Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders

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I. INTRODUCTION

The Nicole Simpson murder has focused public attention on domestic violence as never before. Yet despite an unprecedented level of media coverage and a proliferation of proposed legislation, domestic violence remains the leading health risk for American women.

No issue in domestic violence reform is as critical as the need to stop the repeat batterer before a homicide occurs, committed either by the batterer or by the victim in self-defense. While a centerpiece of reform in this area has been court intervention through the imposition of a civil protection order, a method of swift and effective enforcement of such orders has been elusive.

The current trend, pushed by some battered women advocates, is to criminalize all violations of protection orders. This approach is a misguided continuation of the search for “magic bullet” solutions that has plagued domestic violence reform. It also relies exclusively on state prosecutors who are often hostile to filing such charges, particularly when the batterer’s actions would not otherwise be considered a criminal offense.

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The author wishes to thank Matthew Shaft, Joan Zorza and Professors Robert Batey and Martha Minow for their helpful comments on earlier drafts. The research and editing assistance of Karen & Scott Flint, Lorna Salomon, Pamela Rush, Maureen Godwin and Stacey Bohman is gratefully acknowledged.

1 See infra note 15 and accompanying text.
2 See infra note 20 and accompanying text.
3 Acts, such as repeated telephone calls, unsolicited letters and visits, are violations of the stay away or no contact provisions that are often part of a civil protection order. These incidents can be extremely distressing for the battered woman although such acts are not otherwise considered criminal conduct or even unwelcome under ordinary circumstances. Telephone Interview with Linda Osmundson, Director
Instead, greater reliance should be placed on criminal contempt sanctions as a remedy for protection order violations. Criminal contempt sanctions can often be instituted and prosecuted by the offended civil party, here the battered woman, and usually require an expedited hearing which may be critical to her safety. When coupled with criminal sanctions in appropriate cases, and incorporated into a comprehensive attack on domestic violence, the criminal contempt route empowers the battered woman and assists her in escaping from a violent relationship.

Part II of this Article outlines the social dynamic behind the persistence of domestic violence in the context of the question, "Why do women stay?" and the less often asked question, "Why do men batter?" Part II also explores the flaws of mandatory arrest laws, which typify the "magic bullet" approach that fails to address the complex relationship between the social dynamic of battering and the legal/bureaucratic response.

In Part III, I build on work by Professor Martha Minow and explore the connection between legal language and domestic violence reform. Professor Minow has argued that new laws by themselves will not change the common everyday language that accompanies and excuses domestic violence. In other words, entrenched cultural attitudes cannot be changed by legislative fiat. To be effective, legal reforms must purposefully seek to change this language of acceptance into language of rejection and disapproval of domestic violence. Only by using transformative legal language can legislation hope to alter individual beliefs and behavior.

Minow also shows that such transformative language must be crafted with each actor in the social dynamic in mind—lawyers, police officers, judges, social workers, and above all, victims whose desperate need is for empowering language, not debilitating "victim talk."

I argue in Part III that domestic violence reforms will be more transformative, and hence more successful, particularly with institutional actors (e.g., police, prosecutors and judges), if they incorporate and

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4 See infra notes 189–91 and accompanying text.
5 See infra notes 205–06 and accompanying text for statutes mandating expedited hearings on contempt motions.
6 See infra part IV.B.
7 Professor of Law, The Harvard Law School. Professor Minow has written extensively on family law, feminism, and legal language. See infra note 132 for a list of related publications.
connect with existing societal concepts and practices. In essence, reformers must purposefully seek out existing language and practices as a wedge to promote change in the cultural values underlying domestic violence. However, reformers must be careful to choose only those existing practices and language that can be co-opted for the goal of empowering battered women.

I then make the specific case for combining the concept of empowerment with the everyday and legal uses of "contempt" language in the context of providing a remedy for protection order violations. Contempt language has an everyday meaning that we apply to individuals whose conduct we find despicable. Labelling domestic battering as "contemptible," uses language that shifts the blame away from the victim and rightfully onto the offender. At the same time, contempt language is also powerful legal language, reserved for conduct that violates a court order. Most importantly, criminal contempt sanctions are currently available in most jurisdictions to sanction violations of civil protection orders, either explicitly by statute or under the inherent power of a court to vindicate its orders. Therefore, employing contempt sanctions to punish protection order violations takes advantage of compatible common and legal language, as well as an existing institutional practice. The confluence of these factors presents a unique opportunity to integrate language and policy to address a critical area of domestic violence.

In Part IV, I address the practical implications of this strategy. I show that criminal contempt sanctions offer significant advantages and flexibility when incorporated into a comprehensive attack on domestic violence. In contrast, I demonstrate that the current trend to criminalize all violations of civil protection orders simply repeats the failed single-remedy approach of the past. I conclude with specific suggestions for implementing the criminal contempt and empowerment approach for enforcement of civil protection orders.  

II. THE PERSISTENCE OF DOMESTIC VIOLENCE IN THE UNITED STATES

A. Introduction to the Problem

While feminists could fairly charge as recently as 1967 that the

10 See infra notes 185–86.
11 Specifically, the potential double jeopardy consequences of multiple prosecutions of the same act of domestic violence as contempt and under a criminal statute must be considered. See infra notes 264–68 and accompanying text.
12 Raymond I. Parnas, The American Bar Foundation Survey of the
domestic battering\textsuperscript{13} of women was the American family's dirty secret, it is now front page news.\textsuperscript{14} The Simpson case in California,\textsuperscript{15} the Hedda


\textsuperscript{13} A good definition of "woman battering" is "that pattern of violent and coercive acts perpetrated by a person against a current or former partner, the calculated purpose of which is to control the thoughts, beliefs, or conduct of the partner or to punish the partner for resisting the perpetrator's control." \textit{Angela Corsilles, Note, No-Drop Policies in the Prosecution of Domestic Violence Cases: Guarantee to Action or Dangerous Solution?}, 63 FORDHAM L. REV. 853, 853 n.1 (1994); \textit{see also Linda Gordon, Heroes of Their Own Lives: The Politics and History of Family Violence: Boston 1880-1960} 251 (1988) (focusing on the power relationship between males and females and defining wife-beating as "the chronic battering of a person of inferior power who for that reason cannot effectively resist").

As most authors on this subject, I too will refer to victims of domestic violence as women because they constitute the overwhelming majority of victims. For general background on battered women, see \textit{Barbara Hart, Lesbian Battering: An Examination, in Naming the Violence: Speaking Out About Lesbian Battering} (Kerry Lobel ed., 1986); \textit{Ellen Pence et al., Criminal Justice Response to Domestic Assault Cases: A Guide for Policy Development} (1985); \textit{Susan Schechter, Women and Male Violence: The Visions and Struggles of the Battered Women's Movement} (1982).

There has been some conflict whether the term "battered woman" should be limited to those who suffer physical abuse, or whether it should be broadened to include psychological abuse as well. \textit{Lenore Walker, who is generally given credit for first popularizing this issue, writes that battering also involves a cycle of behavior and that a couple must go through the battering cycle at least twice for the relationship to qualify. \textit{Lenore E. Walker, The Battered Woman} at xv (1979). Both Lenore Walker's early work and her integrity have recently been severely criticized for her willingness to testify as an expert witness on behalf of accused batterers, most notably O.J. Simpson (much of this debate has taken place on the Internet bulletin boards). For a sampling of this debate see in\% femjur@uvm.edu (transcript on file with the author).

Nussbaum case in New York,\textsuperscript{16} the Lorena Bobbitt case in Virginia,\textsuperscript{17} and a constant stream of well-publicized local tragedies\textsuperscript{18} have raised the nation's awareness of domestic violence to perhaps its highest and most sustained level ever.

While this widespread public awareness may be a new phenomenon, those who have worked in the criminal justice and social service professions have long been painfully aware of the pervasiveness and intractability of the nation's domestic violence problem. For the past twenty years, we have witnessed an explosion of academic articles, studies, books, and symposia on the issue.\textsuperscript{19} Domestic violence reform work now

Professor Martha Minow argues that media coverage continues to be part of the problem by either over-dramatizing individual cases or by reporting numbing statistics. Minow, supra note 8, at 1684–85.

\textsuperscript{15} See, e.g., Cindy Loose, \textit{Case Has Area Hot Lines Jumping}, WASH. POST, June 24, 1994, at A22 (noting that since the murder of Nicole Simpson the problem of domestic violence has gripped the national consciousness). The media have also attributed a recent flurry of state and federal legislative action to the concern generated by the Simpson case. See, e.g., Patricia Edmonds, \textit{A Call to Arms Against Spouse Abuse}, USA TODAY, June 23, 1994, at 3A (reporting that the New York Legislature reached an agreement on a bill requiring police to arrest spouse-beaters, that New Jersey passed six new domestic violence bills, and that California proposed new laws to hold spousal abuse defendants longer and maintain a registry of restraining orders); Bill Turque, et al., \textit{He's Going Nuts}, NEWSWEEK, July 4, 1994, at 23 (reporting that New York and Colorado passed tough new domestic abuse laws after 911 tapes of Nicole Simpson were played nonstop over the nation's airwaves). Congress also recently passed the Violence Against Women Act, Pub. L. No. 103-322, 108 Stat. 1916 (codified at 42 U.S.C. §§ 13931–14040 (1994)).


\textsuperscript{17} See Maria E. Odum & Carlos Sanchez, \textit{A Symbol of Shared Rage; Dozens Rallying Around Va. Woman Who Cut Husband}, WASH. POST, Aug. 12, 1993, at B1.

\textsuperscript{18} In 1994, for example, Hillsborough County, Florida had thirty-four domestic murders and approximately 6,400 misdemeanor domestic violence cases. William March, \textit{Cops, Courts Get Tough on Abuse}, TAMPA TRIB., Feb. 8, 1995, at 1. Nationwide, 2,167 women were killed by their spouses, ex-spouses, or lovers in 1992. \textit{Id}. Some of these deaths received extensive and in-depth coverage in the local press. See Sue Carlton, \textit{Road to Mount Etna: The Story of a Domestic Killing}, ST. PETERSBURG TIMES, Jan. 22, 1995, at 1F (Part I of a three-part series chronicling a police officer, Charlie Trice, accused of killing his wife, Darla Trice, after a long history of domestic violence in the marriage).

\textsuperscript{19} "Until 1967, not a single book or journal article focused on the law's response to family violence. There was practically no legislation on the subject, nor focused
extends beyond an isolated sphere of interest groups and advocates to include legislative and executive branch agencies and special commissions at all levels of government.\textsuperscript{20} Even general-membership-legal and other professional organizations have devoted time and resources to the issue.\textsuperscript{21}

This activity has generated "solutions" to the problem at a prodigious rate. Over the past twenty years, all fifty states have enacted laws intended to rein in domestic violence.\textsuperscript{22} As solutions have failed to produce the desired results, some states have enacted more than one major legislative initiative in less than a decade.\textsuperscript{23}

Despite these concentrated efforts, domestic violence remains the greatest cause of serious injury to American women, accounting for more injurious episodes than rape, auto accidents, and mugging combined.\textsuperscript{24} Other statistics are just as chilling. A woman is beaten every twelve seconds.\textsuperscript{25} Fifteen hundred women a year (approximately four per day) die
at the hands of an abusive male partner. Roughly twenty-one thousand domestic crimes against women are reported every week—more than a million assaults, murders, and rapes in a year. These are the reported crimes. Police estimate that for each of these crimes, three more go unreported. In all, there are an estimated 1.8 to 4 million incidents of domestic violence each year.

B. Why Public Awareness Has Not Changed Private Behavior

1. Gender Roles and the Battering Relationship

While part of the failure of the past twenty years of legal reform can rightly be attributed to flaws in the programs and the unwillingness of institutional actors to implement these changes, this can be only part of a serious analysis. An honest appraisal of domestic violence must acknowledge that it is domestic violence’s historical roots, which are still deeply entrenched in much of our culture, that account for its persistence.

