutor's calling the defendant a "monster" and "evil" during closing argument was permissible because it was "based on evidence."⁹⁷

Because the language of and the thinking behind dehumanization is such a powerful force, its use in a criminal courtroom against a defendant does not allow for a fair trial. “[A]ppeals to the monstrousness and disgustingness of the criminal’s offense distance the jury from the defendant, asking them to regard him as utterly ‘other.’”⁹⁸ The emotions of outrage, anger, and contempt, all of which focus on deeds, not inherent traits of the person, are better suited for the courtroom.⁹⁹ After all, it is well accepted that “people do not deserve punishment for their characters,” only their deeds.¹⁰⁰ Outrage, anger, and contempt are reaction to harms that a person caused, not the person’s essence, and therefore they act on a continuum, not as a dichotomy (good–evil, human–nonhuman).

Further, as outlined above, when a person is dehumanized, he is often not ascribed with moral responsibility. Because legal “insanity” is based on a folk-psychology concept of moral culpability, any time we try to hold a person that the fact-finder views as dehumanized legally culpable of a crime, the question of legal insanity should be raised.¹⁰¹

B. Civil context

A similar problem with culpability comes up in the civil context, particularly with the civil commitment of sex offenders. The Supreme Court found that before a “sexually violent predator” who has finished his sentence may be civilly committed, he must be found to be (1) “mentally abnormal,” defined as having a condition that affects “volitional capacity,” and (2) he must be “dangerous.”¹⁰² “Mental abnormality” does not require a showing of mental illness. Justice Thomas explained, in *Hendricks*, that courts have “developed numerous specialized terms to define mental health concepts.”¹⁰³ He stated that, often, “those definitions do not fit precisely with the definitions employed by the medical community” because legal definitions must take into account things like “individual responsibility.”¹⁰⁴

The Court in *Kansas v. Crane* declared that science and jurisprudence are not always based on the same reality:

[T]he science of psychiatry, which informs but does not control ultimate legal determinations, is an ever-advancing science, whose distinctions do not seek precisely to mirror those of the law.” However, “[i]n what way the empirical world of law differs from the world studied by researchers remains unexplained by the Court.¹⁰⁵

In the criminal context, culpability is based on a folk-psychological concept of who “should” be deemed culpable, i.e., possession of free will necessary to be found guilty; it is a normative determination.¹⁰⁶ Free will “is not really intended as a factual issue in criminal cases. The law bestows considerable latitude on criminal juries to make certain moral judgments.”¹⁰⁷

Because it is based on a normative concept, whether a person was exercising “free will” may be made through a normative process. As stated above, normative processes may and should incorporate emotion.

However, in the civil commitment context, legal concepts like “volitional capacity” and “dangerous” are inapposite because normative values (and therefore emotion) have no place in the arena. The sex offender has already been found to be responsible, in his criminal trial, and the legal notion of culpability is no longer an issue. If it were, the *ex post facto* and double jeopardy clauses would be violated.¹⁰⁸ Adding another legal culpability standard post-punishment results in the guilty person having been incapacitated as a culpable moral agent. First he exercised his free will to perform bad deeds and then, after serving his sentence, he is deemed to have not enough free will to be released back into society. They can be found “not responsible for precisely the behavior for which they were convicted and punished.”¹⁰⁹ That a swath of people, categorized by the type of crime they have committed, is automatically put to a legal test in civil court of whether they have free will seems to contradict a few assumptions on which the law generally relies: everyone is assumed to possess free will, and one must answer for his deeds, not his character.¹¹⁰ Here, the state has its cake and eats it too.

It is hard to imagine other types of criminals being held to this post-punishment standard. Stephen J. Morse illustrated how extreme such a statute is by removing all reference to sex from the Kansas’s definition of who may be civilly committed: “Any person who has been convicted of or charged with a violent offense and who suffers from a mental abnormality or personality disorder that makes the person likely to engage in repeat acts of violence.”¹¹¹ Such an exception is made in the case of this group of people because civil commitment laws are based on disgust and dehumanization. The sex offender must be banished from society, either because of his deeds (prison) or his because of his being (civil commitment).¹¹²

Indeed that is what happens. With no scientific operational definition behind it, “mental abnormality” remains within folk-psychology, and fact-finders are free to use “common sense” and emotion, including disgust, to find whether a person has control over their actions. This is dangerous for people for whom “common sense” typically commands dehumanization. One judge found that the lack of a mental illness requirement created a tautology wherein “a sexually violent predator suffers from a mental condition that predisposes him or her to commit acts of sexual violence.”¹¹³ In other words, it would not unreasonable for fact-finders to determine that all sex offenders be institutionalized.

Sex offenders engender disgust, which looks to the “essence” of a person—essentially what civil commitment statutes are asking fact-finders to do anyway—and that results in dehumanization and a finding that no moral agent with free will resides inside the person. Asking for such an assessment belies a purpose of punishment.

To protect against this, and because “[f]reedom from restraint is essential to the basic definition of liberty in the Fifth and Fourteenth Amendments,”¹¹⁴ the law should not create pseudo-scientific standards, standards that are legal ones but act as scientific ones, in the area of civil commitment. Courts must insist in the truth that, in civil proceedings, whether someone is capable of exercising free will is an empirical question and therefore whatever concepts and standards are used to define that free will should be ones firmly rooted in fields that employ scientific methodology. In this area, the law should consistently hold a scientific attitude toward evidence. “Common sense” often smuggles in dehumanization and extreme bias. Therefore, the law should have the propensity to doubt that it already has the right answers before empirical inquiry has been engaged in, and it must allow for the changing of the law when research has shown that a “common sense” belief was in fact erroneous.¹¹⁵ The courts must acknowledge that there is a difference between normativity and subjectivity.¹¹⁶

C. The courts’ deference to legislative findings

Another constitutional bulwark against the tyranny of the majority is found in federalism. The judiciary should act to ensure the other branches are not creating laws that are violative of the Constitution. One way to do this for courts to demand legislatures produce data in support of their lawmaking. While courts generally proclaim that great deference should be given Congress and other legislative bodies regarding their findings of fact and their stated purposes, such deference is given haphazardly and there seems to be no stated rule of when deference is owed and when it is not. Not surprisingly, courts have been extremely deferential toward lawmakers in the field of sex offenders.

However, in non-sex offender contexts, examples of the Supreme Court refusing to follow the findings of legislatures exists. For instance, in *Brown v Entertainment Merchants Ass’n*, the Court found that the California legislature had not shown that laws against violent video games were proportionate to California’s stated need for them, and therefore had not proven that its need outweighed the risks to the First Amendment.¹¹⁷ The majority did not go outside the record to back that finding up, but Justice Breyer, who dissented, did. Although he said he agreed that deference should be given to legislative

findings, he also compiled studies, including ones dealing with “cutting edge neuroscience,” that showed the need for such laws was great.¹¹⁸

There are times courts must use evidence and data to determine whether something is constitutional. There is no other way to determine whether a law is out of proportion to a stated harm, whether it is based on animus, or whether it has an improper effect. Justice Breyer—who has espoused elsewhere that governmental agencies must break out of a vicious circle of allowing Congress and the public “to set agendas and manage particular results,” where the science does not back such a result¹¹⁹—has stated how he would apply strict scrutiny to laws whose constitutionality are being challenged: among other things he would evaluate “the degree to which the statute furthers [the state’s] interest” and “the nature and effectiveness of possible alternatives.”¹²⁰ At least when purportedly applying strict scrutiny, Justice Breyer would look at the effectiveness of a statute and the effectiveness of alternatives. In his dissent in *Hendricks*, he also looked at evidence of the intent behind the civil commitment statute and found it was based on pure animus.¹²¹

Similarly, judges should not convert a lack of evidence in the record to proof that a lawmaker has acted justifiably. Although a reliance on “common sense” and “folk-wisdom,” i.e., “the simple truth,” is pervasive in the legal world, judges must be careful when employing it.¹²² Common sense has “an uneasy relationship with empirical truth.”¹²³ Common sense should be constrained to the world of normative judgments, not to factual ones. For instance, it is common sense that children should be protected from sex offenders. However, it is not common sense “how” they should be protected from them. Where issues of “how” are raised, courts would do best to look to empirical data. If none is presented, it should strike down the law.

A district court judge in Iowa did just that when he invalidated that state’s residency requirement for sex offenders. Judge Pratt found that, “Defendants produced no research showing the effect a proximity restriction has on sex offender recidivism rates” and that therefore, “[w]ith nothing to suggest that restricting a sex offender from living within two thousand feet of a school or child care facility would actually protect children,” the law was not narrowly tailored.¹²⁴ The Eighth Circuit, reversed, however, under a finding that a lack of evidence in an “area where precise statistical data is unavailable and human behavior is necessarily unpredictable” a state legislature authority to make “make judgments about the best means” to protect the welfare of its citizens.¹²⁵

Recently, in California, Judge Thelton E. Henderson determined that, under intermediate scrutiny, a law that would require the registering of all Internet identifiers of all 73,000 California sex offenders was not nar-

rowly tailored. He based his decision on facts presented by the opponents of the law:

In this case, the government has not provided any evidence regarding the extent to which the public safety might be enhanced if the additional registration requirements went into effect. Plaintiffs' evidence—as yet undisputed—indicates that only 1 percent of arrests for sex crimes against children are for crimes facilitated by technology, and that registered sex offenders are involved in only 4 percent of these arrests.¹²⁶

Findings like this are rare, usually because neither side of the issue present any statistical information. This issue has been at the center of a circuit court split regarding the “good cause” finding of the Attorney General that SORNA requirements should apply retroactively and that it was proper to bypass the Administrative Procedure Act’s notice and comment procedures in making the rule. The Act provides that, when an agency for good cause finds that notice and public procedure are impracticable, unnecessary, or contrary to the public interest, it may bypass the notice and comment requirements.¹²⁷ In the SORNA instance, in making its “finding” of good cause, the Attorney General did not provide any evidence proving good cause existed. Therefore, when challenges were brought, courts were asked to rely on faith. Some did and some did not. The Sixth Circuit found that “conclusory speculative harms the Attorney General cites are not sufficient.”¹²⁸ Meanwhile, the Fourth Circuit, in *U.S. v Gould*, found that delay in implementing the rule “could reasonably be found to put the public safety at greater risk.”¹²⁹ Both courts were presented with the same (lack of) evidence, yet one required data and one relied on “common sense.”

Based on the history of sex panics in America, courts should be careful when reviewing any statute that deals with the subject of sex. The Attorney General’s failure to produce an existing Department of Justice report on the risk sex offenders present should have been a warning that the Attorney General is employing emotional common sense rather than empirically derived rationales. It is suggested that, in situations where evidence is not presented, unclear, or seems contradictory, or where animus toward a group is suspected, courts should consider appointing experts or special masters to enlighten their decision-making.¹³⁰

Without data, the Supreme Court will almost necessarily rely on emotional common sense to reach a conclusion. The Court has increasingly used a sliding scale approach to the evidentiary burden needed to support or overcome a challenge, pitting the government’s supposed interests against the individual’s. One problem with this approach is that it depends on how “important” the government interest appears. As these different measures

are challenged, unless the Supreme Court uses real evidence of the costs and benefits, the measures will always pass muster under the sliding scale ad hoc analysis employed more and more today. They will always find an overriding governmental concern.

In the sex offender context, as shown above, the government's interest is often not substantiated by a true findings of fact, only a declaration of what their interest is (e.g., protecting children from sexual predators). It is impossible to argue that such an interest is not a compelling one, yet, with evidence, it can be argued that the risk to the community that is posed is not justified by the stripping of the constitutional protections because the means chosen are not effective.¹³¹

V. Conclusion

Today, all communities rightfully think of crimes such as child rape and molestation as the grave and heinous acts they are; however, a panic has ensued which has led to a squandering of public resources, the dehumanization of a swath of people, and the denigration of the Constitution. For the protection of everyone's constitutional rights, a conscious commitment by all lawmakers to use empirical data in their fact-finding and decision-making is required, even if done while feeling and expressing emotions like anger and contempt. This may be the only way evidence-based practices and policies that *actually* protect the public from sexually violent persons will be born.

NOTES

1. I use the term "sex offender" to refer to those convicted of sex offenses, and "sexually violent predator" to refer to those convicted under sexually violent predator statutes.
2. 539 U.S. 558 (2003). Many of those punished prior to *Lawrence* are still required to remain on sex offender registries.
3. HUMAN RIGHTS WATCH, No Easy Answers: Sex Offender Laws in the US, Vol. 19, No. 4(g) at 8, Sept. 2008, available at <http://www.hrw.org/sites/default/files/reports/us0907webw-cover.pdf>.
4. ROGER N. LANCASTER, SEX PANIC AND THE PUNITIVE STATE, 35-36 (2011).
5. There are nearly 750,000 as of June 2011 according to the National Center for Missing and Exploited Children, http://www.missingkids.com/en_US/documents/sex-offender-map.pdf.
6. LANCASTER, *supra* note 4, at 89. See Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435 (2010).
7. *No Easy Answers*, *supra* note 3, at 104.
8. Yung, *supra* note 6, at 449.
9. LANCASTER, *supra* note 4, at 15.
10. ADAM WALSH CHILD PROTECTION AND SAFETY ACT OF 2006, Pub. L. No. 109-248, 120 Stat. 587 (codified as amended in scattered section of 42 U.S.C.).
11. *Smith v. Doe*, 538 U.S. 84 (2002).
12. CHARLES PATRICK EWING. JUSTICE PERVERTED: SEX OFFENDER LAW, PSYCHOLOGY, AND PUBLIC POLICY 21 (2011); 42 USC § 16901.

13. EWING, *supra* note 12, at 22.
14. *Kansas v. Hendricks*, 521 U.S. 346, 363 (1997). If a post-punishment law has the purpose or effect of applying additional punishment (i.e., if it aims at retribution or deterrence), it is unconstitutional under the double jeopardy and ex post facto clauses of the Constitution.
15. CAL. PENAL CODE § 3003.5(b) (West 2012). The law also requires GPS tracking of sex offenders.
16. COLORADO DEPARTMENT OF PUBLIC SAFETY DIVISION OF CRIMINAL JUSTICE, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY (2004).
17. *In re E.J.*, 47 Cal. 4th 1258 (Cal. Ct. App. 2010).
18. *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2010). “The Ex Post Facto Clause of the Constitution forbids any law that changes the punishment, and inflicts a greater punishment for pre-existing conduct.” *U.S. v. Shenandoah*, 595 F.3d 151, 158 (3d Cir. 2010).
19. *No Easy Answers*, *supra* note 3, at 25.
20. HOWARD N. SNYDER, U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 10 (2000), available at <http://bjs.ojp.usdoj.gov/content/pub/pdf/saycrle.pdf>.
21. MATTHEW R. DUROSE ET AL., U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF SEX OFFENDERS RELEASED FROM PRISON IN 1994, 1 (2003), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1136>.
22. ALLEN J. BECK, U.S. DEPARTMENT OF JUSTICE BUREAU OF JUSTICE STATISTICS, RECIDIVISM OF PRISONERS RELEASED IN 1983, Table 1 (1989), available at <http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1135>.
23. See DAVID L. FAIGMAN ET AL., MODERN SCIENTIFIC EVIDENCE: THE LAW AND SCIENCE OF EXPERT TESTIMONY § 11.1 (2011); See also *No Easy Answers*, *supra* note 4.
24. See LANCASTER, *supra* note 4, at 77-79; STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 35 (1993).
25. See FAIGMAN ET AL., *supra* note 23, at § 11.1; *No Easy Answers*, *supra* note 3, at 25-30.
26. EWING, *supra* note 13, at 62.
27. COLORADO DEPARTMENT OF PUBLIC SAFETY DIVISION OF CRIMINAL JUSTICE, REPORT ON SAFETY ISSUES RAISED BY LIVING ARRANGEMENTS FOR AND LOCATION OF SEX OFFENDERS IN THE COMMUNITY (2004); Amanda Y. Agan, *Sex Offender Registries: Fear Without Function?*, 54 J.L. & ECON. 207 (“There is little evidence to support the effectiveness of sex offender registries, either in practice or in potential.”).
28. JODI SCHWARTZBERG & ANNIE LO, PUBLIC LAW RESEARCH INSTITUTE, UC HASTINGS COLLEGE OF THE LAW, THE LAW AND POLICY OF SEX OFFENDER RESIDENCY RESTRICTIONS: AN ANALYSIS OF PROPOSITION 83, 5 (2006) (“An increase in homelessness may lead to an increase in crime, and reduces the effectiveness of existing registration laws. When sexual offenders have no home, they cannot accurately register. Their subsequent anonymity reduces the communities’ ability to track them and eliminates a check that serves to hold sexual offenders accountable for their actions.”)
29. States spent half a billion on implementing the Sex Offender Registration and Notification Act, and, in the year 2006 alone, states spent half a billion dollars on civil commitment of sex offenders. EWING, *supra* note 13, at 58, 106.
30. BREYER, *supra* note 24, at 35.
31. *Id.*
32. *Id.* at 35-36.
33. LANCASTER, *supra* note 3, at 77.