Program, 74 B.U. L. REV. 329, 329 n.3 (1994) (citing statistics from the FBI and various other sources). Women are nine times more likely to be injured in the home than on the streets. LYNN H. SCHAFRAN, PROMOTING GENDER FAIRNESS THROUGH JUDICIAL EDUCATION: A GUIDE TO THE ISSUES AND RESOURCES 48 (1989) (citing statistics from the Center for Disease Control).

28 Id.
29 Id. Domestic violence also consumes a huge proportion of public services. Battered women account for 20% of all hospital emergency cases, and domestic disturbances are the largest category of calls received by police each year. RICHARD J. GELLES & CLAIRE P. CORNELL, INTIMATE VIOLENCE IN FAMILIES (1985).
31 Feminist historians trace the roots of wife beating to the historical domination by men of the family—the patriarchy. The absolute authority of husbands over their wives dates back to Roman and Christian law and led to legalized domestic violence into the eighteenth century in Europe, England and early America. R. Emerson Dobash & Russell P. Dobash, Wives: The “Appropriate” Victims of Marital Violence, 2 VICTIMOLOGY 426, 427–30 (1978). Only in the late nineteenth century did some states start to prohibit wife beating. Prior to then, it was considered a husband’s marital obligation to control and chastise his wife through physical force. Id. at 430–31.

In the modern context, Gordon asserts that “violence among family members
In many quarters, a low level of domestic violence is still seen as acceptable or at least as a mutual problem in the relationship. On the other hand, men who seriously injure or kill their partners are seen as criminals, not as part of a larger social problem. Abusive relationships, however, need to be seen as part of a larger cultural dynamic. This dynamic defines individual ideas about appropriate gender roles which affect behavior within marital/romantic/sexual relationships. Only from this perspective can one recognize the features of our culture's dominant gender roles, held by both men and women, that foster domestic violence in American society.

In more common parlance, one must answer two questions about domestic violence. First, the most common query: Why do women remain in relationships that are unsatisfying, harmful, and even life-threatening? The second question, less commonly asked (which in itself says a great

arises from family conflicts which are not only historically influenced but political in themselves, in the sense of that word as having to do with power relations. Family violence usually arises out of power struggles in which individuals are contesting real resources and benefits.” GORDON, supra note 13, at 3. For example, “[b]eatings kept women from leaving, kept them providing sexual, housework, and child care services (or were intended to do so).” Id. at 287.


33 Elizabeth Topliife, Why Civil Protection Orders Are Effective Remedies for Domestic Violence but Mutual Protective Orders Are Not, 67 IND. L. L. 1039, 1060–61 (1992). Furthermore, modern developments such as industrialization and urbanization have weakened traditional informal controls over unacceptable levels of marital violence. See GORDON, supra note 13, at 279 (more traditional cultures had “[r]ituals of public shaming, known as charivari, skimmington rides, rough music, and misrules, among many other names, involving costumes and floats, dancing, singing rude songs, and, sometimes, physical punishment. [These] were common from the fifteenth through the nineteenth century. . . . Some similar activity in the United States in the nineteenth and twentieth centuries has been discovered.”). See generally FAMILY VIOLENCE, AN INTERNATIONAL AND INTERDISCIPLINARY STUDY 69 (John M. Eekelaar and Sanford N. Katz eds., 1978).

34 See SCHECHTER, supra note 13, at 210–13 (noting that it is important to see the violence as part of society, not an individual or inter-generational psychological problem).

deal about our culture's dominant gender role stereotypes), is: Why do men batter?36

For women, one must recognize that they too have bought into the social myths that legitimize the violence—be it through religion,37 law, or the norms of friendships, kinships, and neighborhood groups.38 "One assault does not make a battered woman; she becomes one because of her socially determined inability to resist or escape."39 Lack of self-confidence and a traditionalist view about family and the feminine role40 also figure prominently in a battered woman's psychological profile.41

In addition to women's conceptions about themselves generally, there is also a dynamic to the abusive relationship that hinders external efforts to control domestic violence. Unlike stranger-on-stranger crime, after which the parties have little or no contact, domestic violence takes place in a relationship to which both parties often remain committed.42 Women in particular resist outside intervention when they believe that it threatens the future of the relationship.43 This is especially true for women who define their self-image in terms of their relationships with men.44 Further, violent relationships sometimes follow an internal cycle of tension building, release, and reconciliation.45 The victim may therefore be less willing to

36 See Waits, supra note 35, at 286.
37 Sewell, supra note 14, at 986–87.
38 GORDON, supra note 13, at 285.
39 Id. at 285.
40 Waits, supra note 35, at 285.
41 GORDON, supra note 13, at 272.
42 It has also been argued that all women are socialized to stay with their husbands regardless of their partners’ problems. For example, only ten percent of non-alcoholic women leave their alcoholic husbands, while ninety percent of non-alcoholic men leave their alcoholic wives. Similar statistics have been found in marriages involving a partner with a degenerative disease. Telephone Interview with Joan Zorza, Senior Attorney at the National Center on Women & Family Law, New York, N.Y. (Apr. 11, 1995). Battered women frequently state that they want to stay with the batterer, but that they just want the abuse to end. Interview with Linda Osmundson, Director of the CASA Shelter in St. Petersburg, Florida (Mar. 25, 1995). See also infra note 146 discussing differences between men and women’s conceptions of relationships and conflict resolution.
43 See Waits, supra note 35, at 281–82, 286.
45 See Michele Ingrassia & Melinda Beck, Patterns of Abuse, NEWSWEEK, July 4,
take advantage of intervention offered during a peaceful phase.46 Finally, while a woman initially might be strong enough to escape, ongoing exposure to physical and emotional damage can eventually make it difficult for the victim alone to solve the problem.47

In addition to these psychological factors, it cannot be stressed enough that critical economic forces are at work as well. Domestic violence often starts slowly or only after marriage48 and children,49 when leaving presents greater legal and pragmatic obstacles. As long as men continue to earn more than women and women continue to bear the primary burden of child care, male batterers can exert economic coercion,50 especially since many victims are unskilled and have young children.51 While domestic abuse crosses all economic and class boundaries,52 the poor, young, less educated, and unemployed are more likely to have abusive relationships, much

1994, at 26. 30–31. Lenore Walker describes three parts to the abuse cycle: “a phase where tension is building and the woman tries desperately to keep the man calm; an explosion with acute battering, and then a period where the batterer is loving and contrite.” Id. The cycle of battering, remorse and wooing behavior wears women down until they become “brainwashed” into thinking that leaving is impossible. Id.; see Walker, supra note 13, at 55–70 (describing in greater detail her cyclical theory of violence). However, experts now downplay Walker’s cyclical theory of battering, since more recent empirical research suggests it is found only in some battering relationships. Instead, the focus has shifted to the manipulative, opportunistic behavior of the batterer, who seeks to maintain the relationship through whatever means necessary, without regard to a specific timing cycle unique to a battering relationship. Interview with Linda Osmundson, Director of the CASA Shelter in St. Petersburg, Florida (Mar. 25, 1995).

46 Although many battered women who are able to leave the relationship are later able to establish healthier relationships, some studies suggest that the success rate for resolving domestic violence within a chronically violent relationship is very low no matter what interventions are used.

47 Ingrassia & Beck, supra note 45, at 31.

48 See Dobash & Dobash, supra note 31, at 432.

49 See Gordon, supra note 13, at 272.


51 One battered women’s advocate in the Philadelphia area states that most of her clients “often have two or three small children, are in their late 20s or early 30s, have few or no job skills, and have been abused three to five years.” Tina Kelley, Violence on the Home Front, Phila. Inquirer, Oct. 21, 1990, at C4.

52 It is well established that domestic violence occurs in families and relationships of all ages, communities, income levels, races, religions, employment situations, and marital status. See Walker, supra note 13, at 17; Ingrassia & Beck, supra note 45, at 28.
as they are to suffer from other societal ills.\textsuperscript{53} Finally, the poverty, drugs, and alcohol that create dysfunctional families are breeding grounds for batterers and their potential victims.\textsuperscript{54} Programs targeted at domestic violence will run aground if they do not account for the other economic and social problems of many of its victims.\textsuperscript{55}

As significant as female gender roles and economic restraints may be, current research suggests that the long-neglected male gender role is at least as significant a contributor to domestic violence.\textsuperscript{56} Most batterers in

\textsuperscript{53} The assertion that incidences of battering occur more frequently in lower or working-class families than in upper-class families is debatable given the disincentive for upper-class women to report the crime. ROGER LANGLEY & RICHARD C. LEVY, WIFE BEATING: THE SILENT CRISIS 43–46 (1977).

\textsuperscript{54} See generally GORDON, supra note 13, at 264–66. Some research now disputes the role of alcohol in triggering abuse, finding that it is more of a precipitating event than a cause. Id. at 265. In addition, the myth that sexual disagreements were a cause of violence has also been challenged. Id. at 269–71.

\textsuperscript{55} The military offers a microcosm of this effect. Domestic violence in the military has increased steadily since the late 1980s and has become so severe that an average of one spouse or child a week is killed by a relative in uniform. Some of the rise can be attributed to better reporting, but other suggested causes are shrinking military budgets, incomes, and prospects for career advancement, as well as rising tension over more frequent deployments. Eric Schmitt, Military Struggling to Stem an Increase in Family Violence, N.Y. TIMES, May 23, 1994, at 1; Marc Thompson, The Living Room War, TIME, May 23, 1994, at 48.

It may be that different solutions may be appropriate for different classes of batterers, not just by psychological profile, but by economic class and employment status as well. See Lawrence W. Sherman, The Influence of Criminology on Criminal Law: Evaluating Arrests for Misdemeanor Domestic Violence, 83 J. CRIM. L. & CRIMINOLOGY 1, 25 (1992) (finding that arrests for domestic violence tend to deter only employed suspects); Developments in the Law—Legal Responses to Domestic Violence, 106 HARV. L. REV. 1501, 1539 (1993) [hereinafter Developments] (noting that mandatory arrest studies seem to show that unemployed criminal batterers are least responsive to arrest-oriented enforcement because arrest does not deter them).

\textsuperscript{56} Waits, supra note 35 at 286; Daniel G. Saunders, Husbands Who Assault, in LEGAL RESPONSES TO WIFE ASSAULT 11–13 (N. Zoe Hilton ed. 1993). While battered women often suffer from low self-esteem, come from an abusive family, abuse alcohol and drugs, remain passive in relationships, become dependent and isolated, and crave approval, attention and affection, some research suggests that it may be that a violent relationship has less to do with the woman herself as with the man with whom she ends up. Ingrassia & Beck, supra note 45, at 28–29. But see Gerald T. Hotaling & David B. Sugarman, Prevention of Wife Assault, in TREATMENT OF FAMILY VIOLENCE: A SOURCE BOOK 385, 401 (Robert T. Ammerman & Michel Hersen eds., 1990) (noting that exposure to violence while growing up does not predict whether a woman will be abused as an adult).
some way reflect or carry out a model of male behavior that they learned from their parents and upon which they act when challenged.\textsuperscript{57}

Society has taught men to assert dominance in their relationships, both within and outside the family.\textsuperscript{58} Second, some level of violence or at least a willingness to engage in violence can be a respected male quality.\textsuperscript{59} Third, family matters are private—for the man, the home constitutes "his castle" where he can retreat from work and competition with other men.\textsuperscript{60} Accordingly, batterers do not accept that their behavior is wrong or that society has any right to interfere in their conduct of personal relationships.\textsuperscript{61}

More specifically, researchers are finding that there are different profiles for batterers cutting across all strata of society.\textsuperscript{62} Some research divides batterers into two groups, dominant and dependent. The dominant batterer is generally aggressive with society, more severely violent and more likely to have experienced violence in childhood.\textsuperscript{63} The dependent batterer is violent only in the family and tends to show more remorse.\textsuperscript{64}

\textsuperscript{57} Waits, \textit{supra} note 35, at 288; \textit{Langley \& Levy}, \textit{supra} note 53, at 49.

\textsuperscript{58} Any behavior or perceived challenges to the man's possession, authority, and control can trigger a violent episode. Dobash \& Dobash, \textit{supra} note 31, at 438-39. Trivial things like a late meal or talking to another man, though individually inexplicable as "causes," are better understood in the context of maintaining authority. \textit{Id.} at 439.

\textsuperscript{59} Dobash \& Dobash, \textit{supra} note 31, at 434. However, "[c]ontrary to what might be expected, anger and hostility are not consistently related to violence. Some men may act not out of anger but out a sense of a 'duty to discipline' their wife." Saunders, \textit{supra} note 56 at 15.

\textsuperscript{60} David G. Gil, \textit{Societal Violence and Violence in Families, in Family Violence, An International and Interdisciplinary Study}, \textit{supra} note 30, at 14,16.

\textsuperscript{61} Gail Gookasian, \textit{Recent Developments: Judging Domestic Violence}, 10 HARR. WOMEN'S L.J. 275, 283 (1987). Now that the focus has turned to men, some batterers are trying to portray themselves as victims, joining the ever larger number of groups huddling under the victimization label. \textit{See Developments, supra} note 55, at 1523 (condemning this approach and arguing that "[a]ny treatment must be coupled with and forcefully convey blame and public disapproval" and strict punishment which "dispels any lingering myths of society's acceptance of wife beating or exaggerated and antiquated notions of family privacy." ); see also infra text accompanying notes 148-57 for a discussion of empowerment and "victim talk."


\textsuperscript{63} Saunders, \textit{supra} note 56, at 18.

\textsuperscript{64} \textit{Id.} at 18-19.
Other psychologists divide batterers into three types of batterers. The first is the infrequent batterer who does not escalate to serious episodes of violence. The violent behavior usually results from lack of communication skills and particular social stresses. The second is the repetitive abuser whose irrational jealousy, fear of abandonment, and an unwillingness to share power in the relationship cause the violent actions. Such batterers often grew up as the victims of, or witnesses to, abuse. The third type is the anti-social batterer whose abuse is part of a larger pattern of violence and who, frighteningly, often becomes calmer during the attack.

2. Gender Roles and Institutional Actors

Social attitudes toward domestic violence affect not only the batterer and his victim, but also their families and the social institutions with which they come into contact, particularly the institutional actors with the most daily contact with domestic violence. Many police officers, prosecutors, judges, and social workers were raised and acculturated when a certain level of domestic violence was perceived as acceptable behavior, or at least as a private matter in which societal institutions should play no role. These individuals are susceptible to letting their daily exposure to domestic violence reinforce stereotypes rather than challenge them.

For example, police training under federal grants from the Law Enforcement Assistance Administration (LEAA) in the 1960s encouraged

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66 Ingrasia & Beck, supra note 45, at 32.


68 Ingrasia & Beck, supra note 45, at 32.

69 Id.

70 This last category of hard-core abusers, representing 10–20% of all batterers, seems beyond the reach of any therapy. Ingrasia & Beck, supra note 45, at 32.


72 The LEAA has provided special initiatives in the areas of domestic violence, including local police officer training in domestic violence crisis intervention. See Dobash & Dobash, supra note 14, at 161; see also Sewell, supra note 14, at 1000,
the existing police practices of non-arrest, diversion, and the most minimal response to domestic violence situations.\footnote{73 See Eve S. Buzawa & Carl G. Buzawa, Domestic Violence: The Changing Criminal Justice Response 31 (1990); Dobash & Dobash, supra note 14, at 161–64; Murray A. Straus et al., Behind Closed Doors: Violence in the American Family 232–34 (1980); Gail A. Goolkian, Confronting Domestic Violence: A Guide for Criminal Justice Agencies, Issues and Practice in Criminal Justice 29 (National Institute of Justice, May 1986). Even police training manuals had a clear non-arrest policy of abusers in the 1970s. See, e.g., Zorza, supra note 20, at 48–49 (describing police practices in Michigan). This non-arrest policy "was endorsed by the American Bar Association, whose 1973 Standards for the Urban Police Function said that police should ‘engage in the resolution of conflict such as that which occurs between husband and wife . . . without reliance upon criminal assault or disorderly conduct statutes.’" Sherman, supra note 55, at 10 (quoting ABA, Project on Standards for Criminal Justice, Standards for the Urban Police Function 12 (1973)).}

Further, institutional actors have been reluctant to get involved, even after policy and legislative reforms. For example, at the patrol level, officers have resisted implementing mandatory arrest laws.\footnote{74 Lisa G. Lerman, The Decontextualization of Domestic Violence, 83 J. Crim. L. & Criminology 217, 218–20 (1992). According to the Freudians, therefore, the prescribed solution was treatment in which the victim was forced to accept at least half the blame. Pleck, supra note 14, at 145–46. This attitude survives in the approach of some social scientists and practitioners who believe that mutual counseling is the best course for couples experiencing continued episodes of violence because each is at fault. Ingrassia & Beck, supra note 45, at 32.}

Various reasons have been given: the belief that such situations are dangerous to police officers,\footnote{75 A specific example is New York where although there is a mandatory arrest law and a requirement that the officer file a report for every incident, a 1993 study found that of 200,000 calls, reports were filed in only 30% and arrests in only 7% of the cases. Ingrassia & Beck, supra note 45, at 28; see Donald G. Dutton, The Domestic Assault of Women: Psychological and Criminal Justice Perspectives 139, 143–44 (1988); Sarah M. Buel, Recent Developments, Mandatory Arrest for Domestic Violence, 11 Harv. Women’s L.J. 213 (1988); Zorza, supra note 20, at 65.}

sexism by a still overwhelmingly male profession, and n.125. These programs have been criticized for reinforcing established police attitudes rather than changing attitudes. Dobash & Dobash, supra note 14, at 163.
traditional notions about family. 77 Police departments are not the only institutions that have failed to implement the laws enacted to protect battered women. Criminal prosecution rates are still stunningly low. 78 Prosecutors often place the blame on the failure of many victims to press charges 79 or to cooperate with the prosecution. 80 Finally, the courts have account for 30% of all police calls, they account for only 5.7% of police deaths. Zorza, supra note 20, at 52 (citing Joel Gardner & Elizabeth Clemmer, Danger to Police in Domestic Disturbances—A New Look, in RESEARCH IN BRIEF 5 (National Institute of Justice, Nov. 1986)). On the other hand, this study did investigate less serious injuries in domestic cases versus other police-citizen contacts. Nevertheless, advocates argue that better officer training can reduce the risk of assault during a domestic incident. BUZAWA & BUZAWA, supra note 73, at 108.

77 Waits, supra note 35, at 311–14. While these factors are important, the bureaucratic nature of police departments is of at least equal importance. Police departments are resistant to change, particularly after years of non-arrest policies and hostile to limits on their traditional discretion. See LANGLEY & LEVY, supra note 53, at 168–72 (recounting anecdotal stories of police personnel and official policy of non-arrest for domestic disputes). See infra text accompanying notes 124–30 for a discussion of the need to adopt new programs to attack domestic violence within the existing institutional framework and value structure.

78 Most domestic violence cases never make it to trial. See BUZAWA & BUZAWA, supra note 73, at 58 (noting that as many as 80% of domestic violence cases never make it to trial); Rhea Mandulo, Programs Aim at Keeping Abuse Cases Alive, N.Y. L.J., Jan. 6, 1993, at 2 (same for the Manhattan and Bronx areas in New York); Trevor Jensen, Domestic Court Gets Rocky Start, SUN-SENTINEL (Ft. Lauderdale, Florida), Oct. 23, 1994, at 1B (reporting that a “high rate” of domestic assault cases in Dade County were dropped because the victims refused to pursue the charges); Deborah Nelson & Rebecca Carr, Some Frustrated Victims Talk of Taking Up Arms, Chi. SUN-TIMES, July 24, 1994, at 18 (reporting that “[o]ut of 10,700 battery cases filed in domestic violence court in Chicago in the last year, 7,400 have been dropped so far”).

79 Parnas, supra note 12, at 111. As a group, prosecutors still think that a majority of victims do not want to prosecute. Ingrassia & Beck, supra note 45, at 28 (quoting Mimi Rose, chief of Family Violence and Assault Unit, Philadelphia, Pennsylvania). One of the reasons women will not prosecute may be embedded in the nature of the problem. Due to both the manipulative nature of the batterer and the cyclical pattern of violence followed by kindness, many victims are persuaded to drop the charges. See supra notes 46–55 and accompanying text; see also SCHAFFRAN, supra note 25, at 49 (citing additional reasons).

However, the criminal justice system does not make it easy for a woman to keep her resolve. For example, in Chicago, of the over 19,000 domestic violence defendants who appeared in Cook County Domestic Violence courtrooms in 1989, only 87 were given jail terms. Only 1,331 were even convicted. The vast majority of cases were dismissed, usually because the victims, who were required to come to
contributed to the characterization of domestic violence as a family matter.\textsuperscript{81} As a substitute for firmer sanctions, judges often use a stern lecture from the bench,\textsuperscript{82} probation, or referral for counseling.\textsuperscript{83} Therefore, gender role stereotypes toward domestic violence have hindered efforts to make social institutions more responsive.

court every two weeks until the defendant showed up, eventually failed to return to court. Burleigh, supra note 26, at 2.

\textsuperscript{80} Waits, supra note 35, at 321–27. As with the police, however, institutional factors are also at work. For prosecutors, such cases lack the prestige associated with drug, murder, or white-collar crime cases. In addition, many domestic violence charges are misdemeanors relegated to the most inexperienced and overworked prosecutors. See Langley & Levy, supra note 53, at 163 (noting that most prosecutors think their careers will not be enhanced by prosecuting domestic violence cases); U.S. Comm’n on Civil Rights, Under the Rule of Thumb: Battered Women and the Administration of Justice 93 (1982) [hereinafter Rule of Thumb] (describing the low priority prosecutors place on spousal abuse complaints); Laurie Woods, Litigation on Behalf of Battered Women, 5 Women’s Rts. L. Rep. 7 (1979). See infra notes 244–51 and accompanying text discussing prosecutors’ institutional interests.


\textsuperscript{82} Waits, supra note 35, at 328.

\textsuperscript{83} Early in domestic violence reform, counseling was seen as a way to weed out the heavy case load. For example, prosecution was often deferred until after a showing that mediation had failed. Parnas, supra note 12, at 111. Mediation and counseling as primary solutions continue to be heavily criticized. Lerman says mediation and counseling are not helpful because they ignore “criminality of the abuser’s behavior and reinforces his control within the relationship.” Lerman, supra note 74, at 220; see also AMA, Diagnostic & Treatment Guidelines on Domestic Violence 12 (Mar. 1992) (noting that counseling for couples is not recommended if domestic violence is present); Zorza supra note 20, at 72, 72 & n.235 (noting that family counseling and mediation are known to increase domestic violence). But mediation and counseling still have their advocates; Developments, supra note 55, at 1541–43 (describing the advantages and disadvantages of diverting the batterer to a counseling program). The better view is that mediation and counseling only work, if at all, in conjunction with the real threat of prosecution and criminal penalties.
C. Twenty Years of Domestic Violence Reforms: Strengths and Weaknesses

1. An Overview

Viewed from this historical and sociological perspective, it is less surprising that domestic violence has proven difficult to overcome in only twenty years of social and legal reform. Nevertheless, it is important to briefly review the history of domestic violence reform to determine why these efforts have not better addressed the underlying cultural attitudes.