34. See PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA (1998); LANCASTER, *supra* note 4.
35. See *id.*
36. *Id.* at 6. The term was created by British sociologists Stanley Cohen and Stuart Hall in the 1970s.
37. MARTHA C. NUSSBAUM, HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW 250 (2004).
38. JENKINS, *supra* note 34, at 6.
39. *Id.* at 1. (J)
40. *Id.* at xi- xii. (J)
41. *Id.* at xii.
42. *Id.* at 1. (J)
43. NUSSBAUM, *supra* note 37, at 253.
44. Daniel M. Filler, *Making the Case for Megan's Law: A Study in Legislative Rhetoric*, 76 IND. L.J. 315, 335-36 (2001) (In the debate over the Adam Walsh Act one Senator stated, "[C]hild rapes and murders are now being reported on our news programs on a regular basis.").
45. 142 CONG. REC. 17,114 (1996) (statement of Rep. Robert K. Dornan).
46. David M. Filler, *Terrorism, Panic and Pedophilia*, 10 VA. J. SOC. POL'Y & L. 345, 359 (2003).
47. 152 CONG. REC. S8012-01 (2006) (statement of Sen. Orin Hatch).
48. *Id.* (statement of Sen. Rick Santorum).
49. *Id.* (statement of Rep. George Allen).
50. BREYER, *supra* note 24, at 35.
51. NUSSBAUM, *supra* note 37, at 87.
52. *Id.* This phenomenon is clearly illustrated by the Supreme Court in the Comstock decision, where the Court wrote, "If a federal prisoner is infected with a communicable disease that threatens other, surely it would be 'necessary and proper' . . . to refute (at least until the threat diminishes) to release the individual among the general public, where he might infect others." (U.S. v Comstock, 130 S.Ct. 1949, 1961 (2010)).
53. *Id.* at 14.
54. 152 CONG. REC. S8012-01 (2006) (statement of Sen. Chuck Grassley).
55. NUSSBAUM, *supra* note 37 at 87; Mona Lynch, *Pedophiles and Cyber-Predators as Contaminating Forces: The Language of Disgust, Pollution, and Boundary Invasions in Federal Debates on Sex Offender Legislation*, 27 LAW & SOC. INQUIRY 529, 529 (2002).
56. NUSSBAUM, *supra* note 37 at 106.
57. *Id.*
58. *Id.* at 102
59. *Id.* at 32.
60. Lynch, *supra* note 55 at 545.
61. *Id.* at 544.
62. Benoît Dubreuil, *Punitive Emotions and Norm Violations: Philosophical Explorations*, 13 PHILOSOPHICAL EXPLORATIONS 1, 37 (2010).
63. Lynch, *supra* note 55, at 529.
64. *Id.* at 543.
65. *Id.* at 540.

66. DAVID LIVINGSTONE SMITH, *LESS THAN HUMAN: WHY WE Demean, ENSLAVE, AND EXTERMINATE OTHERS* 25, 32 (2011) (“The essence of a thing is that which makes it what it is.”).
67. *Id.* at 31.
68. *Id.*
69. 152 CONG. REC. S8012-01 (2006) (statement of Sen. Chuck Grassley).
70. *Id.*
71. N.Y. ASSEMBLY MINUTES OF A1059C, at 417 (June 28, 1995) (statement of Mr. Tedisco).
72. SMITH, *supra* note 66, at 255.
73. *Id.* at 186 (Estonian nationalists calling for the deportation of Russians: “Cohabitation of human beings with wild beasts is not possible for long. And it is a crime not to send wild beasts back to their natural environment.”).
74. *Id.* at 83.
75. Lasana T. Harris & Susan T. Fiske, *Dehumanizing the Lowest of the Low: Neuroimaging Responses to Extreme Out-Groups*, 17 PSYCHOL. SCI. 10, 852 (2006).
76. SMITH, *supra* note 66, at 13.
77. *Id.* at 52, 69, 86 (Harvard psychologist Herbert C. Kelman writing about the folk-concept of the human: “To accord a person identity is to perceive him as an individual . . . capable of making choices and entitled to live his own life.”).
78. Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880, 1913 (1991).
79. *See* NUSSBAUM, *supra* note 37, at 165.
80. SMITH, *supra* note 66, at 136.
81. *Id.* at 136.
82. *See, e.g.*, U.S. v. Comstock, 130 S.Ct. 1949 (2010).
83. KAN. STAT. ANN. § 59-29a02 (West 2011). *See* Kansas v. Crane, 534 U.S. 407 (2002).
84. FAIGMAN ET AL., *supra* note 23, at § 11:8.
85. *See* SMITH, *supra* note 66.
86. *Id.* at 53.
87. U.S. v. Edwards, 777 F. Supp. 2d 985 (E.D. N.C. 2011) (footnote omitted).
88. 163 U.S. 597 (1896) (Harlan, J., dissenting).
89. LANCASTER, *supra* note 4, at 12.
90. FAIGMAN ET AL., *supra* note 23, at § 11:23.
91. *See* NUSSBAUM, *supra* note 37, at 121-122. Disgust likely played a valuable evolutionary role, such as by recognizing toxic or dangerous substances that would sicken us if ingested.
92. SMITH, *supra* note 66, at 55.
93. Lynch, *supra* note 55, at 530.
94. *See* Lynch, *supra* note 55, at 531.
95. U.S. v. Olhovsky, 562 F.3d 530, 548 (3d Cir. 2009).
96. *Id.* The court found that “not even” a psychiatrist’s letter “supports a conclusion that a ‘pedophile monster’ lurks inside of Olhovsky.”
97. *People v. Gutierrez*, 402 Ill. App. 3d 866, 898 (Ill. App. Ct. 2010)
98. NUSSBAUM *supra* note 37, at 165.
99. *See id.* at 106, 126, 128, 165.
100. Stephen J. Morse, *Protecting Liberty and Autonomy: Desert/Disease Jurisprudence* 48 SAN DIEGO L.R. 1077, 1090 (2011).

101. NUSSBAUM, *supra* note 37, at 165.
102. *Kansas v. Hendricks*, 521 U.S. 346 (1997).
103. *Id.* at 359.
104. *Id.*
105. FAIGMAN ET AL., *supra* note 23, at § 11.22.
106. *See* FAIGMAN ET AL., *supra* note 23, at § 11.8 (Arguing the law makes a fundamental assumption that people have free will. “The criminal law is based largely on a theory of deterrence. Only if people have free will is the theory coherent. Indeed, this was the very basis for the Court’s conclusion in *Hendricks* that the Kansas scheme did not violate the Double Jeopardy or Ex Post Facto Clauses.”).
107. *Id.* at § 11:8.
108. *Id.* at § 11.8.
109. Morse, *supra* note 100, at 1102.
110. *See id.* at 1104.
111. *Id.* at 1101.
112. *See id.*
113. *Young v. Weston*, 898 F. Supp. 744, 747 (Wash. 1995).
114. *Id.* at 747.
115. *See* LEE MCINTYRE, *DARK AGES: THE CASE FOR A SCIENCE OF HUMAN BEHAVIOR* 20 (2006).
116. *Id.* at 35.
117. *Brown v. Entertainment Merchants Ass’n.*, 131 S.Ct. 2729 (2011).
118. *Id.* at 2768.
119. BREYER, *supra* note 24, at 50.
120. *Brown v. Entertainment Merchants Ass’n.*, 131 S.Ct. at 2766.
121. *Kansas v. Hendricks*, 521 U.S. at 384-385.
122. *See* Terry A. Maroney, *Emotional Common Sense as Constitutional Law* 62 VAND. L.REV. 851.
123. *Id.* at 857.
124. *Doe v. Miller*, 298 F. Supp. 2d 844, 876 (Iowa 2004).
125. *Doe v. Miller*, 405 F.3d 700 (8th Cir. 2010).
126. *Doe v. Harris*, 2013 WL 144048 (N.D. Cal. Jan. 11, 2013).
127. *U.S. v. Cain*, 583 F.3d 408, 420 (6th Cir. 2009) (referring to APA § 553(b)(3)(B)).
128. *Id.* at 421 (further stating the Attorney General “gave no specific evidence of actual harm to the public in his conclusory statement of reasons, and gave no explanation for why he could act in an emergency fashion.”).
129. 568 F.3d 459, 470 (4th Cir. 2009).
130. *See* DAVID FAIGMAN, *LABORATORY OF JUSTICE: THE SUPREME COURT’S 200-YEAR STRUGGLE TO INTEGRATE SCIENCE AND THE LAW* 360 (2004).
131. An example of unsubstantiated claims is found in New Jersey’s version of Megan’s Law, N.J. Stat. Ann. § 2C:7-1 (West 1994) (“Sex offenders’ recidivism compounds the problem. As a group, sex offenders are significantly more likely than other repeat offenders to reoffend with sex crimes or other violent crimes, and that tendency persists over time.”).



Dana Humrighouse

**BOUND BY THE FIRST AMENDMENT
AND GAGGED BY PERMIT SCHEMES:
THE CONSTITUTIONAL REQUIREMENT FOR
FREE SPEECH ON UNIVERSITY CAMPUSES**

I. Introduction

“Four dead in Ohio.”¹ This lyric, as sung by Crosby, Stills, Nash, and Young, describes the infamous aftermath of a protest at Kent State University on May 4, 1970.² Over one thousand students gathered to protest the Vietnam War.³ Students burned down the Reserve Officers’ Training Corps building on the campus, started bonfires in the streets of Kent, threw beer bottles at police cars, and threw rocks at the police.⁴ The National Guard was called in to settle events. The confrontation between the students and the authorities ended in gunfire, injuring nine students and killing four.⁵ The Kent State shootings, considered a tragedy by all accounts, exemplify the government’s interest in regulating speech activities on university campuses to ensure public order and safety, preventing these types of harrowing consequences.

However, the right to free speech must also be respected. The First Amendment declares, “Congress *shall make no law*...abridging the freedom of speech...or the right of the people to peaceably assemble.”⁶ Although the United States Supreme Court has never adopted a literal interpretation of the amendment—Congress has always been allowed to regulate certain forms of speech—the right has remained highly protected.⁷ Moreover, the Supreme Court has repeatedly acknowledged the heightened import of freedom of speech and right to assemble on public university campuses, holding, “We have long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition,”⁸ and, further, “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”⁹

Thus an issue presents itself: a balance must be struck between legitimate government interests and highly protected and invaluable rights.¹⁰ This balance is at the heart of a free speech debate currently confronting universities and college campuses across the United States. According to the Foundation

Dana Humrighouse has a J.D from Chapman University and a B.S. from Kent State University. She can be reached at humrighouse@gmail.com. She thanks Professor Kenneth Stahl for his continued feedback and insight. She is also grateful to Jaryn Saritzky and William Zakis for their helpful edits.

for Individual Rights in Education,¹¹ out of 427 universities and colleges, at least 251 have campus regulations that violate First Amendment rights and at least an additional 152 over-regulate speech.¹²

Ranked one of the top ten worst campuses for speech in 2013 is the University of Alabama (“University”).¹³ The University has a permit scheme (“UA Permit Scheme”) that requires all students engaging in any speech activity on University grounds to obtain a permit.¹⁴ A permit is required regardless of the medium undertaken, be it leafleting or holding a rally.¹⁵ A permit is required regardless of how many students are undertaking the speech activity, be it one or one hundred.¹⁶ After an application for a permit is submitted, it takes up to ten days for the University to grant or deny the permit.¹⁷ The University’s stated purpose for the permit scheme is to maintain public order by ensuring student safety, preventing the disruption of classes, and avoiding conflicts between events scheduled for the same time and place.¹⁸

Yet, the impact of the UA Permit Scheme extends beyond maintaining public order. In April 2013, an anti-abortion student group exhibited a display on University grounds.¹⁹ Two days before the display was exhibited, a pro-choice student group found out about this scheduled exhibition and planned to distribute leaflets while it occurred.²⁰ However, the pro-choice group was told by the University that a permit could not be granted in time.²¹ When the pro-choice group then attempted to distribute leaflets without a permit, the University police threatened arrest.²² Almost immediately, free speech groups and scholars decried the UA Permit Scheme, declaring that it impedes First Amendment rights.²³

This article focuses on the constitutionality of permit schemes on state university campuses. It argues that a blanket permit scheme applying to all speech activities on campus, such as the UA Permit Scheme, fails to strike a valid balance between a university’s legitimate interests and students’ protected rights. The UA Permit Scheme is significant because similar permit schemes permeate the landscape of higher education in the United States.²⁴ More universities and colleges must change their permit policies to become consistent with constitutional protections.

Part II examines the first set of rules to which permit schemes are subject: those governing content-neutral regulations. After explaining the difference between content-neutral and content-based regulations, it goes on to explore the narrow exception whereby a content-neutral regulation is treated like a content-based regulation. It then demonstrates why the UA Permit Scheme falls within this exception.

Part III examines the second set of rules to which permit schemes are subject: those governing prior restraints on speech. It describes the antago-

nistic relationship between prior restraints and the First Amendment, and addresses the requirement for an initial decision deadline, including what length of time for a deadline is reasonable. It then analyzes how these rules would be applied to the UA Permit Scheme.

Finally, based on the assessment of the UA Permit Scheme under the two sets of governing rules, Part IV makes two proposals to render the UA Permit Scheme and those similar to it constitutional. First, the campus permit schemes should expedite requests for a permit where students are engaging in speech activities that regard time-sensitive issues.²⁵ Second, campus permit schemes should exempt individuals and small groups from the requirement to obtain a permit before engaging in speech activities.