The primary response is that at least initially, the scope of needed reform was simply so overwhelming that consideration of this issue was at times both unrecognized and premature. For example, when advocates began the current phase of domestic violence reform in the late 1960s and early 1970s, social services such as shelters and other emergency assistance had to be established and funded from scratch. Legal reformers were in a similar position. They had to eliminate the most blatant, overt forms of societal approval for domestic violence such as the marital rape exception and spousal testimonial immunity. In the criminal justice system, the lack

84 Gordon divides society’s approach to domestic violence into five stages over the past 100 years. In the late 19th Century, general charitable organizations and moral reform groups, influenced by early feminism, first addressed the issue. The Progressive Era (1910–30) followed with the incorporation of family violence work into professional social work. There was a strong focus on the poor and on intrusive state regulation. The Depression marked a radical de-emphasis on family violence. The rebirth of attention in the 1940–50s had a heavy reliance on psychiatric categories and “pro-family” values. Finally, the feminist movement of the 1960–70s opened up a critique of family and an attack on the underlying roots of family violence. Gordon, supra note 13, at 19–26. In fact, defining wife beating as a social problem, not as characteristics of specific violent individuals or relationships, was one of the first great achievements of the feminist movement. Id. at 251; see Dobash & Dobash, supra note 14, at 156–57 (noting that in the late 19th Century the concern for battered women emerged because of the work of the early feminists, but it was cloaked in the context of social purity and temperance groups).

85 Even now, most shelters are inadequately funded and overcrowded. Majority Staff of Senate Judiciary Comm., 102d Cong., 2d Sess., Violence Against Women: A Week in the Life of America 39 (1992); see also Developments, supra note 55, at 1506–09 (noting that “[s]helters are typically underfunded, understaffed, and unable to respond fully to the needs of battered women”). Id. at 1506.

86 See Abigail A. Tierney, Spousal Sexual Assault: Pennsylvania’s Place on the Sliding Scale of Protection from Marital Rape, 90 Dick. L. Rev. 777 (1986).

87 Interspousal immunity was used to prevent victims from testifying against their batterers. As early as 1910, Justice Harlan criticized spousal immunity for torts
of any front line response by the police was initially attacked with class action and other civil suits, which prompted some institutional reforms. State legislatures then stepped in and also mandated changes in police procedures, including items so basic as to require police to file a report for every domestic call.

However, when reformers did turn to more proactive legislation, there was also in retrospect sometimes an unrealistic hope that a "magic bullet" remedy could be found for each problem area. In the civil arena, one of the first developments was to authorize family courts to issue civil protection orders to victims of domestic violence. A civil protection order is "a legally binding court order that prohibits an individual who has committed an act of domestic violence from further abusing the victim." The


See DOBASH & DOBASH, supra note 14, at 165–68; Sewell, supra note 14, at 1006–08. However, the continued use of civil tort actions has been criticized as ineffective against all but wealthy defendants. See Andrea Benneke, Civil Rights for Battered Women: Axomatic & Ignored, 11 LAW & INEQ. J. 1, 35 (1992).

See, e.g., Johnson, supra note 23, at 237 (describing the policy in New Jersey).


Civil protection orders are known by a variety of names: restraining orders, see, e.g., ALASKA STAT. § 25.35.010 (1991); COLO. REV. STAT. ANN. § 14-4-102 (West 1989 & Supp. 1994); OR. REV. STAT. § 107.718 (1990 & Supp 1994); no-contact orders, see, e.g., WASH. REV. CODE ANN. § 10.99.040 (West 1990 & Supp. 1995); or abuse orders, see, e.g., VT. STAT. ANN. tit. 15, § 1104 (1989 & Supp. 1994); injunctions, see, e.g., FLA. STAT. ANN. § 741.30 (West Supp. 1995); MICH. COMP. LAWS ANN. § 600.2950 (West 1986). For consistency, I will call them "civil protection orders."

Peter Finn & Sarah Colson, U.S. DEP’T OF JUSTICE, CIVIL PROTECTION ORDERS: LEGISLATION, CURRENT COURT PRACTICE, AND ENFORCEMENT at v (1990). There are two types of civil protection orders, ex parte and permanent. Peter Finn, Statutory Authority in the Use and Enforcement of Civil Protection Orders Against Domestic Abuse, 23 FAM. L.Q. 43, 43 (1989). Ex parte orders are granted by the courts for emergency situations in which immediate protection is needed. Id. Permanent (or full) protection orders are granted after a full adversarial court hearing. Id. As discussed in more detail below, these early protection orders were often limited in scope and availability and usually lacked effective enforcement methods. See infra text accompanying notes 181–82.
significance of such orders as the foundation for the recognition and protection of domestic violence victims should not be underestimated.\footnote{Every jurisdiction provides that spouses are eligible for protection orders. Finn \& Colson, \textit{supra} note 92, at 46. About half of the states provide protection for unrelated household members. \textit{Id}.}

However, the statutes authorizing these orders did not contain sufficient civil or criminal tools to enforce them.\footnote{Even today, violators of civil protection orders often are not immediately arrested and sanctioned. See Finn \& Colson, \textit{supra} note 92, at 49. “For enforcement to work, the courts need to monitor compliance, victims must report violations, and, most of all, police, prosecutors, and judges should respond sternly to violations that are reported. These conditions were not in place in most of the jurisdictions examined for this report.” \textit{Id}; see also Finn \& Colson, \textit{supra} note 92, at 58 (cautioning that women should not assume that a violation of a protective order will result in immediate removal of the batterer by police, because state statutes may not allow police to arrest him before a hearing or a warrant is issued).}

To some extent, the same lack of follow-through legislation was true when battered women advocates sought relief through the criminal justice system. For example, some reformers concentrated solely on increased criminal penalties for domestic violence.\footnote{See Parnas, \textit{supra} note 12, at 118, 153–57 (discussing the full enforcement approach through the criminal law and the limits of this strategy). An example of this approach is the use of so-called “no-drop” policies under which requests by the victim of a battering to drop the case are denied. See, \textit{e.g.}, Fla. Stat. § 741.2901 (Supp. 1994); Minn. Stat. Ann. § 611A.0311 (West 1991 & Supp. 1994); Wis. Stat. Ann. § 968.075(7) (Supp. 1994). Many individual state attorneys’ offices have also instituted “no-drop” policies. Corsilles, \textit{supra} note 13, 863–65. See infra note 253 for discussion of the weaknesses of “no-drop” prosecution policies. On the other hand, criminal law reform efforts have led to the creation of anti-stalking laws which fill a critical hole in the protection of psychologically and physically battered women. See Robert P. Faulkner \& Douglas H. Hsiao, \textit{And Where You Go I’ll Follow: The Constitutionality of Antistalking Laws and Proposed Model Legislation}, 31 Harv. J. on Legis. 1, 2 \& n.3 (1993) (at least 43 states now have statutes designed to protect women against stalking).}

However, the best example of the “magic bullet” approach was the mandatory arrest stampede of the 1980s.

2. The Mandatory Arrest Studies

A widely publicized study of police behavior in Minneapolis, Minnesota published in 1984,\footnote{The findings of the Minnesota study, called the “Minneapolis Domestic Violence Experiment,” first appeared in Lawrence W. Sherman \& Richard A. Berk,} revealed that police officers usually failed
to arrest batterers, even when there was an official policy encouraging arrest. Social scientists suggested that this resistance was generated by, among other things, police officers’ personal attitudes about domestic violence, their beliefs about the failure of complainants to prosecute, and the lack of institutional support for such cases from prosecutors. \textsuperscript{97} The Minneapolis study’s finding that only ten percent of big city police departments even encouraged the arrest of batterers \textsuperscript{98} led to widespread calls for mandatory arrest legislation requiring police to arrest whenever there was probable cause to believe a battery had occurred. \textsuperscript{99} Mandatory arrest law advocates theorized that if batterers were arrested in greater numbers, they would be deterred from future battering. \textsuperscript{100}

In response, sixteen states now mandate an arrest when there is probable cause to believe a domestic assault has occurred, \textsuperscript{101} and other states significantly expanded police powers to make misdemeanor arrests in domestic violence cases. \textsuperscript{102} However, despite the reported benefits of mandatory arrest laws in some situations, \textsuperscript{103} recent follow-up studies suggest less than encouraging results from mandatory arrest policies. \textsuperscript{104}


\textsuperscript{97} See Developments, supra note 55, at 1535–36.

\textsuperscript{98} This study was conducted on the eve of the release of the Minneapolis report by one of its authors. Sherman, supra note 55, at 23.

\textsuperscript{99} Developments, supra note 55, at 1536. In response to the Minneapolis report, the U.S. Attorney General recommended arrest as the standard police procedure to domestic assault and it was this recommendation that seems to have propelled the policy. U.S. DEP’T OF JUSTICE, ATTORNEY GEN.’S TASK FORCE ON FAMILY VIOLENCE: FINAL REPORT 17–24 (1984) [hereinafter U.S. TASK FORCE ON FAMILY VIOLENCE]. However, the authors of the Minneapolis study recommended only a presumption for arrest, not a mandatory policy. Sherman, supra note 55, at 21.

\textsuperscript{100} Waits, supra note 35, at 316; see also Lisa Lerman, A Model State Act: Remedies for Domestic Abuse, 21 HARV. J. ON LEGIS. 61, 130 (1984).

\textsuperscript{101} Domestic Violence Fact Sheet (National Center on Women and Family Law, Inc. 1994). Maryland is the most recent state to join this group.

\textsuperscript{102} Developments, supra note 55, at 1537 n.68.

\textsuperscript{103} An example would be the prevention of further serious violence during a critical battering episode. Developments, supra note 55, at 1537–38 (describing benefits of mandatory arrest laws).

\textsuperscript{104} Parnas, supra note 12, at 150–51. Follow-up studies indicate that arrest alone will not deter the woman’s batterer. See, e.g., Franklin W. Dunford et al., \textit{The Role of Arrest in Domestic Assault: The Omaha Police Experiment}, 28 CRIMINOLOGY 183 (1990); J. David Hirschel & Ira W. Hutchison, III, \textit{Female Spouse Abuse and the Police Response: The Charlotte North Carolina Experiment}, 83 J. CRIM. L. & CRIMINOLOGY, 73, 115 (1992); Lawrence W. Sherman, et al., \textit{From Initial Deterrence to Long-Term Escalation: Short Custody Arrest for Poverty Ghetto Domestic Violence},
For example, researchers did not find a deterrent effect in every city studied.\textsuperscript{105} Further, deterrence was significantly affected by the batterer’s employment status.\textsuperscript{106} The lower down the economic ladder, the less effect a mandatory arrest had on future behavior.\textsuperscript{107} In some cities, mandatory arrest policies actually worsened recidivism over time.\textsuperscript{108} Some studies suggested that an arrest could backfire against the victim by provoking additional assaults after the batterer was released.\textsuperscript{109}

In retrospect, it is not surprising that arrest alone does not work effectively. As one researcher eloquently remarked:

\begin{quote}
The world is all too full of aggressive, impulsive individuals who are willing to take risks in order to vent their temper or get their way. They are often poorly educated and lack solid judgment and planning skills. [Many have no interest in protecting] their reputations or arrest histories. Some are often intoxicated or under the influence of drugs... others have grown so depressed or bitter that they simply don’t care anymore. These types of individuals are not impressed by the risk of short-term incarceration, although for some of them, genuinely harsh sanctions such
\end{quote}

\textsuperscript{29} CRIMINOLOGY 821 (1991). However, in response to the anti-mandatory arrest data now coming out, Lerman argues that these new studies are myopic and ignore the experience of battered women. She states that while studies of arrest policies can provide valuable information, they focus only on this facet of a social problem and result in a “test tube attitude.” Lerman, supra note 74, at 218–19. Experiments need to take into account many other factors, such as the context of the arrest, behavior of police officers, how the case is prosecuted, the victim’s wishes, and the kind of sanctions imposed. Id.; see also Cynthia G. Bowman, \textit{The Arrest Experiments: A Feminist Critique}, 83 J. CRIM. L. & CRIMINOLOGY 1201 (1992) (noting that the problem overall with quantitative research is that it divorces factors from their “socio-economic and historical context”).

\textsuperscript{105} Hirscheil, supra note 104, at 117.

\textsuperscript{106} Dunford, supra note 104, at 184; Sherman, supra note 55, at 25.

\textsuperscript{107} Perhaps because an arrest would have little or no impact if the batterer is unemployed or seeks only low skill jobs which do not require a background check. See Sherman, supra note 55, at 25.

\textsuperscript{108} Id. at 30–31. It has also been argued that the results of the original Minnesota study were simply not strong enough on which to base national policy. The critics of the study cited such negative factors as sparse victim interview data and limited sample size and makeup of that sample. Id. at 20. But see Joan Zorza, \textit{Must We Stop Arresting Batterers?: Analysis and Policy Implications of New Policy Domestic Violence Studies}, 28 NEW ENG. L. REV. 929 (1994) (arguing that arrest is the superior method of deterring domestic violence and criticizing the follow-up studies to the Minneapolis experiment).

\textsuperscript{109} See Developments, supra note 55, at 1538–40. However, this is more likely the result if the batterer believes that the system will not ultimately punish him.
as lengthy prison sentences may have deterrent value.\textsuperscript{110}

For these batterers, a short-term arrest will have little deterrent effect on their willingness to commit another act of domestic violence, just as a short term arrest has relatively little effect at preventing their participation in other crimes.\textsuperscript{111} For many of these reasons, feminists themselves have come to criticize over-reliance on mandatory arrest policies,\textsuperscript{112} recognizing that many batterers have too much invested in their abusive treatment of their female counterparts to fear arrest alone.\textsuperscript{113}

On an institutional level, mandatory arrest laws were also flawed because they tried to eliminate institutional resistance by the police by fiat. Proponents failed to recognize that on a practical level, mandatory arrest policies impose significant administrative costs on police. Mandatory policies for agencies, such as police departments, that normally rely heavily on individual discretion can quickly backfire, causing resentment and efforts to undermine dramatic behavioral changes.\textsuperscript{114} The most

\textsuperscript{110} Mitchell, \textit{supra} note 62, at 243. One should not necessarily read this quote to mean that the domestic abuse problem is one primarily of the lower classes, only that certain classes of batterers are harder to deter. Arrest does appear to have a deterrent effect on employed batterers, perhaps due to social pressures and particular characteristics of the communities in which they live. \textit{See} Sherman, \textit{supra} note 55, at 35. However, the fact that “unemployed, socially marginal batterers are not deterred by arrest” should not be surprising. Many burglars, robbers, and drug dealers commit more crimes after they are released, so we cannot assume that arrest would deter batterers from future violence. Lisa A. Frisch, \textit{Research That Succeeds, Policies That Fail}, 83 J. CRIM. L. & CRIMINOLOGY 209, 213 (1992).

\textsuperscript{111} Mitchell, \textit{supra} note 62, at 243.

\textsuperscript{112} Miriam H. Ruttenberg, \textit{A Feminist Critique of Mandatory Arrest: An Analysis of Race and Gender in Domestic Violence Policy}, 2 Am. U.J. GENDER & L. 171, 191–92 (1994) (arguing that mandatory arrest laws will have a negative impact on African-Americans because of bias in the criminal justice system toward them).

\textsuperscript{113} Bowman, \textit{supra} note 104, at 201–04. Some feminists also caution that it is dangerous simply to ask, “Does arrest work?” If the answer is no, then the response is to do away with a policy that police do not like anyway. They prefer to pose a larger question: “Do arrest, prosecution and support services work?” \textit{Id.} Unfortunately, not enough communities have invested enough resources to implement such a coordinated approach.

While I support the comprehensive approach, given tight resources, advocates must resist calls for broad mandatory policies. In the context of arrest policy, this Article suggests restricting mandatory arrests to batterers who have violated an outstanding protection order. \textit{See infra} text accompanying notes 121–22.

\textsuperscript{114} Moreover, front line service providers in large bureaucratic organizations are adept at circumventing unwelcome policy changes. \textit{See}, e.g., Kathleen J. Ferraro,
dramatic example has been the practice of police to arrest both the woman and man if there was any evidence of physical resistance by the woman during the altercation.\footnote{dobash & dobash, supra note 14, at 199; see also lawrence w. sherman, policing domestic violence: experiments and dilemmas 2–3 (1992). women have also been accused of using domestic violence arrests as a weapon in divorce proceedings. emma bowen, anti-violence law can be a weapon in divorce, nat’l l.j., apr. 11, 1994, at 21. given the high rate of divorce among police officers, this accusation adds further fuel to their hostility to mandatory arrest policies.}

Additionally, mandatory arrest policies alone fail to deter batterers due to the lack of action further along in the criminal justice pipeline. Even when police arrest under a mandatory law,\footnote{many times police do not arrest a suspected batterer despite mandatory arrest laws. see, e.g., buzawa & buzawa, supra note 73, at 99 (noting that arrests were made in less than 20% of domestic violence calls in minneapolis, minnesota); ingassia & beck, supra note 45, at 27 (reporting that arrests were made in only 7% of the cases in new york city).} courts still generally immediately release those arrested.\footnote{u.s. task force on family violence, supra note 99, at 105. thus, other than seeking shelter with an agency or family member, which is not always feasible, there is little the battered woman can hope for to obtain immediate protection at or around the time of a battering episode.} When the police must arrest, the discretionary decision to drop weak cases simply is passed to prosecutors.\footnote{as discussed above, many prosecutors are correctly convinced that many domestic violence complainants will eventually drop charges when the batterer asks to return and promises to stop the beatings. see supra note 79 and accompanying text.} When criminal charges are filed, crowded dockets delay action and misdemeanors are given low priority, leading to dismissals when victims become frustrated and drop the charges. Finally, even in the cases that go to trial, juries and judges do not convict often enough or punish severely enough to deter future acts. So long as the penalties for domestic violence are neither swift nor certain, arrests alone will not break the violent dynamic in which both are trapped.\footnote{"failure of coordination will cause failure of any individual remedy." lerman, supra note 74, at 221–22. without the coordination of law enforcement and
Unfortunately, reliance on top-down mandatory policies that try to reform institutions by command continue today with calls for prosecutorial “no-drop” policies in domestic violence cases.\(^{120}\) For similar reasons, “no-drop” policies are also doomed to failure. Like mandatory arrest policies, a “no-drop” prosecution requirement severely restricts the traditional discretion of prosecutors. In addition, these policies pass the responsibility to weed out weak cases to juries, a tactic costly in resources and in public perceptions of domestic violence.

More generally, since no one has really figured out how to eliminate police or prosecutor discretion in practice, there is all the more reason to develop an alternative, or at least a modified approach.\(^{121}\) For example, mandatory arrests would be more useful when tailored to meet the problem of the recidivist batterer. A mandatory arrest policy for violators of civil protection orders can directly address the immediate needs of victims and take a harder-line approach toward more persistent batterers.\(^{122}\) A similarly narrow “no-drop” policy could be formulated for violators of protection orders as well at the prosecution level.

With an understanding of the gender role dynamic that affects both partners in the relationship and the legitimate needs of the institutions that are asked to intervene, it should be clear that single bullet policies that mandate more arrests, more prosecutions or higher statutory penalties, while important components of a broader approach, are doomed as standalone solutions.\(^{123}\)

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\(^{120}\) See, e.g., Corsilles, supra note 13, at 855.

\(^{121}\) Sherman, supra note 55, at 44.

\(^{122}\) New Jersey’s Domestic Violence Act of 1991 modified the state’s mandatory arrest law to broaden its reach and strengthen its impact. Johnson, supra note 23, at 249. A police officer must arrest an accused batterer if “1) a victim exhibits signs of injury; 2) a warrant is in effect; 3) there is probable cause to believe there is a violation of a restraining order; [or] 4) there is probable cause to believe a weapon was involved in the act of domestic violence.” Id. Even if none of these factors is present, however, the officer may still make an arrest if probable cause exists that the victim was battered. Id. Indeed, when no signs of physical injury are present, the officer may consider the history of the parties and any other relevant factor in determining the need for an arrest. Id. at 249–50.

Advocates also support laws that require officers to make a report even if no arrest is made. Developments, supra note 55, at 1553. This gives the police officer some discretion but forces him to think carefully about the incident. Mandatory reports also allow researchers to gather information and increase public awareness. Id.

\(^{123}\) See infra text accompanying notes 140–47, 242–60.
3. The Current Comprehensive Approach

Other than recognition (or perhaps resignation) that eradication of domestic violence as a serious health risk for women will be a long campaign, what guidance can the shortcomings of past efforts afford to reformers today? Clearly, the first message is that solutions directed at one institution or practice will have little long-term impact. Single-faceted policies will not work because they ignore the persistence of batterers, the dynamic of the battering relationship, and the continued resistance (and needs) of the social institutions that deal with domestic violence. As the follow-up mandatory arrest studies suggest, domestic violence cannot be stopped without a “coordinated response by the law enforcement, social service, and mental health systems.”

Therefore, the current thinking is that a comprehensive effort directed at the police, the courts, and social service agencies offers the greatest hope for success. These programs are geared at keeping battered women in the system by addressing their economic and emotional needs, as well as recognizing that a single violent incident may be insufficient motivation for a woman to make a committed effort to change. This approach clearly makes the most sense and appears to be making headway in some

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124 Lerman, supra note 74, at 220.
125 See Developments, supra note 55, at 1547–51.
126 Salzman, supra note 25, at 338–53 (describing the successes of Quincy, Massachusetts which emphasizes a comprehensive approach involving all institutional players and uses a mix of traditional remedies (i.e., non-criminal) and strict enforcement for violations through the criminal law. Quincy stresses its equal emphasis on access for victims and efficient criminal processing of batterers); see also Developments, supra note 55, at 1516–17; Patricia Nealon, Quincy Program to Aid Battered Women Wins Grant, BOSTON GLOBE, July 15, 1992, at 27.

Additionally, at the state level, Massachusetts has formed a Domestic Violence Policy Commission specifically to create “a safety net of social and criminal justice services and serve as a clearinghouse for the best practices.” Gloria Negri, Commission is Formed to Develop Policies on Domestic Violence, BOSTON GLOBE, Aug. 20, 1993, at 25. The goals of the commission are to “standardize enforcement, to empower victims of abuse to transition to violence-free lives, to emphasize prevention by identifying the appropriate sanctions which will stem the escalation of violence, and to create broader public awareness.” Id.

Another example is Duluth, Minnesota, which has a program that emphasizes victim support and assailant control. Developments, supra note 55, at 1517–18. Such efforts use more realistic methods to persuade or force institutional players to be helpful, not hostile. See id. at 1551–74. For example, some prosecutors have special domestic violence offices which include counselors and a referral network for
communities. As part of this effort, some states have created special domestic violence divisions within the court system and provide special training for their personnel. By concentrating cases within a discrete unit, fewer bureaucratic actors are involved, and with training and self-selection, there is hope that traditional attitudes toward domestic violence can be transcended. Some of these efforts have also employed a second wave of creative approaches, such as removing weapons from homes and using technology to warn victims when their abusers come near.

Even within a comprehensive approach, however, specific policy choices still must be made. New laws and policies will have little impact

additional services. Id. at 1554.