II. Content-neutral regulations of speech

A. The difference between content-neutral and content-based regulations

Speech regulations fall into two categories: content-based or content-neutral. Content-based regulations of speech are those that limit speech based on its subject matter or viewpoint.²⁶ Examples include regulations that prohibit hate speech,²⁷ restrict the broadcasting of sexually explicit television programming²⁸ or ban access to violent video games.²⁹ Regulations that restrict speech based on its content “raise the specter that the government may effectively drive certain ideas or viewpoints from the marketplace.”³⁰ Thus, content-based regulations have a high propensity to run counter to First Amendment policy, for “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content.”³¹ Preventing governmental restrictions is of utmost importance because “[t]o allow a government the choice of permissible subjects for public debate would be to allow the government control over the search for political truth.”³²

Content-neutral regulations limit speech irrespective of its content, generally mandating the time, manner, or place in which speech can take place.³³ Examples include regulations that ban billboards at business locations,³⁴ only allow canvassing between the hours of 9 AM and 5 PM³⁵ or forbid leafleting on public streets and sidewalks.³⁶ These types of regulations only limit the availability and use of particular mediums for speech, meaning that there should be alternate mediums which remain open for the speaker to transmit her message to the public.³⁷ As such, these types of regulations are more apt to accord with the First Amendment prohibition against restricting specific messages from entering the marketplace of ideas.³⁸

The Court has followed the general approach that regulations that more severely interfere with public debate and the marketplace of ideas will accordingly be subject to a stricter standard of review, and, thus, a greater burden

will be placed on the Government to justify the regulation.³⁹ Therefore, the general rule is that content-based regulations are subject to strict scrutiny review, while content-neutral regulations are subject to intermediate or mid-level review.⁴⁰

B. The exception, whereby a content-neutral regulation will be treated like a content-based regulation and subject to strict scrutiny review

1. The three required elements to trigger strict scrutiny review

In *National Association for the Advancement of Colored People v. Button*⁴¹ and *Brown v. Socialist Workers '74 Campaign Committee*,⁴² the Court made an exception to the general rule and reviewed a content-neutral regulation under strict scrutiny.⁴³ The Court did not explain its reasoning for the exception.⁴⁴ However, in both cases, a content-neutral regulation severely burdened significant opportunities for political speech, with the result that certain ideas were restricted from reaching the marketplace of ideas.⁴⁵ It is arguable, in light of these facts, that the level of review was heightened because in effect the regulations acted as content-based regulations by only restricting certain viewpoints or subjects from reaching public discourse although the content-neutral regulations facially applied to all speech regardless of content.⁴⁶ Similar to the treatment of content-based regulations, subjecting content-neutral regulations to strict scrutiny review in this circumstance would ensure adherence to the First Amendment policy that the Government not “suppress unpopular ideas or information or . . . manipulate the public debate through coercion.”⁴⁷ Further examination of the facts and rationale of *Button* and *Brown* provides insight into this exception.

In *Button*, Virginia law barred any organization from retaining a lawyer in connection with litigation to which it is was not a party or had no financial right or liability.⁴⁸ The regulation fell under the purview of the First Amendment because it precluded a form of political expression: litigation.⁴⁹ Even though the regulation was content-neutral, in that it applied to all organizations regardless of its viewpoint or its subject matter, the Court applied strict scrutiny review and invalidated the regulation, as applied to the National Association for the Advancement of Colored People (NAACP).⁵⁰ The Court found that even though the NAACP could still express its beliefs through a multitude of other forms—speeches, leafleting, picketing, publication of articles, or supporting political candidates—litigation was a superior form of expression for the NAACP.⁵¹ The Court reasoned that for the NAACP, litigation was the “sole practicable avenue” for a minority group to make a “political expression” for “equality.”⁵² Conversely, for the majority of the public who use litigation only to resolve private differences, the regulation would not preclude a vital form of political expression.

In *Brown*, Ohio law required that every political party report the names and addresses of any individuals who contributed to its campaign.⁵³ The law infringed on the First Amendment right to associate with a political party.⁵⁴ It was a content-neutral regulation, in that it applied to all political parties, regardless of their affiliation.⁵⁵ In fact, six years earlier, the Court reviewed this exact regulation under intermediate scrutiny, as is typical for content-neutral regulations, and upheld the regulation on its face.⁵⁶ Yet, in *Brown*, the Court reviewed the regulation under strict scrutiny and invalidated it, as applied to the Socialist Workers Party.⁵⁷ The Court reasoned that known membership within an unpopular political party, such as the Socialist Workers Party, could subject an individual to “threats, harassment, and reprisal,” which would severely deter individuals from contributing to these political parties.⁵⁸ Whereas, the Court explained, members of more generally acceptable political parties, such as Republican Party or Democratic Party, would not be as dissuaded from making contributions because they would not face the same stigma from publicly recognized affiliation.⁵⁹ While those who espoused socialist beliefs could still communicate the tenets of socialism via other channels, such as anonymous publications in periodicals, the Court noted the special import of financial contributions to sustain political parties and the historical role political parties have played in contributing to the “free circulation of ideas” within society.⁶⁰

In both *Button* and *Brown*, three key elements appear to trigger strict scrutiny of a content-neutral regulation.⁶¹ The first key element is that the regulation burdened political speech: the speech of those who advocate civil rights and socialism, respectively.⁶² Political speech is highly revered in a republican form of government because the free exchange of such ideas enables the electorate to be well informed.⁶³ The second key element was that a significant opportunity for speech was severely burdened in these cases: speech through litigation in the first case and through association in the second.⁶⁴ The opportunity was significant because the medium targeted was effective and distinct. No alternate medium could equivalently target the same audience and retain the same nature of the communication.⁶⁵ Handing out a leaflet would not vindicate civil rights as litigation did, whereby all violators within a respective jurisdiction would be required to acknowledge and adhere to the message.⁶⁶ Likewise, political party association is unique in its ability to enable participation in politics and elections. The burden was severe because it largely foreclosed the targeted medium from use.⁶⁷ A seminal group that undertook civil rights litigation, the NAACP, was completely barred from doing so in all instances, save the few in which it had a financial right or liability.⁶⁸ Economic support is vital for a political party

to sustain its existence.⁶⁹ Severely burdening a significant opportunity for speech kept the message from reaching the public.⁷⁰ The third key element was that this burden affected one group or idea far more than all others subject to the regulation.⁷¹ Racial minorities would be precluded from expression more than the majority.⁷² Similarly, Socialists would be dissuaded from association more than members of mainstream political groups.⁷³ What is important is not simply that the regulation keeps messages from reaching the public, but that it has a disparate impact. It keeps only certain messages out while allowing others to come into the marketplace of ideas.⁷⁴ In this vein, the content-neutral regulation operates like a content-based regulation because only certain messages are burdened.⁷⁵ When taken together, these three elements result in the prevention of certain political ideas from reaching the electorate. Such selective prevention poses a substantial risk to the integrity of self-government.⁷⁶

2. Extending the exception: Significant opportunities for speech are burdened when one distinct mode of speech or many indistinct modes of speech are restricted

In several cases, content-neutral regulations, which at first blush appear similar to *Brown* and *Button*, have been reviewed under mid-level review.⁷⁷ The regulations in these cases severely burdened a medium of political speech, with a disparate impact that impeded particular messages from reaching the public.⁷⁸ In *Greer v. Spock*,⁷⁹ a regulation banning political speech on military bases applied to all political candidates. However it had a disparate impact on “minor candidates” who did not have a campaign budget to use media as a platform to express their campaign messages, so they relied on more inexpensive mediums, such as speeches.⁸⁰ Likewise, in *U.S. v. O’Brien*,⁸¹ a regulation prohibiting anyone from burning a draft card applied to anyone regardless of their reasons for burning draft cards. Yet it disparately impacted those who were against the draft, because draft supporters had no logical motivation to destroy their cards.⁸²

Yet upon closer scrutiny, it is clear that reviewing these regulations under intermediate scrutiny was consistent with the aforementioned interpretation of *Brown* and *Button*. This is because even though political speech was burdened and the “actual restrictive effect of the challenged law . . . [was] clearly disparate,” unlike *Brown* and *Button*, a significant opportunity for speech was not burdened because the mode of speech prohibited was indistinct.⁸³ “[The actual restrictive effect was] not severe, for even the disproportionately disadvantaged speakers . . . [could] readily shift to alternative means of expression.”⁸⁴ The political candidate could still mail pamphlets to the military base, and the anti-draft protestor could still hold a rally to speak out against the draft, which allows the speakers in both cases to target the same audiences.

Further, the nature of the communication remained the same, as speeches and pamphlets are both traditional forms of campaigning, and burning flags and holding rallies are both demonstrative forms of protest. Because the speaker could still effectively get her message out to the public, the First Amendment policy concern that certain ideas may be censored was not applicable.⁸⁵ In other words, where the regulation severely burdens an indistinct medium, leaving alternate mediums that can adequately transmit the message to the public, the Court has held that strict scrutiny will not be triggered.⁸⁶

The inquiry at the heart of whether a significant opportunity for speech has been severely burdened appears to be: by targeting that opportunity has the message been prevented from reaching the public?⁸⁷ This premise naturally extends to include regulations that block a substantial amount of indistinct modes of communication.⁸⁸ An example of this type of regulation would be a ban that applies to leafleting, speech making, and engaging in any type of demonstration. In this example, unlike *Brown* and *Button*, the content-neutral regulation has not impeded speech by eliminating *one distinct* mode of communication. Rather, it has impeded speech by eliminating virtually *all indistinct* modes of communication. In either scenario, the result is the same: there is no alternate medium for speech, meaning that messages will be substantially prevented from reaching the public. Either type of content-neutral regulation evokes the First Amendment policy concern of censoring only specific ideas or viewpoints from reaching the marketplace of ideas. Given the similar result and policy concern, the view that significant opportunities for speech are severely burdened when one distinct mode of speech is targeted should be extended to also include situations in which a substantial amount of indistinct modes are targeted.⁸⁹

3. Overcoming challenges to the exception

Two pivotal cases since *Brown* and *Button* have challenged the idea that disparate impact is a factor that can influence judicial review. *Renton v. Playtime Theaters, Inc.*⁹⁰ involved a regulation prohibiting movie theaters that showed pornography within 1,000 feet of a dwelling, church, park, or school.⁹¹ The regulation was facially content-based, and because it only burdened pornographic films, as opposed to all other types of films, it clearly had a disparate impact.⁹² Yet, the Court held that the regulation was actually content-neutral and reviewed it under intermediate scrutiny.⁹³ The Court's reasoning was that the regulation's justification was content-neutral because the regulation sought to stop the crime that is a secondary effect of movie theaters that show pornography, rather than wanting to stop the showing of pornography itself.⁹⁴ Since the Court ignored the disparate impact of the regulation and only considered its justification in determining which level of

review to apply, a broad holding of this case is that a regulation's disparate impact will not influence the level of judicial scrutiny to be used.⁹⁵

However, under the *Button* and *Brown* exception, it is not purported that a regulation's disparate impact alone is ever sufficient to merit strict scrutiny.⁹⁶ Rather, it is only when a regulation's disparate impact is *combined* with a burden on political speech, and it is a severe burden to significant opportunities for speech, that strict scrutiny is evoked.⁹⁷ The regulation in *Renton* did not burden political speech. Rather, it burdened pornography.⁹⁸ Pornography does not hold the same import for enlightening the electorate as political speech, meaning that there is not the same concern that its absence could jeopardize a republican form of government.⁹⁹ Also, the regulation in *Renton* did not severely burden significant opportunities for speech. The regulation only banned showing pornography at movie theaters.¹⁰⁰ This left many alternate mediums open to convey pornography, such as video cassettes, magazines, or other printed materials. These mediums were arguably equivalent as they were readily available to the same audience and would not degrade the content's aesthetic quality. Because two elements required under *Button* and *Brown* were missing, there was no First Amendment concern that only certain political speech would be unable to reach the public, and consequently no requirement to use strict scrutiny.

Perhaps more to the point of this inquiry is *Hill v. Colorado*.¹⁰¹ *Hill* involved a regulation prohibiting anyone from approaching within eight feet of a person who was within a hundred feet of a healthcare facility, without consent, for the purpose of "engag[ing] in oral protest, education, or counseling with [that] person."¹⁰² The Court held the regulation to be facially content-neutral, as it applied to all protests, education, or counseling regardless of the subject or viewpoint.¹⁰³ The rule was applied in the context of abortion clinics, and those engaging in speech activity were doing so in regard to abortion rights.¹⁰⁴ Speech regarding the right to have an abortion falls within the purview of political speech. The regulation also disparately impacted those who held anti-abortion views, as they were the only ones accosting clinic patients.¹⁰⁵ As a facially content-neutral regulation that had a disparate impact on political speech, at first glance it may appear to fall precisely within the scope of the *Brown* and *Button* exception. Yet, the Court only applied intermediate scrutiny.¹⁰⁶

However, applying intermediate scrutiny in *Hill* was completely consistent with the *Brown* and *Button* exception. Again, there are three requisite elements to trigger strict scrutiny. The regulation in *Hill* did not merit strict scrutiny because it did not severely burden a significant opportunity for speech. *Hill*

prohibited only a few indistinct modes of communication—namely, the ability to approach someone within an eight-foot radius, within a hundred feet of a healthcare facility, without consent, for the specific purpose of “engag[ing] in oral protest, education, or counseling with [that] person.”¹⁰⁷ This left many equivalent alternate mediums available that did not change the scope of the audience or the nature of the communication. As noted by the Court, the same audience of patients would be exposed to the message, but from a distance of eight feet away.¹⁰⁸ Further, the nature of the conversation remained the same for two reasons. First, the nature of publicly protesting remained intact. This is because speakers could still use the same mediums, as signs were still held even if they were a little farther away, and messages were still verbalized albeit at a higher volume to be heard.¹⁰⁹ Second, the ability to engage in dialogue with patients (which existed before the regulation) continued under the regulation. This was because a speaker who received consent to approach a patient confronted no restriction on the mediums of speech that could be used.¹¹⁰ The regulation only applied where the patient was not consenting, or “unwilling” to engage in dialogue with the speaker.¹¹¹ Because alternate mediums were equivalent, reaching the same audience and preserving the nature of the communication, the First Amendment concern that certain political speech will be barred from public debate was absent, which would trigger strict scrutiny.

C. The UA Permit Scheme is a content-neutral regulation that falls within the exception, subjecting it to strict scrutiny

The UA Permit Scheme requires all students to register for a permit ten days prior to engaging in any speech activity on campus grounds.¹¹² The regulation is facially content-neutral, as a permit is required for all students, regardless of the subject or viewpoint of their speech. The general rule would be to review this regulation under intermediate scrutiny. However, because the regulation severely burdens significant opportunities for political speech and only certain ideas are restricted from reaching the marketplace of ideas, the regulation should trigger strict scrutiny.¹¹³

1. The UA Permit Scheme burdens political speech

While the UA Permit Scheme applies to all speech in name,¹¹⁴ in effect, it especially burdens political speech. According to the University newspaper, “Protests and demonstrations are . . . ingrained in the history of the University of Alabama;” in the 1960s students regularly protested regarding racial equality, in the 1970s about the Vietnam War, and in the twenty-first century about LGBTQ rights, abortion, and the Iraq War.¹¹⁵ In July 2013, UA students threatened with arrest for leafleting were engaging in political speech about the right to have an abortion.¹¹⁶

Historically, students on university campuses have exercised political speech rights throughout the United States. In the 1930s, students protested against war and militarism.¹¹⁷ In the 1960s and '70s, students protested for equal rights for women and for African Americans, as well as against the United States' involvement in the Vietnam War.¹¹⁸ In the 1980s, students protested against selective service registration, United States involvement in South America, and South African apartheid.¹¹⁹ Since 2000, students have protested for gay rights, for immigrant workers' rights, and against increases in public university tuition.¹²⁰ Therefore, the permit scheme endangers a long-time campus tradition of political speech and free expression of dissent.

2. The UA Permit Scheme severely burdens significant opportunities for speech

The UA Permit Scheme severely burdens significant opportunities for speech in two ways. First, it eliminates a distinct mode of communication. As with *Brown*, the right to associate has been severely burdened. For up to ten days, students cannot be part of a collective demonstration, rally, or audience.¹²¹ They cannot take a public stand to show they are united behind a similar cause. Also as with *Brown*, a distinct medium is being closed off. In *Brown*, party membership was a distinct medium due to its historical importance in allowing Socialists to convey messages on a national level or impact political debate.¹²² Similarly, student protests are a distinct medium due to their historical importance in allowing students to convey messages on a national level or impact political debate. The Assistant Director of the Office of Student Media at the University of Alabama affirmed this value of group protest for students by stating that making an "impact... [requires] numbers. The truth is that three or four people won't make a difference."¹²³

Indeed, the effectuation of change through group protests and demonstrations undertaken by students is a theme in United States' history. Student protests at the University of California at Berkeley in 1964 resulted in the University President being fired and contributed to the election of Ronald Reagan as the Governor of California.¹²⁴ Student protests at Colombia in 1968 led to a stop in federal sponsorship of Colombia to conduct classified weapons research.¹²⁵ Student protests in 1991 against tuition increases at the City University of New York made national headlines.¹²⁶ Also, the September 2013 protest at the University of Alabama, where students called for desegregation of sororities, made national headlines.¹²⁷

Second, the UA Permit Scheme also eliminates a substantial amount of indistinct modes of communication. The UA Permit Scheme is a blanket ban for up to ten days on *all* speech activities that would require physical use of the University grounds.¹²⁸ Any speech activity where the speaker is relay-

ing her message in person is banned.¹²⁹ An individual student cannot pass out leaflets, make a speech, or hold a sign.¹³⁰ The ability to reach a national audience aside, the question becomes whether an individual student can even convey his ideas to fellow students.

Similar to *Hill* and *Brown*, alternate mediums for expression exist, as students can still post signs or publish articles in the school newspaper.¹³¹ Where alternate mediums are available, the dispositive inquiry is whether they are equivalent as in *Hill* or not equivalent as in *Button*. In *Hill*, the Court held that the alternatives remaining were equivalent because the target audience—every patient—would still be exposed to the message. The speaker merely had to step back eight feet and either talk louder or hold a bigger sign.¹³² Further, the nature of the speech remained the same, as protest and dialogue could continue under the regulation. Conversely, in *Button*, the Court held the alternatives remaining were not equivalent because the scope of the audience was greatly reduced, as litigation was the only form of expression that could require acknowledgment and adherence by all civil rights violators within a given jurisdiction.¹³³ Further, the nature of the speech that could occur was changed, as making speeches, handing out leaflets, or publishing literature does not vindicate violations of civil rights.¹³⁴

Like *Button* and unlike *Hill*, the UA Permit Scheme does not leave equivalent alternate mediums for expression because it changes the scope of the audience and the nature of the communication. First, the UA Permit Scheme severely limits the scope of the type of audience that can be reached. Instead of reaching the unaware or critics, students are now more likely to draw an audience of only those who already know about that subject or already adhere to the espoused viewpoint. This is because the scheme bans all mediums that include physically and pro-actively engaging with an audience, which enables the speaker to approach those who may not know about or agree with her message. Contrary to *Hill*, students do not have the opportunity to just step back eight feet and speak more loudly. Rather, the UA Permit Scheme only allows messages conveyed through media or writing, which are passive mediums that tend to reach voluntary audiences. If people do not know that an issue exists, they are less likely to seek out information regarding it. Additionally, people who adhere to one belief generally do not seek out information that criticizes their belief. These two groups of people are no longer as likely to be within a student's reachable audience nor exposed to a student's message.

Second, passive mediums do not create the same kinds of conversations. Students of the University have declared that they protest on campus to encourage dialogue.¹³⁵ In fact, the University of Alabama itself endorses

the special role universities play in fostering a “robust exchange of ideas ... within a diverse and inclusive learning environment.”¹³⁶ Certainly, the ability to proactively engage an audience in a dialogue is indispensable to the exchange of diverse ideas. Passive mediums do not encourage dialogue, as a reader merely receives information, and does not have an easily accessible or ready opportunity to respond. Although the reader could respond by making and posting his own signs or writing his own newspaper article, such a response requires a substantial investment of time and work. This investment is likely to dissuade all but the most impassioned readers from engaging in dialogue. Further, after a reader posts her response, she then has to wait for someone equally impassioned to decide to take the time and work to respond in writing with answers, comments, or rebuttals. Face-to-face dialogue is far more communicative because it does not entail an investment of much time or work.

Arguably, students can still approach others on a one-on-one basis, engaging in personal conversations, to actively engage an audience.¹³⁷ However, these one-on-one encounters are hardly tantamount to a mass demonstration. They severely limit the number of people who can be reached, as opposed to handing out leaflets, participating in rallies, making speeches or holding signs. Having a conversation requires time, and only so many one-on-one conversations can occur within a day. Conversely, handing someone a leaflet may only take a second. A rally or group of people holding signs will expose a message to any number of passersby. Similarly, a speech can be heard by a very large audience. These mediums of speech allow a message to be conveyed to more people in a shorter time, enabling a message to quickly reach the level of public debate. Talking one-on-one to individuals dramatically limits the potential size of the audience that can be reached.

Further, it is insufficient that students may be able to engage in all of the speech activities covered by the permit scheme, so long as they do so off-campus. The Court has repeatedly held that the unconstitutional restriction of speech in one location may not be justified by the ability of that speech to occur elsewhere.¹³⁸ The combination of eliminating both a distinct mode of communication as well as all indistinct modes on the University campus is doubly crippling. For up to ten days, students are given virtually no viable medium to reach the public. Yet, this broad prohibition only lasts for ten days, which poses the question of whether it is actually a prohibition at all.

3. The UA Permit Scheme disparately impacts certain groups or ideas

It is likely that the UA Permit Scheme disparately impacts certain groups or ideas precisely because of the ten day waiting period. This is because for certain speech—speech regarding issues of continuing debate—a waiting

period is a delay that does not also serve as a prohibition. Issues become ones of ongoing debate when there is no apparent time limit on the relevancy of speech about these issues. Because the issues are not rendered moot by time, speech about the issues can have an impact regardless of when it takes place. Examples of these issues include abortion and the death penalty, which have been debated for many decades in the United States. They were issues ten days ago and will surely still be issues ten days from now.

Conversely, for speech regarding issues that are time-sensitive, the waiting period functions as a prohibition rather than a mere delay. Issues are time-sensitive when they are only relevant within a certain time period. At a certain point, the issue will become moot, and speech on that issue will no longer have an impact or the impact will be greatly diluted. Two scenarios highlight this concept. First, when a speech-arousing event will take place in fewer than ten days—speech must take place before the event occurs to have impact. Speech after ten days would be irrelevant. Take, for example, a public notification that the University will break ground in five days to transform a nearby green space into a parking structure. If students want to build support for preserving the green space, any speech activity would need to take place within five days, before construction has commenced. If students have to wait ten days, the green space will already have been demolished.

Second, there is the scenario in which an event takes place unexpectedly, and it is unknown whether the event will last for longer than ten days. Speech must occur before the event has ended for it to impact the event. If the event ends before ten days, speech to influence that event would similarly be irrelevant. Take, for example, a government shutdown. If students wanted to protest a shutdown, condemning it as a tool to change government policy, such speech would only be relevant while the shutdown was occurring. If the shutdown were to end in five days, student condemnation after the fact would not be nearly as relevant. The impact of the speech would be severely or completely diluted, as the shutdown has ceased to be part of current events, largely eliminating it from the news cycle or public debate.

In these types of scenarios, a ten-day delay creates a disparate effect because time-sensitive issues are eliminated from the marketplace of ideas, while ongoing issues are allowed to remain.¹³⁹ Similar to the way the NAACP's political ideas were restricted in *Button*¹⁴⁰ and socialist political ideas were restricted in *Brown*,¹⁴¹ time-sensitive political ideas are restricted under the UA Permit Scheme. As the UA Permit Scheme completely bans the ability to associate or engage in active mediums for political speech regarding time-sensitive issues, as opposed to issues of continuing debate, it should be subject to strict scrutiny in accordance with *Brown* and *Button*.

III. Prior restraints

A. The antagonistic relationship between prior restraints and the First Amendment

Prior restraints are a sub-category of regulations on speech. “[A] prior restraint exists when the enjoyment of protected expression is contingent upon the approval of government officials.”¹⁴² The requirement of a permit or license to engage in a speech activity, such as a protest, parade, or leafletting, is a form of prior restraint.¹⁴³ Our history has long acknowledged the threat that prior restraints pose to free speech.¹⁴⁴ The First Amendment was, in part, a reaction against licensing requirements that existed in England.¹⁴⁵ The centrality of prior restraints to First Amendment doctrine is evidenced by William Blackstone’s definition of freedom of the press, which was quoted in the Supreme Court’s seminal case on prior restraints, *Near v. Minnesota*:¹⁴⁶ “the liberty of the press is, indeed, essential to the nature of a free state; but this consists in laying no previous restraints upon publication.”¹⁴⁷

There are two ways in which prior restraints effectuate the censorship that the First Amendment seeks to prohibit. First, prior restraints can result in government censorship of ideas because the government is in a position to screen or suppress ideas before they enter the public arena.¹⁴⁸ Second, prior restraints can result in self-censorship because individuals are deterred from undertaking speech activities due to the burden and time it takes to apply for a permit.¹⁴⁹ So that public discourse is not stifled by either type of censorship, “a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others *beforehand*.”¹⁵⁰ As a result, “prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.”¹⁵¹ “Any system of prior restraints of expression comes to th[e] Court bearing a heavy presumption against its constitutional validity.”¹⁵²

B. Rules governing prior restraints

While prior restraints are subject to either the respective rules governing all content-based or content-neutral regulations of speech, because of their disfavor they are also subject to additional rules.¹⁵³ However, the content of these rules is widely debated.¹⁵⁴ Scholars in the field have commented that the “doctrine is a source of confusion and controversy,”¹⁵⁵ and even that the “doctrine is so far removed from its historic function, so variously invoked and discrepantly applied, and so often deflative of sound understanding, that it no longer warrants use as an independent category of First Amendment analysis.”¹⁵⁶ Given the deep division among judicial circuits, a clear and comprehensive understanding of the rules governing waiting periods for prior restraints is best established by relying on Supreme Court precedent.¹⁵⁷

1. A permit scheme must have an initial decision deadline

Four crucial cases set the framework on whether there is a deadline requirement for an initial decision which grants or denies a permit.¹⁵⁸ *Freedman v. State of Maryland*¹⁵⁹ established three procedural safeguards required for prior restraints.¹⁶⁰ “(1) [A]ny restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the burden of proof once in court.”¹⁶¹ *Shuttlesworth v. Birmingham*¹⁶² held that permit schemes must have narrow, objective standards to guide the licensing authority.¹⁶³ *FW/PBS, Inc. v. City of Dallas*¹⁶⁴ required licensors to make an initial decision to grant or deny a permit within a specified and reasonable time period.¹⁶⁵ *Thomas v. Chicago Park District*¹⁶⁶ held that the *Freedman* procedural requirements applied only to content-based prior restraints, meaning that they are not required for content-neutral prior restraints.¹⁶⁷

How these holdings bear on one another is of crucial importance. One view is that the requirement for a reasonable initial decision deadline is rooted in *Freedman* and was dismissed under *Thomas*. After the Court in *Thomas* held that the *Freedman* procedural safeguards were not required for content-neutral prior restraints, the 9th, 10th, and 11th Circuits held that included among these procedural safeguards was the *FW/PBS* requirement to have a reasonable fixed deadline for the initial decision to grant or deny a permit.¹⁶⁸ However, Supreme Court precedent indicates that this is a misinterpretation of *Freedman*.¹⁶⁹ The procedural safeguards of *Freedman* were specific and detailed, and did not reference an initial decision deadline.¹⁷⁰ The *Freedman* safeguard most similar to such a deadline is that “any restraint prior to judicial review can be imposed only briefly in order to preserve the status quo.”¹⁷¹ However, this safeguard is not synonymous with a requirement for an initial decision deadline.¹⁷² An initial decision deadline addresses the time between the application for a permit and the decision to grant or deny that permit. Prompt judicial review addresses the time between a decision to deny a permit and the judicial hearing for an appeal of that decision. Further, in *FW/PBS*, the Court invalidated a license scheme, noting that it did not provide an initial decision deadline *or* an avenue for prompt judicial review. This confirmed that the application process and the review process are two separate elements.¹⁷³

It is arguably a more accurate proposition that a requirement for a reasonable initial decision deadline is rooted in *Shuttlesworth*, required under *FW/PBS*, and affirmed by *Thomas*. In *FW/PBS*, the Court explicitly stated

a license ordinance is required to “place limits on the time within which the decision-maker must issue the license.”¹⁷⁴ In *Thomas*, the Court held that this initial decision deadline actually falls under the purview of “adequate standards to guide the official’s decision” that are required in *Shuttlesworth*,¹⁷⁵ signaling that it is not grounded in *Freedman*’s procedural safeguards. The Court explained that an initial decision deadline derives from *Shuttlesworth* because without it a licensing official could “favor or disfavor speech based on its content” by unduly delaying subjects or viewpoints that she does not like.¹⁷⁶ Speech could be delayed indefinitely¹⁷⁷ until a message has become moot or until the speaker’s desire to speak dissipates. By preventing undue delay, the initial decision deadline ensures that the licensing official does not have “unduly broad discretion in determining whether to grant or deny a permit.”¹⁷⁸ Then, the complete opposite of dismissing this requirement, the Court in *Thomas* conveyed an affirmation of the requirement for an initial decision deadline.¹⁷⁹ After discarding the *Freedman* procedural safeguards for content-neutral permits, the Court in *Thomas* held that these schemes must still include “adequate standards to guide the official’s decision,” then cited the 28-day initial decision deadline as an example of such standards.¹⁸⁰

2. The initial decision deadline must be set for a reasonable amount of time

Given that a licensor must make an initial decision to grant or deny a permit within a specified and reasonable time period, the issue becomes which length of time is reasonable. In 2002, the Court implied an answer to this issue in two key cases, *Thomas v. Chicago Park District*¹⁸¹ and *Watchtower Bible and Tract Society of N.Y. Inc. v. Vill. of Stratton*.¹⁸² In these cases, the Court held that spontaneous speech is a right that should only be burdened in very limited circumstances.¹⁸³ A permit scheme burdening this right can only be justified when it has a legitimate purpose, and the regulation of speech, in and of itself, is not a legitimate purpose.¹⁸⁴ For a waiting period to be reasonable, the length of time must be required to accomplish the purposes of the permit scheme.¹⁸⁵ Further, when the purposes of the permit scheme can be addressed by alternate means that do not delay speech, any additional waiting period will be deemed unreasonable and invalid.¹⁸⁶

In *Thomas*, a regulation required a permit to use municipal parks for “large-scale events” that either included more than fifty people or used amplified sound.¹⁸⁷ Applications for permits were “granted [or denied] within 14 days, unless by written notice to the applicant ... [the licensor] extend[ed] the period an additional 14 days.”¹⁸⁸ Numerous permits had been denied.¹⁸⁹ The Court held that the 28-day deadline was reasonable and that the regulation was valid.¹⁹⁰ This ruling stands in contrast to the *Watchtower* decision, which involved a regulation that required a permit for individuals to hold a

door-to-door canvass.¹⁹¹ Permits were granted on the day the applications were submitted, approval of the permits was automatic, and no permits were denied.¹⁹² The Court held that the one-day deadline was unreasonable and that the regulation was invalid.¹⁹³

Thomas and *Watchtower* were very similar in some ways. In both *Thomas* and *Watchtower*, decision-makers burdened the right to engage in spontaneous speech.¹⁹⁴ Speakers were precluded from certain mediums of impromptu speech because they had to undergo an application process before exercising their speech.¹⁹⁵ In both cases, the Court also found the permit scheme had legitimate purposes.¹⁹⁶ In *Thomas*, the legitimate purpose was to maintain public order by preventing illegal or dangerous activity; preserve park facilities; verify financial accountability for any damages; and to coordinate shared space.¹⁹⁷ In *Watchtower*, the legitimate purposes were to prevent fraud, prevent crime, and protect residents' privacy.¹⁹⁸

Yet despite these similarities, the Court reached antipodal holdings. In *Watchtower*, the Court held that a one-day waiting period in which permits were automatically approved to all who applied was too burdensome to be valid.¹⁹⁹ This is a stark contrast from its decision to uphold a 28-day waiting period in which permits may have been denied in *Thomas*.²⁰⁰ The explanation for this divergent treatment is seemingly derived from the reasonableness of the waiting period in each case. Further, a correlation is indicated between the size of the group being regulated and the reasonableness of the waiting period: larger groups justify longer waiting periods, while smaller groups are likely to justify no waiting period at all.