127 The San Diego approach is considered one of the nation's most effective. It focuses on special training for police, prosecutors, judges, and medical personnel who deliver standardized remedies to domestic violence. Kathleen McClain, Charlotte Leaders Hear How San Diego Fights Domestic Violence, CHARLOTTE OBSERVER, Oct. 22, 1993, at 1C.

128 Some advocates worry that creating a special criminal court for domestic violence will trivialize it. For example, in Illinois, Cook County created two domestic violence courtrooms in 1986. These courts handled only misdemeanors, thus all domestic violence cases were filed as misdemeanors, regardless of the seriousness of the assault. Separating domestic violence courts from other courts risks perpetuating the stereotype that domestic violence is a less serious crime. Burleigh, supra note 26, at 3. On the other hand, limiting the number of courts reduces the amount of re-training necessary. Florida seems to be experiencing mixed results with its new domestic violence courts. See, e.g., Jenson, supra note 78, at 1B (reporting research showing that while there is a decrease in physical abuse from batterers who have been through the system, there is frequently an increase in psychological or mental abuse).

129 The 1991 Domestic Violence Act in New Jersey allows police officers to seize any weapons which they reasonably believe might be used against the victim. Johnson, supra note 23, at 250.

130 One of the chief criticisms of civil protection orders is that once an order is granted, the woman feels safe, but when the batterer returns, the order is a mere piece of paper. In addition, police often arrive too late on the scene to capture the batterer. One solution to this problem is the electronic monitoring of subjects under restraining orders. Electronic monitoring devices can be set so that they will notify the victim and the police when a batterer comes closer than the order allows. Sheriff Robert Rufo of Suffolk County, Massachusetts, said that these devices "empower the victim because the minute a stalker comes within proximity, he will be known to her and the police." Cheong Chow, Abused Women Gain a Weapon; High-Tech Warning System Now on the Market, BOSTON GLOBE, Dec. 5, 1992, at 13. Furthermore, the device can be used to document every instance in which an order has been violated. Id. The wearing of such a device also clearly stigmatizes the batterer and prevents him from being perceived otherwise by co-workers, family and friends.

131 See Developments, supra note 55, at 52 (advocating that "criminal
unless they are accompanied by changes in the basic belief systems of abusive men, battered women, police officers, prosecutors, judges, social workers, and society in general. Thus, the task of reformers is not as simplistic as changing laws and policies in order to increase the likelihood and severity of punishment for abusive behavior; rather, they must also transform the way domestic violence is perceived by society.

Part III addresses the relationship between legal reforms and social change in the context of domestic violence. It cautions, however, that legislative solutions must be realistic in their transformative goals. While reforms surely must attempt to change entrenched cultural and institutional values, at the same time they must use or adapt aspects of existing concepts and institutional practices to avoid being rejected out of hand or silently subverted by bureaucratic actors.

III. CONTEMPT AND EMPOWERMENT: AN ANSWER TO MARTHA MINOW

A. Words As the “Door to Change” and the Trap of “Victim Talk”

In two articles, Professor Martha Minow has addressed the question of whether legal reforms can truly change the family violence dynamic of our society. In “Words and the Door to the Land of Change: Language and Family Violence,” she frames the question as whether “words can stem violence,” particularly words used by lawyers. She criticizes the language used in legal texts to describe family violence, and compares it with

prosecutions should receive the greatest emphasis of all substantive approaches to domestic violence”).


133 Minow focused on DeShaney v. Winnebago County Dep’t of Social Servs., 489 U.S. 189 (1989). Three-year-old Joshua DeShaney was beaten by his father so badly that he became paralyzed and lost the function of one-half of his brain. The majority opinion, authored by Chief Justice Rehnquist, used legal rhetoric and unemotional language that blunted the impact of the trauma that Joshua received at the
more evocative descriptions of family violence from literature and music. She argues that words matter because

[i]n order to change policy and to enforce adapted policies, many words first must be marshaled to convince people of the degree of domestic violence and the need for change. Words play a significant role in changing the external and internal restraints people may feel against committing violence against family members.

Minow asks whether there are words to describe “family violence that do not make it seem routine and familiar.” While there are important extra-legal efforts underway to combat domestic violence, a significant percentage of reform has been targeted at legal solutions. Therefore,

hands of his father. The Court then employed words like “private” and “failure to act” to deny Joshua recovery on his lawsuit against the county. Minow, supra note 8, at 1668. Professor Minow described the Court’s choice of passionless language as “a choice to submerge sympathy under fear, a choice to seek and then to cling to totemic concepts—acts omissions, public and private—to avoid confronting our mutual implication in one another’s lives.” Id. at 1675.

Minow argues that the use by legal scholars of more evocative language like that found in literature “may help illumine the difficulties in speaking about domestic violence” and may help persuade judges and others to do something about it. Minow, supra note 8, at 1688–89. She uses literature and music to teach judges how to enlarge their understandings and sympathies of the problems of domestic abuse and how to look at life from the perspective of others. Id. at 1694–99.

Id. at 1665 n.2.

Id. at 1665. The silence surrounding domestic violence is so strong that even professionals whose jobs put them in touch with it find themselves without a vocabulary to break through to their clients. A doctor described her experience of asking women if domestic violence was an issue in their lives: “It seemed so out of the blue. . . . I had to find words that didn’t make it seem so odd to people.” Stripling, supra note 21, at 7. Other doctors have described similar discomfort. Id.

There are over 1200 shelters for abused women operated nationwide. They offer women temporary lodging and child care, and arrange for transportation, medical care, and legal and social counseling. They also help women readjust to their situation after they leave. Some shelters even offer counseling for batterers. Cris Barrish, Shelters: Safe Houses for Abused, News-Journal (Wilmington, Del.), Feb. 4, 1990, at A10. However, even these efforts sometimes require legal intervention of some sort, such as putting women in touch with authorities to file charges and keeping locations of shelters secret. Id. Many shelters are forced to turn away two-thirds of women seeking help due to lack of funds, so these women must still look to legal remedies. Id.

Some internal reforms were in response to class action lawsuits brought against police departments. Dobash & Dobash, supra note 14, at 165–66. Self-reform
Minow places specific emphasis on whether there are different words lawyers can use “to persuade judges, to empower victims,”\textsuperscript{139} since a significant part of society’s response to domestic violence is “how the law should respond to individual acts of domestic violence in order to best protect victims and punish batterers.”\textsuperscript{140} Thus a particular problem for the law, and particularly for criminal law, is to find appropriate language to account for and adjust to the social dynamic underlying individual acts of domestic violence.\textsuperscript{141}

However, Minow does not focus solely on the language used by lawyers. She also asks whether there are words uttered by anyone else that can help to stop the violence.\textsuperscript{142} In the domestic violence arena, the group most in need of new words, or in some cases any words at all, are battered women themselves. Without having words to condemn what has been done to them, without knowing words to ask for help from friends and society, without words to tell the batterers that their behavior is unacceptable, there

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\footnotesize proved insufficient, prompting most states to enact tougher laws. See Johnson, supra note 23, at 236 (describing how New Jersey’s original Prevention of Domestic Violence Act of 1981 was ineffective, resulting in the new act in 1991).

\textsuperscript{139} Minow, supra note 8, at 1666.

\textsuperscript{140} Developments, supra note 55, at 1503.

\textsuperscript{141} As lawyers, of course, we must guard against a bias for legal solutions. And, if lawyers participate in a broad-based attack on domestic violence, we necessarily will have to work more closely with battered women advocates and social service agencies. In such cases, we must also be prepared for conflicting ideological approaches and suspicion from those quarters.

I experienced this first hand in 1993 when I was invited as a last minute speaker at a St. Petersburg, Florida workshop to teach battered women advocates to be expert witnesses. My role was to act as a prosecutor and cross-examine a nationally regarded expert on battered women. In the organizational meeting the night before the conference, all the lawyers recruited to participate met with this expert. When she informed us that she had been cross-examined by prosecutors in numerous trials and that there were standard techniques they used, I asked her to share these stories with me in order to improve our overall presentation. She refused to do so, citing her fear of me as a former prosecutor and her uncertainty about who might attend the conference and later share this information in such a way as to hurt the movement. She then had a similar conflict with the public defender present, which suggested a clash of cultures, between lawyers who believe in truth through the adversary system and a member of a movement for whom the safety of its members is preeminent. The program went reasonably well without her divulging her secrets and we all parted on good terms. The lasting import of this event, however, was the recognition of how differently individuals even on the “same side” of this issue perceive their roles.

\textsuperscript{142} Minow, supra note 8, at 1666.
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is little that can be done from the outside.\textsuperscript{143}

Yet Professor Minow recognizes that for battered women, and for victims in general, our society's conceptualization of victimization is often as paralyzing as having no words at all.\textsuperscript{144} She discusses this dilemma in \textit{Surviving Victim Talk}, stating that victim talk creates a self-fulfilling prophesy, on the one hand, by suggesting that victims are powerless. Yet on the other hand, rejecting victim talk may lead to blaming powerless people for their own powerlessness. It may also lead to a sense of futility and political passivity for just those people [The battered woman or victim] must then struggle to reconcile a positive self-image with the image of oneself as a powerless and defeated victim.\textsuperscript{145}

We must therefore offer battered women something more than the label of victims in need of our succor. "Victim talk," Professor Minow points out, "obscures the complex interactions of individual choice, social structures, and the historical legacies within which both individuals and

\textsuperscript{143} One leader at a health clinic spoke out against mandatory reporting of domestic violence incidents by physicians, stating that some women may not seek help if they fear it will be reported.

Part of what we're trying to do is to empower the person to let them actually take the action to make the decisions. . . . We can help them if there are legal issues just by documenting in our medical records what's going on. If they choose to press charges, that's their decision, but I've had women who would only talk to me if I did not have to report them.

Stripling, supra note 21, at 7 (quoting Dr. Barbara Meyer, a leader of the Domestic Violence Prevention Project at Group Health Cooperative of Puget Sound, Washington).

\textsuperscript{144} Early battered women advocates stressed the victimization of women to change society's attitude that if women did not want the abuse they would leave. Victim concepts such as "learned helplessness" explained this phenomenon. WALKER, supra note 13, at 187. Perhaps such an emphasis has entrenched the battered women movement too deeply in victimology.

The over-reliance on images of victimization have also led to calls for eliminating, or at least substantially modifying, the battered woman syndrome defense for women who kill their batterers. Anne M. Coughlin, Excusing Women, 82 CAL. L. REV. 1 (1994) (arguing that the battered woman syndrome currently is profoundly anti-feminist because it reinforces a view of women who stay in abusive relationships as deviant and devoid of the free will and personal responsibility that male criminal defendants are assumed to possess).

\textsuperscript{145} Minow, supra note 9, at 1420–21.
institutions operate.”

Public debate and legal solutions that talk about domestic violence only in terms of victimology “neglect the complex solutions needed to sustain and equip victimized individuals to choose differently while also restricting the individuals and social forces that oppress them.”

B. Empowerment Ideology, Not Victimology in Domestic Violence Reform

The Minow articles suggest a series of interrelated practical questions about the need for new language and policy. First, what words can legal reformers offer to battered women to help them change? Second, will these words allow battered women to acknowledge their victimhood without hamstringing them with their own powerlessness or imposing a paternalistic solution from above? Third, what words do we ourselves use

146 Id. at 1429-30. See also CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982). Gilligan’s research reveals that men and women present “different modes of thinking” about relationships. Men tend to value autonomy and see others as opponents in a contest of rights, whereas women tend to value caring and see others as members of a network of relationships on whose continuation they all depend. Id. at 59. Coughlin, supra note 144, suggests that according to this theory, a woman who stays in an abusive relationship rather than being faulted for not leaving, should be “applauded for her endurance, her perseverance, and self-sacrifice in order to nurture her violently explosive spouse and repair, if possible, their pathological interactions.” Id. at 89.

147 Minow, supra note 9, at 1430. Another reason to transcend “victim talk” is that victims often lack the social vision to clearly see their problem or a way out. Many battered women will initially deny at great lengths that they are battered women. Others will take the blame for the battering.

Feminist scholars, in particular, have emphasized yet another reason to be suspicious of a normative scheme that relies wholly on preference satisfaction, beyond recognizing the problems of ambivalence and the need to look carefully at the social context in which preferences are formed. Relatively disempowered people, as women frequently are in relationship to men, may be unable to form truly self-promoting preferences. The most ready, and dramatic examples, are of women in long-term battering relationships. Their ostensible “desires” may simply be to do whatever will accommodate the batterer’s wishes, hoping, often vainly, that if they are able to anticipate each conceivable whim, that they can avoid being victimized.

in our roles as advocate, prosecutor, and judge in order to enable this process to occur in domestic violence reform? Finally, if we can identify such words, what are their implications for legal solutions?

The women’s movement, and other victims’ movements seeking to escape the throes of “victim talk,” have already identified a central word/concept for liberation—empowerment.\(^{148}\) Literature from the battered women’s movement consistently employs this theme because empowerment ideology offers the battered woman language to take control of her life and to take the initiative to seek assistance from organizations, friends, and family. Empowerment translated into social action takes the form of shelters and economic independence programs to provide the practical means to break the economic and psychological binds to the batterer.\(^ {149}\)

\(^{148}\) See, e.g., CATHERINE A. MACKINNON, FEMINISM UNMODIFIED 32-45 (1987) (Rather than focus on whether men and women are “different,” MacKinnon argues that the focus of feminist analysis should be on the power differential between the genders in current society. Therefore, the empowerment of women is a central component of her dominance theory of feminism.); National Coalition Against Domestic Violence, A Current Analysis of the Battered Women’s Movement (January 1992) at 5. This advocacy booklet states the following:

One key prerequisite to the ending of violence is the empowerment of all women and children. Women and children must be able to direct our own lives, and control our own bodies. . . . Empowerment can only be achieved through collective action, and an understanding that battering is a societal and political problem as well as a personal and family problem.

In addition to the legal and economic constraints inhibiting their ability to leave or obtain help to leave the relationship, battered women are often also unable to take advantage of what help is available due to fear and incapacitation. Therefore, for those working with battered women as lawyers or advocates, the goal is not just to provide legal services, shelter, or counseling. The goal is to empower them and help “them realize that domestic violence should not be tolerated and that ending a relationship is an option. . . .” Angelo N. Ancheta, Community Lawyer, 81 CAL. L. REV. 1363, 1387 (1993) (book review).

\(^{149}\) One empowering view of battering is to see that women are not beaten just from subordination but also from contesting it. Had women consistently accepted their subordinate status, and had men never felt their superior status challenged, there might have been less marital violence. To focus on women’s “provocations,” and to examine men’s grievances against their wives, is not to blame women but, often, to praise them. It is to uncover the evidence of women’s resistance.

GORDON, supra note 13, at 286.
But empowerment language has its limitations, both in general and in this setting.\textsuperscript{150} Generally, empowerment ideology can lead to divisiveness and separatism,\textsuperscript{151} in which the victimized group rejects outside assistance as paternalistic and tainted by past actions or dominant cultural attitudes.\textsuperscript{152} This is particularly true when institutions needed to effectuate specific reforms (e.g., the justice system and its component parts) have been part of the problem in the past.

More importantly, empowering battered women addresses only one-half of the domestic violence equation. Words must still be found to challenge and constrain the batterer’s actions.

Finding words that lawyers can use that both transform our institutions’ approach to domestic violence and empower battered women is therefore more difficult than saying “empowerment” and moving on.\textsuperscript{153}

\textsuperscript{150} A wonderful word, “empowerment speak” can obscure the very difficult social interaction between a professional, who clearly sees that the relationship is unhealthy and in fact dangerous for a woman, but nevertheless finds the appropriate language to encourage, support, confront, or demand that a woman change her behavior.

\textsuperscript{151} For example, “[r]adical feminists tended to favor separatism and emphasized the need to develop a women’s culture, rather than building coalitions with men as liberal and socialist women did.” MARY BECKER ET AL., CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY 19 (1994); see also MARILYN FRYE, THE POLITICS OF REALITY: ESSAYS IN FEMINIST THEORY 104 (1983); SARAH L. HOAGLAND, LESBIAN ETHICS: TOWARD A NEW VALUE 57–58 (1988).

\textsuperscript{152} Battered women empowerment ideology can be problematic for women who are members of a racial or ethnic minority. Black women may share the view of a sexual assault coordinator in Oakland, California, who stated, “I am black first. My culture and anything else comes after. . . . Our husbands and boyfriends may be perpetrators, but we are also concerned about what will happen to them in the racist [justice] system.” World’s Women Speak As One Against Abuse, L.A. TIMES, May 27, 1991, at E1; see Jeany Rivera, Domestic Violence Against Latinas by Latino Males: An Analysis of Race, National Origin, and Gender Differentials, 14 B.C. THIRD WORLD L.J. 231 (1994) (Latina women need special support services due to cultural disadvantages); Elizabeth Schneider, Particularity and Generality: Challenges of Feminist Theory and Practice in Work on Woman-Abuse, 67 N.Y.U. L. REV. 520, 535 (1992) (battered immigrant women may not be able to call police if they fear deportation).

Similarly, some African-Americans are rethinking their allegiance to Brown v. Board of Educ., 347 U.S. 483 (1954), and its integrative ideal. Instead, they are experimenting with separatist educational institutions, once derided as a throw-back to the discredited “separate, but equal” doctrine. See Drew S. Days, III, Brown Blues: Rethinking the Integrative Ideal, 34 WM. & MARY L. REV. 53 (1992).

\textsuperscript{153} See infra text accompanying notes 239–43 for a discussion of the disagreement between feminists and others over the role of criminalization of
Nevertheless, there have been some successes. For example, as previously noted, the dominant question generally asked about battered women is: "Why do they stay?" However, the actual data suggests that the most serious violence (including more than half the murders of battered women by their partners) occurs after the woman has left the home or after repeated efforts to leave.\footnote{154} Newspapers are full of stories of domestic murders committed precisely because the victim was attempting to leave the relationship or avail herself of a legal remedy such as a protection order.\footnote{155} Feminist scholars recognizing the phenomenon that serious domestic violence is frequently the result of leaving, not the failure to leave, have urged a new label—separation assault.\footnote{156} This is more than a mere cogent naming of sociological data. The term "separation assault" explodes the myth that battered women are passive creatures who share the blame for their plight because they knowingly elect to remain in the path of violence. By removing blame and telling them that they are entitled to society's help in exercising their right to live where and with whom they want, it also empowers women.

As a legal matter, prosecutorial policy and judicial sentencing of those who commit "separation assault" can be seen as comparable to stranger-on-protection order violations.

\footnote{154} Separation assaults also indicate that a large problem in domestic violence is not that "women won't leave," but rather the real dangers of doing so. Martha Mahoney, Legal Images of Battered Woman: Redefining the Issue of Separation, 90 Mich. L. Rev. 1, 5-6 (1991); see also Angela Browne, When Battered Women Kill 114 (1987).

\footnote{155} Parnas, supra note 12, at 153 (noting that the FBI reported in 1986 that husbands or boyfriends were responsible for 30% of female homicides); see also, Larry Dougherty, Victims of Abuse Should Choose Flight over Fight, St. Petersburg Times, Mar. 7, 1994, at 1B (reporting stories of two women who were shot to death by former boyfriends after histories of abuse); Bill Sanderson, Judge Ignored Violence Policy Husband Sent Home: Wife Killed, The Record, Aug. 8, 1991, at A1 (wife clubbed to death with a baseball bat after judge ignored guideline to remove the batterer from the home, and prohibited him only from entering her bedroom); Woman Was Denied Protection Before Death, Phila. Inquirer, Jan. 2, 1987, at B12 (woman killed by former boyfriend after police prevented her from filing assault complaints against him).

\footnote{156} The separation assault concept may also explain some anomalies in the arrest studies which indicate that many couples were not living together anymore after arrest. Rather than conclude that the arrest was the trigger for the separation, perhaps it was the decision to separate that caused the assault. See Frisch, supra note 110, at 209. It is suggested that perhaps arrest is ineffective in stopping the "expected progression of violence . . . rather than to fault the arrest for the subsequent violence." Id. at 214.
stranger assault and not diminished as merely "family violence." 157

C. Let's Hold Batterers in Contempt

While "separation assault" does to some extent focus blame on the batterer who is unwilling to give up the relationship, it still primarily addresses the battered woman, and more specifically only those who try to leave. Other than attempting to label every aspect of domestic strife as "criminal," 158 theorists have been less successful finding words for the batterer's actions.

In this vein, this Article suggests a word for the batterer's side of the equation—contempt. I mean contempt in two senses, one designed for the legal system and another for society in general. As a familiar legal word contempt means "a sanction for failure to obey a court order." 159 In more common usage, however, contempt is defined as "the act of despising." 160 When both the legal system and society hold batterers in contempt, surely we have found transformative language to better express how we feel about men who physically and emotionally harm the women they profess to love. 161 Furthermore, when batterers are held in contempt by all strata of

157 But see Mahoney, supra note 154, who warns that an overemphasis on separation assault risks protecting only those women who separated or tried to separate before being assaulted. The woman who still lives with the batterer but asserts an intent to separate also needs protection from an attack that is caused by her assertion. Id. at 65.

158 See infra text accompanying notes 239–69 for a discussion of criminalization.

159 Contempt is a willful disobedience of the court's authority. Contempt can be classified as either civil or criminal. Civil contempt results when a party fails to do something for the benefit of another party, but the offense is not directly against the dignity of the court. Criminal contempt, however, entails a direct offense upon the court, such as disobedience of a lawful order resulting in the obstruction of the administration of justice. BLACK'S LAW DICTIONARY 318 (6th ed. 1991).

160 WEBSTER'S SEVENTH NEW COLLEGIATE DICTIONARY 180 (1965); see also, THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 438 (2d ed. 1987) (defining contempt as "the feeling with which a person regards anything considered mean, vile, or worthless").

161 Like "separation assault," this renaming runs the risk of marginalizing those battered women who fall outside its definition, either by failing to try to leave, or here, by not having a protection order at the time of the battery. See supra notes 32–55 and accompanying text. While this is certainly a risk, the potential remains that as society begins to view batterers contemptuously, more battered women will be empowered to obtain a protection order earlier in the relationship. Eventually, perhaps, marriage contracts themselves could be required to contain binding language that the parties agree not to batter each other within the relationship and that such
society; when it is a label to be avoided like child molester, perhaps then the violence will stop.  

How can the concept of "contempt" be integrated into the legal response to domestic violence? I believe that one path to this goal can be to make criminal contempt the preferred, initial sanction for a violation of a protection order. The use of criminal contempt sanctions for this purpose should have multiple positive consequences both for the legal system and on societal attitudes.

First, as noted, contempt language has an everyday meaning that we apply to individuals whose conduct we find despicable. This concept meshes well with current societal values about bullies—those who use physical force against a substantially smaller person, or a victim who is unwilling to fight. Using language that focuses on the bullying, "contemptible" quality of domestic violence thus shifts the focus away from the victim and rightfully onto the offender.

This shift also transfers into the courtroom. Rather than dwelling on the history of the relationship (such as the woman's decision to stay), a criminal contempt proceeding is primarily about the batterer and the judge.

language could be interpreted as having the same legal effect of a court order, making contempt an immediately available sanction.