Presumably, the reason for this discrepant treatment is that speech activity undertaken by a large group presents unique risks that require time to be prevented.²⁰¹ In *Thomas*, the permit scheme only applied to large-scale events, using the inclusion of fifty people as a factor to define "large-scale."²⁰²

If 50 people engage in dangerous or illegal behavior, they may cause severe damage. Further, larger crowds, it may be argued, have a greater propensity to breakdown into chaos and riots. Another risk present for large groups is related to space. In *Thomas*, the space at issue was a park.²⁰³ A park is a finite area that can only hold a limited number of people. If no notice were required, numerous large-scale events could occur on the same day, overrunning the park with people.²⁰⁴ When these risks are present, one might argue that the government needs time to take preventative measures. The Court's rationale that permit waiting periods provide time for such preparation, and may be reasonable under certain circumstances, provides some kind of explanatory framework for the seemingly divergent rulings in *Thomas* and *Watchtower*.

Thomas illustrates this contention, as accomplishing the proffered government interests would require time. It would take time to investigate whether the demonstrating group planned to engage in dangerous or illegal behavior, undertake proper precautions to protect park facilities, and verify that someone would be financially accountable if there were damages.²⁰⁵ By having advance notice, the municipality could also coordinate use among large-scale events.²⁰⁶ Therefore, the Court upheld the permit scheme because it was feasible that 28 days were required to undertake the preventative measure to avoid these risks.²⁰⁷

Logically, the risks present with large group activities are *de minimus* or non-existent when the same activities are undertaken by individuals or small groups.²⁰⁸ In *Watchtower*, the permit scheme applied to individuals and small groups.²⁰⁹ If only five people engage in the exact same dangerous or illegal behavior, much less damage would be caused simply based on available manpower. Small-group demonstrations are far less likely to degenerate into riots. Also, individuals and small groups do not take up as much space as large groups and therefore are less apt to overcrowd an area. For these reasons, not as much time is necessary for investigating and preparing for potential damage or for coordinating the usage of space. Further, the risk of these consequences is so slight that it likely does not justify any waiting period at all.²¹⁰

Furthermore, those purposes for permit schemes that are legitimate in relation to small groups tend to not intrinsically require time to be accomplished. In other words, the waiting period provided by a permit scheme is only one of numerous means to achieve such purposes. This concept was conveyed in *Watchtower*, in which the Court held that the permit's purposes to prevent fraud and protect the residents' privacy could be achieved through the permit scheme.²¹¹ Yet the Court reasoned that these valid purposes could also be accomplished by alternate means that were less burdensome on the speakers' First Amendment right to spontaneous speech.²¹² Fraud could be prevented by requiring only commercial solicitors to attain a permit,²¹³ and privacy could be preserved by having residents post a sign that said "no soliciting."²¹⁴ Because a one-day waiting period was not required to accomplish the purposes of the permit scheme, it was found unreasonable and invalid.²¹⁵

C. Review of the UA Permit Scheme's initial decision deadline

The UA Permit Scheme requires that an initial decision to grant or deny a permit be made within ten days after an application is submitted.²¹⁶ This ten day waiting period burdens the right to engage in spontaneous speech. The University of Alabama has stated that the purpose of the permit scheme is to

maintain public order by ensuring student safety, avoid conflicts between events scheduled for the same time and place, and prevent the disruption of classes.²¹⁷ These purposes would likely be upheld as legitimate, as the Court in *Thomas* found that maintaining public order is a legitimate purpose for a permit scheme.²¹⁸ For the ten day waiting period to be found reasonable, ten days must be required to maintain public order on the University campus. Further, if public order can be maintained through alternate means that would not require a delay to speech, the ten day waiting period would likely be held as unreasonable and thus, invalid. Because of the correlation between the size of the group under regulation and the reasonableness of the waiting period, the Court would likely reach a different holding for the regulation as applied to small groups versus large groups.²¹⁹

1. Courts would likely rule that ten days is a reasonable and valid deadline for large groups

While frustrating to advocates of free and spontaneous expression, the ten day waiting period would likely be held reasonable and valid for large groups. This is because the waiting period arguably accomplishes the goal of keeping students on campus safe. Because large groups present the unique risks, as compared to small groups, of causing a severe damage or turning into a riot, courts would likely recognize them as a potential threat to student safety. As with *Thomas*, the permit provides time for the University to take preventative measures to avoid these risks. For example, the University has time to set up a designated perimeter for the event or coordinate security, thereby ensuring greater student safety. Further, scheduling security or constructing a perimeter would likely take a few days, which might theoretically justify the ten day waiting period. Also as with *Thomas*, since this time to prepare can only be attained through the waiting period, a less restrictive alternative would not accomplish the University's purpose of maintaining student safety.

The waiting period also accomplishes the goals of preventing scheduling conflicts between events and the disruption of classes. Like the park in *Thomas*, a campus is a finite area and cannot hold numerous large groups without being overrun. The permit provides time for the University to check an event schedule to verify that no large events are scheduled concurrently with one another. Also, groups comprised of many people are comprised of many audible voices, meaning that they can generate noise that may disrupt classes. The permit scheme provides time to check class schedules to verify that large events are not scheduled near classes in session. Taking the time to verify schedules would accomplish both goals of avoiding time conflicts between events and avoiding class disruption. Courts may find the argument that class schedules are established far in advance, and accessing a schedule of events

only take a few minutes, compelling in such a way that the ten-day waiting period seems largely unnecessary and unjustified in regard to realistically accomplishing these two latter goals.²²⁰ However, based on the Supreme Court's permissiveness in the case law, it is likely that UA's ten-day waiting period would nonetheless be upheld as a reasonable means of achieving the legitimate goal of ensuring student safety during large group events.

2. Ten days is an unreasonable and invalid deadline for individuals and small groups

In turn, the ten-day waiting period would likely be held to be unreasonable and invalid as applied to individuals and small groups. Small groups are not as likely to cause a severe damage or to turn into a riot, so there is little threat posed to student safety, obviating any need on the University's part to take preventative measures. Small groups do not require large amounts of space, meaning that the University grounds can accommodate many small groups at once. Accordingly, the University does not need to verify that events are not scheduled concurrently. Small groups also do not have the same propensity to be loud and disrupt a class, so the University should not need to verify that events are not scheduled near classes in session. Simply stated, a few students leafleting do not pose a risk of jeopardizing anyone's safety, disrupting classes, or requiring coordination for the use of space. Making a pamphleteer wait ten days will not accomplish any of UA's proffered goals because there is no relationship between speech activity and the purposes of UA's Permit Scheme. As with *Watchtower*, because no length of time is required to accomplish the stated purposes, any length of time is unreasonable for a waiting period.

IV. Amending the UA permit scheme to comply with the First Amendment

After the University of Alabama threatened students with arrest for undertaking speech activity without a permit, many decried the violation of First Amendment rights.²²¹ The University was forewarned that a lawsuit would be forthcoming if changes were not made.²²² Soon thereafter, the University amended the UA Permit Scheme.²²³ The amendment provided:

If an Event is spontaneous, such that it is occasioned by news or issues coming into public knowledge within the preceding two (2) calendar days, an expedited request for a . . . [permit] may be made. . . . In such event, the University will attempt to accommodate and provide access. . . . within twenty-four hours, to an area of the [University] Grounds which is available and which does not interfere with regular academic programs or scheduled events and programs.²²⁴

This policy amendment avoids disparate impact, as suggested in the previous scenario, because an expedited application process allows time-sensitive speech to reach the marketplace of ideas.²²⁵ Without a disparate impact,

strict scrutiny cannot be triggered under the *Button* and *Brown* rule.²²⁶ As a result, the UA Permit Scheme no longer risks being subject to strict scrutiny, a veritable death sentence for regulations on high-value speech.²²⁷

However, the UA Permit Scheme still requires a permit for speech activities undertaken by individuals and small groups. It is likely that the waiting period is unreasonable and the permit scheme is invalid, as applied to individuals and small groups because a waiting period is not required to accomplish the UA Permit Scheme's purposes.²²⁸ To comply with the rules set forth in *Thomas* and *Watchtower*, the UA Permit Scheme should, at a minimum, only require permits for large groups undertaking speech activities.²²⁹ Individuals and small groups should be allowed to engage in spontaneous speech without being required to ask the University for permission.²³⁰

V. Conclusion

A blanket requirement for all students to obtain a permit for speech activities undertaken on public college and university campuses is unlikely to pass constitutional muster. Such permit schemes should expedite applications for speech activities regarding time-sensitive issues and allow an exemption for speech activities by small groups and individuals. By implementing the aforementioned changes, a more equitable balance will be struck, so that a students' highly protected right to engage in free speech is not sacrificed in the name of a university's interest in maintaining public order. Hopefully, as more colleges and universities are encouraged to examine their permit schemes, they will narrowly tailor their regulations to conform with Supreme Court precedents. These precedents preserve some fundamental aspects of First Amendment expression rights. By drastically shrinking their regulatory schemes, institutions will not only avoid legal challenges, but preserve the legacy of student protest in the twenty-first century.

NOTES

1. CROSBY, STILLS, NASH, & YOUNG, OHIO (Atlantic 1970).
2. *Id.*
3. Jeremy M. Lewis & Thomas R. Hensley, *The May 4 Shootings at Kent State University: The Search for Historical Accuracy*, 34 KENT STATE UNIVERSITY, available at <http://www2.kent.edu/about/history/May4/lewihen.cfm>.
4. *Id.*
5. *Id.*
6. U.S. CONST. Amend. I.
7. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 481-82 (2007); *Bridges v. CA*, 314 U.S. 253, 263 (1941); *Dennis v. U.S.*, 341 U.S. 494, 580 (1951) (Black, J., dissenting); See also GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 1017 (6th ed. 2009) (discussing the Court's failure to adopt the literal interpretation of the First Amendment).
8. *Gutter v. Bollinger*, 539 U.S. 306, 329 (2003).

9. Shelton v. Tucker, 364 U.S. 479, 487 (1960). *See also* Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967) (quoting U.S. v. AP, 52 F. Supp. 362, 372 (D.N.Y. 1943) (“The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”)).
10. Nathan W. Kellum, *Permit Schemes: Under Current Jurisprudence, What Permits Are Permitted?* 56 DRAKE L. REV. 381,382 (2008) (discussing how permit schemes confront a tension between regulating for legitimate purposes and the right to engage in free speech).
11. The Foundation for Individual Rights in Education is a nonprofit organization whose mission is “to defend and sustain individual rights at America’s colleges and universities.” THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, <http://www.thefire.org> (last visited Aug. 14, 2014).
12. Tyler Kingkade, *Majority of Colleges Restrict Speech on Campus: FIRE Report*, HUFFINGTON POST (Jan. 24, 2014, 5:59 PM), http://www.huffingtonpost.com/2014/01/21/colleges-restrict-free-speech-fire-report_n_4633542.html.
13. *Id.*
14. The Univ. of AL., Facilities and Grounds Use Policy §I.B, I.E.2 (Aug. 2010). The University of Alabama defined speech activities as anything other than “casual recreational or social activities.” §I.B
15. *Id.*
16. *Id.*
17. *Id.* at §I.E.2.
18. Andy McWhorter, *Rights Group Asks US to Recognize Free Speech*, THE CRIMSON WHITE, (Jul. 10, 2013), <http://cw.ua.edu/2013/07/10/rights-group-asks-ua-to-recognize-free-speech> (quoting Cathy Andreen, Director of the Office of Media Relations for the Univ. of AL.).
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*; *University of Alabama: Pro-Choice Group Tells Pro-Choice Group to Get Permit for Pamphlets or Face Arrest*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Jul. 1, 2013), <http://www.thefire.org/article/16005.html>; Eugene Volokh, *No Leafleting at a University Without Several Days’ Notice*, VOLOKH CONSPIRACY (Jul. 2, 2013, 12:42 AM), <http://www.volokh.com/2013/07/02/no-leafleting-at-a-university-without-several-days-notice/>.
24. In July of 2014, Citrus University was sued, in part, for requiring student groups to obtain a permit two weeks in advance of engaging in group speech on campus. *FIRE Brings Four Speech Lawsuits in One Day*, FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION (Jul. 1, 2014), <http://www.thefire.org/fire-brings-four-free-speech-lawsuits-in-one-day/>. In April 2014, Hawaiian University was sued for requiring students to obtain a permit seven days in advance of soliciting other students on campus. Clark Reilly, *Hawaiian University Sued For Blocking Students From Passing Out Copies of the Constitution*, HUFFINGTON POST (Apr. 26, 2014, 5:59PM), http://www.huffingtonpost.com/2014/04/26/hawaii-constitution-lawsuit-university-students_n_5216705.html. In October 2013, Modesto Junior College was sued, in part, for requiring students to obtain a permit five days in advance of handing out fliers. Nan Austin *MJC Student Files Freedom of Speech Lawsuit Against College*, MODESTO BEE (Oct. 10, 2013) <http://www.modbee.com/2013/10/10/2968629/mjc-student-files-freedom-of-speech.html>.
25. During the writing of this article, this first change was adopted by the University of Alabama. The Univ. of AL., Facilities and Grounds Use Policy § I.E.6 (July 2013). *See supra* Part IV.

26. ERWIN CHERMERINSKY, CONSTITUTIONAL LAW; PRINCIPLES AND POLICIES § 11.2.1 (4th ed. 2011).
27. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 380 (1992) (holding regulation that prohibits expressive conduct which disfavors based on the subject of race, color, creed, religion, or gender is content-based).
28. *U.S. v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811 (2000) (holding regulation that requires cable operators to either scramble sexually explicit content or limit the broadcast of such content to specific hours is content-based).
29. *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2735 (2011) (holding regulation that bans the sale or rental of violent video games to minors is content-based).
30. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (citing *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991)).
31. *Police Dept. of Chi. v. Mosely*, 408 U.S. 92, 95-96 (1972) (citing *Cohen v. Cal.*, 403 U.S. 15, 24 (1971); *St. v. N.Y.*, 394 U.S. 576 (1969); *N.Y.T. Co. v. Sullivan*, 376 U.S. 254, 269-70 (1964)).
32. *Consolidated Edison Co. of N.Y. Inc. v. Pub. Serv. Commn.*, 447 U.S. 530, 538 (1980).
33. *Greynard v. City of Rockford*, 408 U.S. 104, 115 (1972). *See also Hill v. Colo.*, 530 U.S. 703, 720 (2000) ("As we have repeatedly explained, government regulation of expressive activity is 'content neutral' if it is justified without reference to the content of regulated speech.").
34. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 806-07 (citing *Metro-media Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981)) (holding a regulation that bans the use of billboards is content-neutral because it applies to all billboards irrespective of subject matter or viewpoint).
35. *Schneider v. State*, 308 U.S. 147, 158, 163 (1939) (holding a regulation that limits the time frame in which canvassing can occur is content-neutral because it "bans communication of any views or the advocacy of any cause").
36. *Id.* at 154, 162-63. A regulation that prohibits all leafleting is content-neutral because it applies to all leafleting irrespective of subject matter or viewpoint.
37. Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 64-65 (1987). For example, messages could be conveyed through commercials instead of billboards, canvassing could still occur between the hours of 9:00 AM and 5:00 PM, and leafleting could still occur at parks or other public spaces.
38. *Id.* at 54-8 (citations omitted).
39. *Id.*
40. *Madsen v. Women's Health Ctr.*, 512 U.S. 753, 790-91 (1994) (citations omitted); *Turner Broad. Sys. v. F.C.C.*, 512 U.S. 622, 642 (1994) (citations omitted). "[I]ntermediate scrutiny requires that the restriction be 'narrowly tailored to serve a significant government interest.'" *Madsen*, 512 U.S. at 791 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)). Under strict scrutiny, regulations are valid where they "[are] narrowly tailored to promote a compelling Government interest. . . [I]f a less restrictive alternative would serve the Government's purpose, the legislature must use that alternative." *Playboy*, 529 U.S. at 813 (citing *Sable Communications of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989); *Reno v. ACLU*, 521 U.S. 844, 874 (1997)). Under strict scrutiny review, a regulation on speech will almost always be held to be invalid. Stone, *note 26*, at 47. "Outsid. the realm of low-value speech, the Court has invalidated almost every content-based restriction that it has considered in the past thirty years." *Id.* Speech is categorized as high-value or low-value, with the Court affording more protection to high-value speech. STONE, *supra* note 7. Examples of low-value speech include obscenity, hate speech, and pornography.

Id. at 1129. All speech that does not fall into a category of low-value speech is high-value speech. Stone, *supra* note 26, at 47 n.3. Political speech, which is the primary subject of this paper, is high-value speech. See *Citizens United v. FEC*, 558 U.S. 310, 340 (2010) (citing *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 464 (2007)). Subsequently, if reviewed under strict scrutiny, any regulation of political speech, such as the UA Permit Scheme, would likely be found invalid.

41. 371 U.S. 415 (1963).
42. 459 U.S. 87 (1982).
43. *Button*, 371 U.S. at 423, 438; *Brown*, 459 U.S. at 88, 91.
44. *Button*, 371 U.S. 415; *Brown*, 459 U.S. 87.
45. Stone, *supra* note 37, at 60-63, 68-69, 85 (citations omitted).
46. *Id.* at 68-69, 81, 85. “A law that is facially content-neutral can be treated as content-based if it’s purpose and/or effects are content-based.” CHEMERINSKY, *supra* note 26, § 11.2.1.
47. *Turner Broad. Sys.*, 512 U.S. at 641-42.
48. *Button*, 371 U.S. at 423.
49. *Id.* at 429.
50. *Id.* at 438. The Court stated that only a “compelling state interest. . . [could] justify limiting First Amendment freedoms” *Id.* (emphasis added).
51. *Id.* at 429-31.
52. *Id.* at 430.
53. *Brown*, 459 U.S. at 88.
54. *Id.* at 91.
55. *Id.* at 88.
56. *Buckley v. Valeo*, 424 U.S. 1, 68-72 (1976).
57. *Brown*, 459 U.S. at 91 (quoting *NAACP v. Ala.* 357 U.S. 449, 463 (1958)). “The First Amendment right will yield only to a ‘subordinating interest of the State [that is] compelling.’” *Id.* (emphasis added).
58. *Id.* 93 (citing *Buckley*, 424 U.S. at 71, 74).
59. Stone, *supra* note 37, at 62, 68-69.
60. *Brown*, 459 U.S. At 93 (quoting *Buckley*, 424 U.S. at 71). See generally W. HESSELTINE, *THIRD-PARTY MOVEMENTS IN THE UNITED STATES* (1962) (describing the impact of minor parties on elections).
61. Stone, *supra* note 37, at 60-63, 68-69, 81, 85 (citations omitted).
62. *Id.* at 61-63.
63. Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 26-28 (1971) (discussing the importance of protecting political speech as opposed to nonpolitical speech).
64. Stone, *supra* note 37, at 60-63 (citations omitted).
65. *Id.*
66. *Button*, 371 U.S. at 443.
67. Stone, *supra* note 37, at 60-63 (citations omitted).
68. *Button*, 371 U.S. 419-20, 423.
69. Stone, *supra* note 37, at 55, 59, 60-63 (citations omitted).
70. *Brown*, 459 U.S. at 93 (citing *Buckley*, 424 U.S. at 71, 74).
71. Stone, *supra* note 37, at 68-69, 81, 85.

72. *Button*, 371 U.S. at 435.
73. Stone, *supra* note 37, at 62, 68-69.
74. *Id.* at 68-69.
75. *Id.* at 81.
76. Bork, *supra* note 65, at 26-28.
77. Stone, *supra* note 37, at 83.
78. *Id.*
79. 424 U.S. 828 (1976).
80. Stone, *supra* note 37, at 83 (citing *Spock v. David*, 469 F.2d 1047, 1056 (3d Cir. 1972)).
81. 391 U.S. 367 (1968).
82. Stone, *supra* note 37, at 83 (citing *O'Brien*, 391 U.S. at 370).
83. *Id.* at 84.
84. *Id.*
85. *Id.*
86. *Id.* at 83-84.
87. See Stone, *supra* note 37, at 58-59 (noting the “pivotal inquiry [when determining what level of review should be applied is] the extent to which the challenged restriction actually diminishes the opportunities for free expression.”)
88. This type of regulation is dissimilar from *Greer* and *O'Brien*, which only severely burdened one type of indistinct medium, as opposed to a substantial amount of indistinct mediums.
89. Stone came close to suggesting as much in his analysis of *Buckley v. Valeo*. In *Buckley*, the distinct mode of communication regulated was campaign expenditures. Stone, *supra* note 26, at 64. Campaign expenditures were found to be distinct because such expenditures enable nearly all indistinct modes of communication. *Id.* at 59. By directly burdening one distinct mode of communication, the regulation indirectly burdened nearly all indistinct modes of communication.
90. 475 U.S. 41 (1986).
91. *Id.* at 43.
92. CHEMERINSKY, *supra* note 26, § 11.2.1.
93. *Renton*, 475 U.S. at 48-50.
94. *Id.* at 48.
95. CHEMERINSKY, *supra* note 26, § 11.2.1. (citing *Renton*, 475 U.S. at 48) (citations in case omitted). However, scholars have noted that the law is not completely clear on this point. *Id.* Chermerinsky contends that Supreme Court precedent in this area has neither been clear or consistent and that the issue of disparate impact has yet to be explicitly addressed. *Id.* In fact, the only certain holding, narrowed to the facts of *Renton*, is that “a facially content-based law will be treated as content-neutral if it is motivated by a desire to prevent adverse secondary effects of the speech.” *Id.* This holding is only applicable to facially content-based regulations. *Id.* It would be inapplicable to all facially content-neutral regulations, inclusive of when a disparate impact can render a facially content-neutral regulation to be treated as content-based. *Id.* Thus, it is consistent with *Renton* that disparate impact is a viable element for review of facially content-neutral regulations.
96. Stone, *supra* note 37, at 61, 63.
97. *Id.*
98. *Renton*, 475 U.S. at 43.
99. CHEMERINSKY, *supra* note 26, § 11.2.1.
100. *Renton*, 475 U.S. at 43.

101. 530 U.S. 703 (2000).
102. *Id.* at 707 (quoting Colo. Rev. Stat. § 18-9-122(3) (1999)).
103. *Id.* at 719.
104. *Id.* at 708.
105. CHEMERINSKY, *supra* note 26, § 11.2.1.
106. *Hill* 530 U.S. at 725-26.
107. *Id.* at 707 (quoting Colo. Rev. Stat. § 18-9-122(3) (1999)).
108. *Id.* at 726-27. As stated by the district court, “signs and leaflets may be seen, and speech may be heard, at a distance of eight feet.” *Id.* at 711. Even within the eight foot radius of a patient, a speaker could stand still and either picket with a sign or speak out, as doing so does not fall within the purview of approaching a patient. *Id.* at 726-27.109. *Id.* at 711.
109. *Id.* at 726-27.
110. *Id.* at 723.
111. *Id.*
112. The Univ. of AL., Facilities and Grounds Use Policy §I.E.2 (August 2010).
113. *See supra* Part II.B.1.
114. The Univ. of AL., Facilities and Grounds Use Policy §I.E.2 (August 2010).
115. Chris Kowalski, *UA Has Deep History of Protests, Demonstrations*, THE CRIMSON WHITE (Jun. 5, 2003), <http://cw.ua.edu/2013/06/05/ua-has-deep-history-of-protests-demonstrations/>. More recently, in November of 2012, the University of Alabama students protested the Israeli bombing of the Gaza Strip. Carlene Robinson, *Protest for Gaza*, KALEIDOSCOPE (Nov. 20, 2012) <http://studentmedia.uab.edu/2012/11/protest-for-gaza/>. In September 2013, students held rallies speaking out against racism and calling for desegregation of sororities. Alan Blinder, *A Turnabout at Traditionally White Sororities, in Nine Days at Alabama*, N.Y. TIMES (Sept. 21, 2013) http://www.nytimes.com/2013/09/21/us/a-turnabout-at-traditionally-white-sororities-at-alabama-university.html?_r=0.
116. Andy McWhorter, *supra* note 18.
117. University of Wisconsin, *Protests and Social Action at UW-Madison during the 20th Century*, ARCHIVES AND ORAL HISTORY (2009), <http://archives.library.wisc.edu/uw-archives/exhibits/protests/1980s.html>.
118. Christopher A. Huff, *Student Movement of the 1960s*, NEW GEORGIA ENCYCLOPEDIA (Aug. 30, 2013), <http://www.georgiaencyclopedia.org/articles/history-archaeology/student-movement-1960s>.
119. University of Wisconsin, *supra* note 116.
120. Bradon Goyette & Peter Rothberg, *The Top 14 Student Activism Stories of the Year*, NATION (Jan. 15, 2011), *available at* <http://www.thenation.com/blog/157798/top-14-student-activism-stories-year#>.
121. The Univ. of AL., Facilities and Grounds Use Policy §I.E.2 (August 2010).
122. *Brown*, 459 U.S. at 93.
123. Chris Kowalski, *supra* note 114.
124. Joe Freeman, ENCYCLOPEDIA OF AMERICAN SOCIAL MOVEMENTS 1178 (Immanuel Ness et al. eds. 2004) *available at* <http://www.uic.edu/orgs/cwluherstory/jofreeman/sixtiesprotest/berkeley.htm>.
125. Joseph Karaganis, *Radicalism and Research at Columbia: The Legacy of '68*, COLUMBIA, <http://www.columbia.edu/cu/21stC/issue-4.1/karaganis.html> (last visited Nov. 11, 2013).
126. Evelyn Nieves, *CUNY Student Protest Spreads to 4 More Colleges*, N.Y. TIMES (Apr. 20, 1991), <http://www.nytimes.com/1991/04/10/nyregion/cuny-student-protest-spreads-to-4-more-colleges.html>.

127. *Blinder*, *supra* note 114.
128. The Univ. of AL., Facilities and Grounds Use Policy §I.B, §I.E.2 (August 2010).
129. *Id.*
130. *Id.*
131. *Id.*
132. *Hill*, 530 U.S. at 711.
133. *Button*, 371 U.S. at 429-30.
134. *Id.*
135. Andy McWhorter, *supra* note 18.
136. *Id.* (quoting Cathy Andreen, Director of the Office of Media Relations for the Univ. of AL.).
137. The University has not taken a stance on whether engaging with numerous strangers on a one-on-one basis in a public forum would be labeled as speech activity or not. Presumably, this scenario would fall on a sliding scale. Where more individuals are engaging multiple strangers on University grounds, the speech begins to resemble an organized activity and would likely fall within the purview of the UA Permit Scheme. Conversely, situations where students are talking with a small group of friends appear casual and more clearly outside the scope of the UA Permit Scheme.
138. *Reno v. ACLU*, 521 U.S. 844, 880 (1997) (quoting *Schneider*, 308 U.S. at 163) (“One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.”).
139. Because of this discrepant treatment, the University could in effect time its release of controversial information in a manner that ensured students would not have an opportunity to speak out before certain matters came to pass.
140. *Button*, 371 U.S. At 429-30.
141. *Brown*, 459 U.S. at 93.
142. *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097, 1100 (9th Cir. 1998) (citing *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 713 (1931)).
143. *RODNEY SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH*, 8-4 (1994). *E.g.*, *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969) (holding a requirement to obtain a permit to participate in a parade, procession, or public demonstration is a prior restraint); *Kunz v. People of State of N.Y.*, 340 U.S. 290, 290 (1950) (holding a requirement to obtain a permit to hold public worship meetings in the street is a prior restraint); *Staub v. City of Baxley*, 355 U.S. 313, 321-22 (1957) (holding a requirement for unions to obtain a permit before soliciting members is a prior restraint).
144. *CHEMERINSKY*, *supra* note 26, § 11.2.1.
145. *Lovell v. Griffin*, 303 U.S. 444, 451-52 (1938). Between the 15th and 17th century in England, no book or pamphlet could be published without first receiving permission from the government. *STONE*, *supra* note 37, at 1017-18.
146. 283 U.S. 697 (1931).
147. *Id.* at 713 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES 151-152). This First Amendment policy was typified in *Lovell*, where a regulation banning the distribution of literature without a permit was found to be an unconstitutional prior restraint. 303 U.S. at 451. The Court held that “the ordinance...[was] invalid on its face. Whatever the motive which induced its adoption, its character is such that it strikes at the very foundation of the freedom of press by subjecting it to license and censorship. The struggle for the freedom of press was primarily directed against the licensor.” *Id.* See also *Thomas v. Collins*, 323 U.S. 516, 540 (1945) (“We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment.”); *Near*, 283 U.S. at 713 (“In determining the extent

- of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.”).
148. *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958).
 149. *Shuttlesworth*, 394 U.S. at 162 (Harlan, J., concurring) (expounding on the danger of “requiring persons to invoke unduly cumbersome and time-consuming procedures before they may exercise their constitutional right of expression”); *Freedman v. Maryland*, 380 U.S. 51, 59 (1965) (explaining how permits entail a “deterrent effect . . . [from] an interim and possibly erroneous denial of a license.”).
 150. *Se. Promotions Ltd. v. Conrad*, 420 U.S. 546, 559 (1975) (emphasis added).
 151. *Neb. Press Assn. v. Stuart*, 427 U.S. 539, 559 (1976).
 152. *N.Y. Times v. U.S.*, 403 U.S. 713, 714 (1971) (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 59, 70 (1963)). See also *Staub*, 355 U.S. at 321; *Niomtko v. State of Md.*, 340 U.S. 268, 273 (1951); *Kunz*, 340 U.S. at 293; *Cantwell v. State of Conn.*, 310 U.S. 296, 306 (1940); *Schneider*, 308 U.S. at 164; *Lovell*, 303 U.S. At 451.
 153. See *Hill*, 530 U.S. at 709, 720, 733 (addressing both whether the regulation was content-based or content-neutral and whether the regulation was a prior restraint); *Ward*, 491 U.S. at 792-93.
 154. Kellum, *supra* note 10, at 383 (citations omitted).
 155. *Id.* (quoting Marin Scordato, *Distinction without a Difference: A Reappraisal of the Doctrine of Prior Restraint*, 68 N.C. L. REV. 1, 2 (1989)).
 156. *Id.* (quoting John Calvin Jeffries, Jr., *Rethinking Prior Restraint*, 92 YALE L.J. 409, 437 (1983)).
 157. Kellum, *supra* note 10, at 405, 418.
 158. *Id.* (discussing the importance of *Freedman v. Maryland*, *Shuttlesworth v. Birmingham*, and *Thomas v. Chicago Park District* to establish a framework for permit schemes. See also JULES B. GERARD & SCOTT D. BERGTHOLD, *PRIOR RESTRAINT DOCTRINE-TIME LIMITS, LOCAL REGULATION OF ADULT BUSINESS* §5.6 (Supp. Nov. 2012) (discussing the importance of *FW/PBS, Inc. v. City of Dallas* to the doctrine of permit schemes).
 159. 380 U.S. 51 (1965).
 160. *Id.* at 58-59.
 161. *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 321 (2002) (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 227 (1990) (citing *Freedman*, 380 U.S. at 58-60)).
 162. 394 U.S. 147 (1969).
 163. *Id.* at 150-53 (citations omitted).
 164. 493 U.S. 215 (1990).
 165. *Id.* at 227.
 166. 534 U.S. 316 (2002).
 167. *Id.* at 322 (citations omitted). The Court has never “required that a content-neutral permit scheme regulating speech in a public forum must adhere to the procedural requirements set forth in *Freedman*.” *Id.* (citing *FW/PBS* 493, U.S. at 224).
 168. *Or. Barter Fair v. Jackson Cnty.*, 401 F.3d 1128, 1138 (9th Cir. 2005); *Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1258-60 (10th Cir. 2004); *Granite State Outdoor Adver., Inc. v. City of St. Petersburg, Fla.*, 348 F.3d 1278, 1281-83 (11th Cir. 2003). This interpretation by appellate courts is a prime example of the confusion surrounding prior restraint doctrine and the corresponding need to rely on Supreme Court precedent for clarity. Kellum, *supra* note 10, at 418-22.
 169. Kellum, *supra* note 10, at 418-22.
 170. *Thomas*, 534 U.S. at 321 (quoting *FW/PBS*, 493 U.S. at 227) (citing *Freedman*, 380 U.S. at 58-60).

171. Kellum, *supra* note 10, at 419-20.
172. *Id.*
173. *FW/PBS*, 493 U.S. at 229.
174. *Id.* at 493 U.S. at 226 (citations omitted). In *FW/PBS*, the Court went on to hold the requirement for an initial decision deadline was required under the *Freedman* procedural safeguards. *Id.* However, this view appears to have been later rejected in *Thomas*. *Thomas*, 534 U.S. at 323-24.
175. *Thomas*, 534 U.S. at 323-24.
176. *Id.*
177. *FW/PBS*, 493 U.S. at 227.
178. *Thomas*, 534 U.S. at 323.
179. *Id.* at 323-24.
180. *Id.* The dissenting opinion in *Or. Barter Fair*, clearly recognized and articulated the two separate holdings of *Thomas*. *Or. Barter Fair*, 401 F.3d at 1125-26. One holding dismissed the procedural safeguards of *Freedman* for content-neutral regulations. *Id.* However, the second holding required content-neutral regulations to have adequate standards to guide the licensor's decision. *Id.* The requirement for an initial decision deadline was cited as one of these adequate standards. *Id.*
181. 534, U.S. 316 (2002).
182. 536 U.S. 150 (2002).
183. *Id.* at 165-67. "It is offensive—not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so . . . a law requiring a permit to engage in such speech constitutes a dramatic departure from our national heritage and constitutional tradition. . . . Even a spontaneous decision to go across the street and urge a neighbor to vote against the mayor could not lawfully be implemented without first obtaining the mayor's permission." *Id.*
184. *Chicago*, 534 U.S. at 322; *Watchtower*, 536 U.S. at 164. "As a matter of principal a requirement of registration in order to make a public speech would seem generally incompatible with an exercise of the rights of free speech and free assembly. . . . If the exercise of the rights of free speech and free assembly cannot be made a crime, we do not think this can be accomplished by the device of requiring previous registration as a condition for exercising them and making such a condition the foundation for restraining in advance their exercise and for imposing a penalty for violating such a restraining order. *So long as no more is involved than the exercise of the rights of free speech and free assembly, it is immune to such a restriction* We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." *Id.*
185. *Id.* at 168. *Chicago*, 534 U.S. at 322.
186. *Watchtower*, 536 U.S. at 168.
187. *Thomas*, 534 U.S. at 317-18.
188. *Id.* at 318.
189. *Id.* at 320.
190. *Id.* at 326.
191. *Watchtower*, 536 U.S. at 153.
192. *Id.* at 154-55.
193. *Id.* at 169. The regulation was held to be invalid as applied to "religious proselytizing, anonymous political speech, and the distribution of handbills." *Id.* at 153

194. *Thomas*, 534 U.S. at 318; *Watchtower*, 536 U.S. at 154, 165-67.
195. *Thomas*, 534 U.S. at 318; *Watchtower*, 536 U.S. at 154.
196. *Thomas*, 534 U.S. at 322; *Watchtower*, 536 U.S. at 168-69.
197. *Thomas*, 534 U.S. at 322.
198. *Watchtower*; 536 U.S. at 168-69.
199. *Id.* at 154-55, 169.
200. *Thomas*, 534 U.S. at 324, 326.
201. *C.f.* Kellum, *supra* note 10, at 406-07 (citations omitted). Kellum articulates the general proposition that only large groups, as opposed to small groups or individuals, pose public safety concerns. *Id.* However, instead of focusing on why only large groups pose this risk, Kellum's primary contention is that large groups do not have the ability to mobilize as quickly as small groups. *Id.* at 407. This means that a permit scheme will not severely burden a large group's ability to engage in spontaneous speech, because their inability to mobilize keeps them from engaging in spontaneous speech anyway. *Id.* However, since small groups and individuals can easily mobilize, permit schemes do severely burden their ability to engage in spontaneous speech. *Id.*
202. *Thomas*, 534 U.S. at 317-18.
203. *Id.* at 317.
204. *Id.* at 322.
205. *Id.* at 322.
206. *Id.*
207. *Id.*
208. Kellum, *supra* note 10, at 406-07. "A permit requirement that covers individuals and small groups should be viewed as improper because movements of such small magnitude are not significant enough to justify prior permission" *Id.* at 408.
209. *Watchtower*, 536, U.S. at 154.
210. Kellum, *supra* note 10, at 406-07.
211. *Watchtower*, 536 U.S. at 168-69. The Court held that the permit scheme would not address the permit's third purpose of preventing crime, as a criminal would not be deterred from preying on residents for want of a permit. *Id.* at 169.
212. *Id.* at 165, 168.
213. *Id.* at 165.
214. *Id.* at 168.
215. *Id.* at 168-69.
216. The Univ. of AL., Facilities and Grounds Use Policy §I.E.2 (August 2010).
217. McWhorter, *supra* note 18 (quoting Cathy Andreen, Director of the Office of Media Relations for the Univ. of AL).
218. *Thomas*, 535 U.S. at 322.
219. Although what number comprises a large group has not been explicitly decided by the Court, this number would presumably be dependent on the circumstances of each forum. In *Thomas* where the forum was a park, a large group was defined as a group comprised of at least fifty people. Given the relative size of University grounds and the park are similar, it is possible that fifty people would also be the definition of a large group at the University of Alabama. However, more facts about the specifics of the University grounds would have to be ascertained to make a specific determination on what would be considered a large group.
220. However, it is possible that the Court would find that the ten day waiting period is reasonable even as applied to the goals of preventing conflicts between events and the disruption

of classes, as the 28 day period in *Thomas* was not found to be unreasonable as applied to the goal of coordinating shared space.

221. FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, *supra* note 23; McWhorter, *supra* note 18; Volk, *supra* note 23.
222. McWhorter, *supra* note 19. The Alabama Alliance for Sexual and Reproductive Justice (“AASRJ”) threatened to file a lawsuit. *Id.* It was members of the AASRJ that were handing out leaflets without a permit in April 2013, when they were threatened with arrest by the University Police.
223. The Univ. of AL., Facilities and Grounds Use Policy §I.E.6 (July 2013).
224. *Id.*
225. *See supra* Part II.C.3.
226. *See supra* Part II.B.1.
227. Stone, *supra* note 37, at 47. *See also supra* note 30.
228. *See supra* Part III.C.2.
229. *See supra* Part III.C.1.
230. *See supra* Part III.C.2.



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Alan W. Clarke

BOOK REVIEW: *HARD MEASURES*

Jose Rodriguez, Jr. with Bill Barlow, *Hard Measures: How Aggressive CIA Actions after 9/11 Saved American Lives*, New York, Threshold Editions, 2012, 288 pp.

Can we cozy up to evil without becoming tarnished ourselves? Is there value in Lucifer's perspective?¹ Should we study books that defend heinous practices? Such as *Battle of Casbah: Terrorism and Counter-Terrorism in Algeria, 1955-57*² in which French General Paul Aussaresses describes how he "cold-bloodedly tortured and summarily executed dozens of prisoners."³ What, if anything, can we learn from full-throated defenses of torture?

Most pressingly, what about the euphemistically dubbed "enhanced interrogation techniques" used to interrogate prisoners in America's 21st century war against terror? Methods explicitly designed to deceive, hiding in offshore gulags, while evading the legal and moral consequences of their rightful name – torture. Ought we to understand that perspective?

Hard Measures, Jose Rodriguez, Jr.'s publicity-seeking apologia, describes his meteoric rise within the CIA⁴ and then attacks any who dare criticize his or the agency's actions—particularly with respect to harsh interrogations, renditions, black-site prisons, and Guantanamo Bay. Because this constitutes the majority of the book, the reader must plow through much self-serving, cliché-ridden special pleading, without literary or historical value. Notwithstanding, I recommend it.

Hard Measures strives to prove three related, dubious and morally reprehensible points:

1. The CIA's use of waterboarding and other harsh interrogation measures does not constitute torture;
2. These harsh measures (what the rest of us call torture) works; and
3. Harsh interrogation methods—or even more euphemistically, enhanced interrogation methods—are therefore justifiable in the U.S. war on terror.

On the brutality of waterboarding, recall the late Christopher Hitchens, who pivoted from progressive writing for *The Nation* to unreserved endorsement of the neoliberal pro-war perspective on the invasion of Iraq and unqualified denial that the U.S. committed human rights violations or

Alan W. Clarke is a Professor of Integrated Studies at Utah Valley University and a Contributing Editor at *National Lawyers Guild Review*."

anything approaching torture. He resisted calling waterboarding, or any other harsh interrogation methods, “torture.” A reader challenged him to undergo waterboarding. To his credit, he accepted; his road to Damascus conversion followed.⁵ A chastened Hitchens wrote in *Vanity Fair*,⁶

You may have read by now the official lie about this treatment, which is that it ‘simulates’ the feeling of drowning. This is not the case. You feel that you are drowning because you are drowning—or, rather, being drowned, albeit slowly and under controlled conditions and at the mercy (or otherwise) of those who are applying the pressure.

He continued,

The interrogators would hardly have had time to ask me any questions, and I knew that I would quite readily have agreed to supply any answer As if detecting my misery and shame, one of my interrogators comfortingly said, ‘Any time is a long time when you’re breathing water.’

Hitchens concluded,

I apply the Abraham Lincoln test for moral casuistry: ‘If slavery is not wrong, nothing is wrong.’ Well, then, if waterboarding does not constitute torture, then there is no such thing as torture.

This is not the place to canvass the torturous, painful and debilitating effects of waterboarding and other so-called “torture lite” techniques,⁷ or the empirical evidence that torture rarely, if ever, works⁸ and it will not reassert the moral and legal reasons why a nation should not travel this path⁹ (a path opposed by many of Rodriguez’s CIA colleagues).¹⁰ Many in the CIA dispute torture’s claimed effectiveness (or “harsh measures” as Rodriguez prefers to characterize it).¹¹ Moreover, even Rodriguez—contrary to the assertions made in this book¹²—now admits under journalistic pressure, “that he doesn’t know if the techniques prevented any acts of terrorism”¹³ and he further concedes, again contrary to his book, “that he destroyed the video tapes [documenting CIA waterboarding] to protect himself and his colleagues.”¹⁴

Waterboarding remains illegal under international law¹⁵ and was consistently prosecuted as torture by the U.S. prior to the Bush administration both as a war crime and as a matter of domestic law.¹⁶ Notwithstanding, Rodriguez, a University of Florida law school graduate, peddles the notion that waterboarding is alchemically transmuted into non-torture by way of Bush administration Justice Department Office of Legal Counsel opinions,¹⁷ and by supposed limitations on how it is accomplished.¹⁸ Many of the other harsh techniques, some of which continue to be used by U.S. forces, constitute torture.¹⁹

Claims by Rodriguez and others that the U.S. does not torture appear risible given what we now know about the intellectual bankruptcy of those

OLC opinions,²⁰ the practices to which they led, and the disastrous effect that harsh interrogations ultimately have had on prosecuting legitimate terror cases.²¹ The contention that the controlled drowning and reviving of a prisoner constitutes an acceptable interrogation practice, so palpably fails the blush test of plausibility that nothing further need be said on the topic. The same can be said of the other harsh interrogation practices Rodriguez so ardently defends. As a result, this review will only address two further matters:

1. Why should anyone suffer through this odious book?
2. How are we, who lack insider knowledge, to assess the claim that torture works?

The first question requires one to merely endure; a distasteful project, but not otherwise harmful, and little enough to ask anyone of ordinary integrity. The subject's temporal propinquity—U.S. government officers, and others working at their behest, in the near past torturing people deemed terrorists on our presumed behalf, in our putative interest, and for our supposed safety—ought to dismay all but the irredeemably calloused. “We have met the enemy and he is us”²² looms large, close and emotionally threatening; our complicity plainly, if inferentially, revealed. However, the contention that one should avoid a jeremiad endorsing abusive, painful interrogation methods simply because it unsettles a complacent, soporific slumber is no argument worth considering. On the contrary, the profound discomfort this book provokes makes the exertion all the more worthwhile. As with bitter medicine, it feels better when done.

Just as it was important for us to understand Paul Aussaresses' perspective, it is important for us to understand how a company man thinks. Stanford psychologist, Phillip Zimbardo, has spent a lifetime studying the situations that lead human beings to systematize the abuse of others. He encourages understanding of what he calls the *Lucifer Effect*,²³ at least in part, to grasp how one might learn to resist the pressure to engage in abuse. Zimbardo insists that we must comprehend to have the ability to critically evaluate organizations that regularize, bureaucratize and encourage obedience to abusive authority. He writes that everyone has the “potential for engaging in evil deeds despite their generally moral upbringing and pro-social life style, like Adolf Eichmann.”²⁴ Similarly, “any of us may come to act heroically by being ready to do the good thing, to help others in need when situational demands give us that rare opportunity.”²⁵ Zimbardo's challenge is for one to develop sufficient reasoning skills that at a pivotal moment of challenge, one chooses justice over injustice; that one chooses to resist abusive authority rather than either to enlist as an active participant or to choose willful, blind complicity. Seen in this light, Rodriguez's book can become indispensable

to our moral health. Far from leaving us tarnished by our brush with evil, we can use his account to learn so that in that rare moment of challenge we take a “heroic stand against unjust authority.”²⁶

We cannot fully understand those impoverished Huguenots of Le Chambon sur Lignon who spirited over 6,000 Jews to Switzerland and safety during WWII without also comprehending the Nazi evil they faced and circumvented. Similarly, we cannot understand Henri Alleg’s resistance to the French forces in Algeria, and the resistance’s ultimate triumph, without understanding those responsible for his torture,²⁷ as well as the torture and murder of thousands of other Algerians.

Jose Rodriguez minimizes, evades and defends American torture. *Hard Measures* is his Sisyphean undertaking to explain, absolve and vindicate. Our moral education must include his perspective, as well as the defenses asserted by the major war criminals before the International Military Commission at Nuremberg, the defenses of those prosecuted by the International Criminal Tribunal for Yugoslavia, the International Criminal Tribunal for Rwanda, and the new International Criminal Court. We repeat “never again” and yet atrocities recur, again and again and again.²⁸

Moreover, this is manifestly not a problem perpetrated solely by authoritarian regimes. Human rights abuses persist, albeit more securely hidden, within liberal democracies such as the United States, Britain, and France. An important moral challenge, for those living in democracies that have committed systematic human rights abuses, is to understand the dynamic involved, and then to actively resist it. Sitting idly by saying “I did not know” slips all too easily into moral evasion. We ought not, from the comfort of an armchair, criticize authoritarian human rights abusers, such as Syria’s Bashar al-Assad or Sudan’s Omar al-Basir, without at least gazing into our own backyard. If we wish to maintain a modicum of integrity we must not ignore those who commit and defend human rights abuses on our behalf.

How then are we to evaluate Rodriguez’s insider claim that torture worked to save lives of Americans after 9/11? The CIA destroyed the videotapes of prisoner waterboarding. According to Rodriguez, he ordered their destruction, against the advice of virtually every higher authority in government that was consulted,²⁹ to protect vulnerable CIA officers against whom terrorists might retaliate.³⁰

In any event, much of the evidence upon which he predicates his claims remains, and will likely continue to remain, classified for the foreseeable future. Must we accept Rodriguez at his word that torture saved American lives? One of his former colleagues demolishes the argument that the tape destruction was benign:

In November 2005, Rodriguez, who was a classmate of mine at CIA, ordered on his own authority and contrary to Agency general counsel advice the destruction of 92 videotapes that recorded interrogation sessions in a secret prison in Thailand. This was done, he says, to protect the identities of CIA interrogators from possible reprisals by terrorists, not to cover-up waterboarding being used to obtain information, a procedure he claims was both an acceptable interrogation technique and one that was subject to congressional oversight before it was employed. He does not explain exactly how terrorists could obtain the tapes or be able to make identifications from them; perhaps the idea is that someday the recordings might leak to the public. Whatever its plausibility, or lack thereof, his argument might just as well be a deliberate deception if the primary purpose of his actions was to eliminate evidence of what many would consider a war crime. I leave it up to the reader to decide what explanation is most likely.³¹

This statement shreds Rodriguez's benign explanation and removes any claim of vestigial credibility to the destruction of the videotapes. This in turn undermines his other claim that his and the CIA's methods worked. However, others inside the government claim that those harsh interrogation methods worked³² (again, procedures that include torture to Christopher Hitchens and most everyone else). Thus, the "torture sometimes works" contention must be directly rebutted. How then do we assess the insider's claim on this point? What of the assertion that we should believe the insider because he or she has direct access to, and has seen and carefully evaluated, classified evidence that we may never see?

There is voluminous evidence that torture does not as a general matter work well,³³ and that should by itself promote skepticism of the claim that "harsh measures," (or whatever else one might wish to call it) worked post-9/11 for the CIA. Moreover, there is abundant evidence that torture and so-called "torture lite" lead to disastrous mistakes, such as al-Libi's now infamous claim under torture that Iraq was training al Qaeda in the use of weapons of mass destruction—a claim that arguably provided the pretext for the ill-advised and illegal war on Iraq.³⁴

Could there be exceptions? We do, not, in this instance, have the direct evidence. Because of the government's penchant for classifying anything remotely embarrassing to it, we are unlikely to soon uncover this evidence. The fact that other equally well-placed CIA officers, as well as former FBI agents, dispute Rodriguez's account and tell us that it did not work provokes skepticism, but does not fully decide the point.

There is, however, one more narrowly focused bit of evidence to further guide our skepticism—past instances where the government and its apologists claimed torture worked³⁵ Historian Alfred W. McCoy disputes these

accounts, and argues that torture advocates misrepresent the facts. One case cited where torture was allegedly effective revolved around the torture of an alleged terrorist in the Philippines. Police secured information that supposedly prevented an airliner from being blown up. McCoy reports, however, that the police got “all the important information . . . in the first few minutes, when they seized [the terrorist’s] laptop Most of the supposed details gained from the sixty-seven days of torture that followed were . . . police fabrications that [the terrorist] mimed to end the pain.”³⁶ It bears repeating that the scholar Darius Rejali, who conducted the most thorough and comprehensive review of the history of the use of torture and other harsh interrogation techniques by both democracies and dictatorships, questions whether torture ever works.³⁷ Therefore, the strongest case demonstrating that torture has worked has been debunked.³⁸

None of this proves conclusively that torture never works; indeed, it may be that in isolated instances it has provided useful information. What this does tell us, however, is that we should not just be skeptical, but perhaps massively dubious about contested insider claims that EIT’s or “harsh measures” or torture provided useful and actionable information in the post-9/11 war on terror. The burden must be on the insider to provide independently verifiable evidence. Absent such, the public can and should conclude the evidence withheld simply protects officials against embarrassment and potential war crimes; as has happened in the past, what is hidden is not a state secret but incompetence, bungling and perfidy.³⁹

This review has avoided broader, non-instrumental arguments against torture, and inhumane, abusive treatment. Rodriguez barely mentions the topic and then only to cavalierly dismiss it. Such conceptions of morality do not directly confront his thesis. Taking *Hard Measures* on its own terms generates sufficient incredulity; there is thus no need to detour into deontological critiques. Books like this serve to sharpen our critical reasoning skills and arm the discerning reader to view with enormous suspicion claims of supposed existential crisis leading to calls for surrender to abusive authority.

You may need to flog yourself to do so; however, I strongly recommend going to the library to check this book out. If it is not on your local library’s shelves, try interlibrary loan. If that fails, call me—you may have my copy.

NOTES

1. John Milton does precisely that in *PARADISE LOST* (1668), which provides Lucifer’s perspective as well as God’s.
2. PAUL AUSSARESSES, *SPECIAL SERVICES ALGERIA*, (Robert L. Miller trans., Enigma Books 2002-2006) (originally published under the title *SERVICES SPÉCIAUX ALGÉRIE 1955-1957*).

3. Douglas Martin, *Paul Aussaresses, 95, Who Tortured Algerians, Dies*, N.Y. TIMES (Obituaries), Dec. 4, 2013.
4. Rodriguez rose to become in May 2002 the Director of the CIA's Counter Terrorism Center and in 2004 he became Deputy Director for Operations and he continued as Director of the National Clandestine Service.
5. See, e.g., Jonathan Kay, *True to His Own Gospel*, NATIONAL POST, Jul. 10, 2008, at A17.
6. Christopher Hitchens, *Believe Me, It's Torture*, VANITY FAIR, Aug. 2008, available at <http://www.vanityfair.com/politics/features/2008/08/hitchens200808>.
7. See, e.g., Alan Clarke, *Creating a torture culture*, 32 SUFFOLK TRANSNAT'L L. REV. 1 (2008).
8. See, Darius Rejali, *5 Myths About Torture and Truth*, WASH. POST, Dec. 16, 2007, at B3; Rejali, Darius M., *Does Torture Work?*, in THE PHENOMENON OF TORTURE: READINGS AND COMMENTARY 255, 255–59 (William F. Schultz ed., 2007); Rejali, *Torture, American Style —The Surprising Force Behind Torture: Democracies*, BOSTON GLOBE, Dec. 16, 2007, at D1; REJALI, *Torture and Democracy* 23 (2007).
9. See, e.g., Alan W. Clarke, *RENDITION TO TORTURE* (Rutgers U. Press, 2012).
10. One former CIA officer, a former classmate of Jose Rodriguez at the CIA writes:
 Rodriguez might find comfort in his apologia pro vita sua, but I rather suspect his is a voice in the wilderness. Thankfully, I do not know anyone inside the intelligence community who considers torture morally acceptable under any circumstances, and most intelligence officers would regard its use ipso facto as an egregious failure. Secret prisons, renditions, and enhanced interrogations are characteristic of police states, not constitutional republics. Thirty-six years ago Rodriguez and I together took an oath to defend the Constitution of the United States of America. Today he would be well advised to remember that moment.
 Philip Giraldi, *Torture and the CIA*, STATES NEWS SERVICE (May 24, 2012).
11. Colin Freeze writes in *The Quest for bin Laden, the Question of Torture*, THE GLOBE AND MAIL, at R18:
 One wishes someone had kept him on a shorter leash. Working under open-ended presidential decrees, Rodriguez personally authorized the waterboarding interrogations of key al-Qaeda figures. Years later, he found himself under criminal investigation for ordering the destruction of the videotapes of those same interrogations, so no one outside the CIA would ever see them.
 It would be nice if the tapes had survived, if only to verify Rodriguez's claims about the interrogation of the Sept. 11 mastermind known as "KSM" (spyspeak for Khalid Sheik Mohammed). The CIA has been revealed to have waterboarded this admitted terrorist an astonishing 183 times.
 While Rodriguez says such EITs were invaluable, many of his counterterrorism colleagues aren't so sure. The consensus CIA opinion seems to be that the soften-'em-up methods elicited only lay-of-the-land information, "a cartography of al-Qaeda," according to one official.
12. Rodriguez writes, "Can I tell you exactly how many plots were stopped? No. But I am confident that more than ten serious mass-casualty attacks were thwarted because of information received from detainees who had been subjected to enhanced interrogation." JOSE RODRIGUEZ JR., ET AL., *HARD MEASURES*, (2012), at 103-04.
13. Ray Hanania, *Why We Can Never Compromise on Principle*, JERUSALEM POST, May 3, 2012, at 16.
14. *Id.*
15. The UN Special Rapporteur on Torture, Manfred Nowak, said with respect to waterboarding, "I'm not willing any more to discuss these questions with the U.S. government, when they say this is allowed. It's not allowed." Quoted in Martin Hodgson, *U.S. Censored for Waterboarding*, GUARDIAN (London), Feb. 7, 2008.

16. Evan Wallach, *Drop by Drop: Forgetting the History of Water Torture in U.S. Courts*, 45 COLUM. J. TRANSNAT'L L. 468 (2007).
17. He writes at pp. 230-31, "Let there be no doubt. The treatment that a small handful of terrorists received at our hands was unpleasant. It was unpleasant for them and, not insignificantly, unpleasant for us. But we went to great lengths to make sure that it was legal, safe and effective." He goes on to say, "The Department of Justice senior officials who provided our guidelines are sometimes accused of telling us what we wanted to hear. But those officials, at the top of the food chain for U.S. government lawyers, gave us their best judgments and we had no reason to believe they were incorrect, then or now."
18. One graduate of the military's SERE school where waterboarding was done to train special forces recruits under circumstances more restrained than that done to detainees in the war on terror describes waterboarding as "real drowning that simulates death" and causes a sensation of "burning liquid" worse than "pulling out fingernails." Clarke, *supra* note 9, at 36.
19. Jeffrey Kaye, *Contrary to Obama's Promises, the US Military Still Permits Torture*, THE GUARDIAN, Jan. 25, 2014, www.theguardian.com/commentisfree/2014/jan/25/obama-administration-military-torture-army-field-manual.
20. THE TORTURE MEMOS: RATIONALIZING THE UNTHINKABLE, DAVID COLE, ed., The New Press, 2009).
21. See e.g., JESS BRAVIN, THE TERROR COURTS (Yale, 2012).
22. Walt Kelly, *Pogo*, (poster for Earth Day 1970), I GO POGO, available at www.igopogo.com/we_have_met.htm.
23. PHILLIP ZIMBARDO, THE LUCIFER EFFECT (2007).
24. *Id.*
25. *Id.*
26. *Id.*
27. Henri Alleg, THE QUESTION (Bison Books ed., John Calder trans. U. Neb. Press 2006)(1958).
28. Kelly Dawn Askin, *The Nuremberg Trials: A Reappraisal and Their Legacy: "Never Again" Promise Broken Again, Again, and Again*, 27 CARDOZO L. REV. 1723 (2006).
29. JOSE RODRIGUEZ JR., ET AL., HARD MEASURES, (2012), Chap. 8, *The Tapes*.
30. Rodriguez writes at p. 239, "my goal was to protect the identities of my officers." He also claims that he could not simply obscure the officer's faces because "there are countless techies in the world who like nothing better than unraveling secrets, and it wouldn't have been long before the full, unobscured images of those CIA officers would have been available for anyone with an internet connection."
31. Giraldi, *supra* note 8.
32. For example, former U.S. Vice President Dick Cheney, "Responding to a conservative radio interviewer who asked whether water boarding, which involves simulated drowning, was a "no-brainer" if the information it yielded would save American lives. 'It's a no-brainer for me,' Mr. Cheney replied." Demetri Sevastopulo, *Cheney Endorses Simulated Drowning Terror Suspects*, FINANCIAL TIMES, Oct 27, 2006, at P6.
33. Rejali, *supra*, note 9.
34. Clarke, *supra*. note 10 at chapter 6.
35. See, Richard A. Posner, *Torture, Terrorism, and Interrogation*, in TORTURE, A COLLECTION 291, 295 (Sanford Levinson ed., 2004).
36. ALFRED W. MCCOY, A QUESTION OF TORTURE: CIA INTERROGATION, FROM THE COLD WAR TO THE WAR ON TERROR 112 (2006).
37. Rejali, *supra*, note 9.
38. Stephanie Athey, *The Tale of Abdul Hakim Murad*, ON TORTURE, 87 (Thomas C. Hilde, ed., 2008).

39. For example, the case that created the state secrets evidentiary privilege, *United States v. Reynolds*, 345 US 1 (1953) sprang illegitimately into U.S. jurisprudence. In *Reynolds*, an experimental air force jet crashed killing its crew. Family members sued, but their case foundered when the government successfully asserted the state privileges secret by claiming that its accident report on the incident included sensitive secrets that would inevitably be disclosed in litigation. Year later, when the report was declassified, the public learned that it revealed no legitimate secrets, but rather, “a horror story of incompetence, bungling, and tragic error.” Garry Wills, *Why the Government Can Legally Lie*, 56 N.Y. REV. OF BOOKS 32, 33 (2009).



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1. Title of Publication: NATIONAL LAWYERS GUILD REVIEW. 2 Publication number: 231 560. 3. Date of filing: October 1, 2014. 4. Issue frequency: quarterly. 5. Number of issues published annually: Four. 6. Annual subscription price: \$25. 7. Complete mailing address of known office of publication: National Lawyers Guild Review, 132 Nassau Street, # 922, New York NY 10038. 8. Complete mailing address of the general business offices of the publisher: 132 Nassau Street, # 922, New York NY 10038. 9. Full names and complete mailing address of publisher, editor and managing editor: Publisher: National Lawyers Guild Review, 132 Nassau Street, # 922, New York NY 10038. Editor: Nathan Goetting, 132 Nassau Street, # 922, New York NY 10038. Managing editor: Deborah Willis. 10. Owner: National Lawyers Guild Foundation. 11. Known bondholders, mortgagees, and other security holders owning or holding 1 percent or more of total amount of bonds, mortgages, or other securities: none. 12. For completion by nonprofit organizations authorized to mail at special rates (Section 423.12DMM only): Status has not changed during the preceding 12 months. 13. Publication name: NATIONAL LAWYERS GUILD REVIEW. 14. Issue date for circulation data below: Summer 2013. 15. Extent and nature of circulation. Average number of copies of each issue during preceding 12 months. A. Total number of copies (net press run): 506. B. Paid and/or requested circulation (1) Outside county: 420. (2) Paid in-county subscriptions: 4. (3) Sales through dealers and carriers, street vendors, counter sales and other non-USPS paid distribution: 0. (4) Other classes mailed through the USPS: 0. C. Total paid and/or requested circulation: 424. D. Free distribution by mail (samples, complimentary and other free): 0 (1) Outside county: 0. (2) In-county: 0. (3) Other classes mailed: 0. E. Free distribution outside the mail (carriers or other means): 0. F. Total free distribution: 0. G. Total distribution: 424. H. Copies not distributed: 79. I. Total:503. Percent paid and/or requested circulation: 100%. Actual number of copies of single issue published nearest to filing date. A. Total number of copies (net press run): 378. B. Paid and/or requested circulation (1) Outside county: 377. (2) Paid in-county subscriptions: 1 (3) Sales through dealers and carriers, street vendors, counter sales and other non-USPS paid distribution: 0. (4) Other classes mailed through the USPS: 0. C. Total paid and/or requested circulation: 378. D. Free distribution by mail (samples, complimentary and other free): (1) Outside county: 0. (2) In-county: 0. (3) Other classes mailed: 0. E. Free distribution outside the mail (carriers or other means): 0. F. Total free distribution: 0. G. Total distribution: 378. H. Copies not distributed: 109. I. Total: 487. Percent paid and/or requested circulation: 100% 16. This statement of ownership will be printed in the Fall 2013 issue of this publication. 17. I certify that the statements made by me above are correct and complete. Signature and title of editor, publisher, business manager or owner: National Lawyers Guild Foundation, owner, October 1, 2014.

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