162 Others have suggested additional remakings of domestic violence. Charlotte Bunch, director of the Center for Global Issues and Women's Leadership at Rutgers University, argues that gender violence should be counted as a human rights abuse, claiming it is "the most pervasive and insidious human rights abuse in the world today." Hendrix, supra note 152. Legally, such a recognition would increase the remedies available, particularly for women seeking political asylum who are fleeing forced marriages, abuse or incest. At home, she advocates reclassifying domestic violence as a hate crime. Id.; see also, Nancie L. Katz, Domestic Violence: A Civil Rights Crime? Massachusetts Court Extending Protection, Chi. Trib., Apr. 16, 1994, at 1 (describing as a "path-breaking development" a Massachusetts case in which the court held that a repeat abuser would face civil rights charges if he assaulted any women). Congress has established "a Federal civil rights cause of action for victims of crimes of violence motivated by gender." in the Violence Against Women Act. Pub. L. No. 103-322, 108 Stat. 1916 (codified at 42 U.S.C. § 13981(a) (1994)).

163 The average height and weight differential between men and women is not present in every relationship and obviously weapons are a great equalizer. Therefore, it is important to again recognize a significant reason there are so many more male batterers is the gender role difference in the willingness to resort to violence to solve interpersonal problems. Walker, supra note 13, at 15.

164 See Waits, supra note 35, at 288 ("He is violent at home because he has a bully's 'sure winner' mentality. He beats his wife because he can win a physical battle with her, and because he can get away with it, so long as society does not intervene.").
The court's narrow interest is in whether the contemnor did something that violated the court's outstanding order.\textsuperscript{165} This places the batterer on the defensive. Because of the existence of the order, and the often accompanying lecture of the issuing court to avoid situations that could lead to violations, it is harder for the batterer to claim that the woman provoked him or instigated the confrontation.

Furthermore, purely within legal culture, contempt language is quite powerful.\textsuperscript{166} The extreme deference paid to the court by attorneys is ultimately backed by the contempt power.\textsuperscript{167} Moreover, potentially any defiance or evasion of a court order can result in this sanction.\textsuperscript{168} The potency of legal contempt language is transmitted to clients through their lawyers. Attorneys carefully coach their clients how to behave in front of the judge and instruct them to comply with all court orders to the letter. Contempt sanctions also occupy a distinct status in a civil case because it is the only way a civil litigant can be incarcerated. While rarely resulting in this ultimate sanction, nevertheless, contempt motions are filed in a wide variety of civil proceedings based on in-court behavior, for discovery violations and for violations of injunctions. Most importantly, contempt sanctions are applicable to civil protection order violations, either by statute or under the inherent power of a court to vindicate its orders.

Employing contempt sanctions to punish protection order violations takes advantage of compatible common and legal language and an existing

\textsuperscript{165} A Denver family court judge described her view of violations of protection orders as follows, "to call a restraining order just a piece of paper is to demean the authority of the court. . . ." Gail D. Cox, The Court of St. Joan: An Innovative Protective Order Court in Denver Hears Pleas from People Who Can't Wait for Routine Justice, NAT'L L.J., Nov. 9, 1992, at 1 (attributing to Judge Jacqueline St. Joan).

\textsuperscript{166} See Edward G. Mascolo, Procedures and Incarceration for Civil Contempt: A Clash of Wills Between Judge and Contemnor, 16 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 171 (1990) (tracing the historical roots of the contempt power and contempt's crucial past and present function in ensuring the ability of courts to administer justice).


\textsuperscript{168} Sometimes this fear is ameliorated by humor. Among my former colleagues at the U.S. Attorney's Office, a lawyer heading to court bearing news that the office would not comply with a judge's request was told to bring a toothbrush in the event he or she was "stepped back" to the holding cell after a finding of contempt. Nevertheless, in four years of practice, I knew of only one federal public defender who was held in contempt for outrageous courtroom behavior.
institutional concept and practice that is powerful and widespread within the legal system. The criminal contempt sanction strategy also simultaneously reconceptualizes social attitudes toward domestic batterers while providing a needed remedy for violations of protection orders. Therefore, the use of criminal contempt sanctions to enforce domestic protection orders presents a unique opportunity to integrate language and policy to transform a critical area of domestic violence reform.

Criminal contempt sanctions for protection orders can also fill a critical gap in society's response to domestic violence in which the criminal law has been unable alone to provide an effective remedy. Part IV explores this idea in more depth, with particular attention being paid to the potential for the criminal contempt route to empower battered women and the practical advantages of this remedy as an initial response to a violation of protection orders.

IV. Civil Protection Orders and Criminal Contempt Sanctions

A. Civil Protection Orders Are a Core Component of Society's Response to Domestic Violence

1. An Overview of Civil Protection Orders

Civil protection orders are now available for battered women in all fifty states and the District of Columbia. They permit a victim of

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domestic violence to obtain a binding order from a court that at the minimum prohibits an abuser from committing further acts of violence.\textsuperscript{170} Such orders may also enjoin other conduct (e.g., all contact whatsoever with the woman), award custody of children to the woman, limit the batterer’s visitation rights, grant the woman possession of the residence or other property, and award child support or other economic relief.\textsuperscript{171}

Obtaining a civil protection order is usually a two-step process.\textsuperscript{172} First, the victim petitions the court ex parte for a temporary order that provides emergency injunctive relief restraining the batterer from inflicting further violence.\textsuperscript{173} The emergency order will remain in effect for a short duration, usually only a few weeks.\textsuperscript{174} The emergency order must then be served on the batterer along with notice of an adversary hearing.\textsuperscript{175}

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\item[\textsuperscript{170}] See, e.g., W. VA. CODE § 48-2A-6 (1992 & Supp. 1994) (providing that a protection order “shall direct the respondent to refrain from abusing the petitioner”).
\item[\textsuperscript{171}] Most states provide for this and similar type of relief in their statutes. See, e.g., ALA. CODE § 30-5-7 (1989) (describing the options available to the court to fashion appropriate relief). For a list of statutes authorizing protection orders, see supra note 135.
\item[\textsuperscript{172}] While the specific requirements for obtaining a protection order vary somewhat from state to state, the basic procedures are similar. See Kinports & Fischer, supra note 81, at 165–66.
\item[\textsuperscript{173}] See, e.g., ALASKA STAT. § 25.35.020 (1991).
\item[\textsuperscript{174}] See id. § 25.35.020(c) (providing that the emergency order will remain in effect for 20 days).
\item[\textsuperscript{175}] See, e.g., ARK. CODE ANN. § 9-15-206(e) (Michie 1993); CONN. GEN. STAT. ANN. § 46b-15(e) (West Supp. 1994); MINN. STAT. ANN. § 518B.01 Subd. 7(b) (West 1990 & Supp. 1995); see also Kinports & Fischer, supra note 81, at 165–66. For a
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Second, the court will hold a subsequent hearing during which the civil protection order may be made semi-permanent, lasting anywhere from several weeks\textsuperscript{176} to a year or longer.\textsuperscript{177}

Civil protection orders, as opposed to criminal sanctions, are prospective. They explicitly seek to alter the future behavior of the batterer. The remedies offered by protection orders are also broader than criminal remedies because they are available to deal with conduct that the police might otherwise overlook as not serious.\textsuperscript{178} In addition to providing a measure of protection, a civil protection order serves to bring the batterer and victim into the domestic violence system.\textsuperscript{179}

While civil protection orders were initially limited to certain classes of persons and were sometimes difficult to obtain,\textsuperscript{180} their availability and discussion of ex parte and full (or permanent) protection orders, see supra note 92.


\textsuperscript{177} See, e.g., ILL. ANN. STAT. ch. 750, para. 60/220(b) (Smith-Hurd 1993 & Supp. 1994) (fixing the duration of a protection order at two years); N.H. REV. STAT. ANN. § 173-B:4III (1994) (fixing the duration of a final protection order at one year, but providing for extensions if necessary).


\textsuperscript{180} Initial problems that battered women encountered with civil protection orders related to their accessibility. The forms that had to be filled out to start the process moving were numerous and difficult to complete without assistance. Kinports & Fischer, supra note 81, at 171-75. Moreover, many women found it difficult to get to the courthouse during business hours. Id. at 178. Slow service also created problems for battered women, the most obvious problem being the vulnerability that women were exposed to by not having the protection of the order between filing and serving. Id. at 222-23.

In years past, some states refused to provide protection to a woman unless she and the batterer were married, making it difficult to obtain protection against former spouses. See Catherine F. Klein & Leslye E. Orloff, Providing Legal Protection for
flexibility has grown dramatically in recent years. There is now near universal agreement that civil protection orders are an essential part of

Battered Women: An Analysis of State Statutes and Case Law, 21 Hofstra L. Rev. 801, 815 (1993). But most states now do not require that the batterer and victim live together. Id.

 Courts are also sometimes reluctant to extend the protection of domestic violence statutes. See, e.g., Woodin v. Rasmussen, 455 N.W.2d 535 (Minn. Ct. App. 1990) (refusing to extend protection under Minn. Stat. Ann. § 518B.01, subd. 2(b) because an unborn child was not a "child in common" as required under the statute); Croswell v. Shenouda, 646 A.2d 1140 (N.J. Super. Ct. Ch. Div. 1994) (holding that a prior terminated pregnancy does not qualify as "child in common" under N.J. Stat. Ann. § 2C:25-19d).

181 In fact, an acknowledged advantage of civil protection orders is the range of remedies available to the court. Topliffe, supra note 178, at 1064.

182 Issuance of civil protection orders are at record levels. For example, in Massachusetts by September 1992, 45,000 orders had already been issued. Adrian Walker, Restraining Orders Are at Record High, Boston Globe, Sept. 23, 1992, at 1. However, some statutes authorizing the issuance of protection orders still lack key critical remedies such as requiring the courts to award exclusive possession of the residence to the woman and authorizing the courts to issue orders based solely on verbal threats. See Kinports & Fischer, supra note 81, at 195–96, 200–01.

 Moreover, while most courts now routinely grant an initial protection order, there are still some jurisdictions in which courts have frustrated the enforcement of the statutes by delaying grants of the initial emergency order, or denying such an order altogether. Judges have great discretion regarding the issuance of protection orders and many will not issue one absent proof of serious acts of violence. Buawa & Buawa, supra note 73, at 115–17. A protective order is a significant restriction on an individual's liberty and judges are naturally circumspect of violating an individual's due process rights, particularly when issuing ex parte orders. Id. Ex parte prejudgment orders have been challenged on procedural due process grounds in the past, most notably in Fuentes v. Shevin, 407 U.S. 67 (1972), and courts remain cognizant of this when issuing them. See Nadine Taub, Ex Parte Proceedings in Domestic Violence Situations: Alternative Frameworks for Constitutional Scrutiny, 9 Hofstra L. Rev. 95, 99–103 (1980). Indeed, most statutes require that ex parte orders be issued only upon a showing of something similar to "[c]lear and convincing evidence of immediate and present danger of abuse." W. Va. Code § 48-2A-5 (1992 & Supp. 1994). Furthermore, some courts will decline to issue a protection order if the woman delayed seeking it or previously dropped it. Kinports & Fischer, supra note 81, at 189–95.

 Another serious problem women face when deciding whether or not to obtain a protection order is how the man will react. One study indicates that 10% of women are beaten simply because they obtained a protection order. Kathleen J. Ferraro, Cops, Courts, and Woman Battering, in Violence Against Women: The Bloody Footprints 173 (Pauline B. Bart & Eileen G. Moran eds., 1993).
domestic violence reform. But while everyone agrees that greater enforcement of civil protection orders is necessary, lack of enforcement is still cited as the principal weakness of protection orders.

2. Civil Protection Orders Are Currently Enforced Through Contempt Sanctions and Criminal Prosecution

Varying state to state, a violation of a civil protection order is punishable as a misdemeanor, by civil or criminal contempt, or by both criminal and contempt sanctions. Approximately forty states currently have statutes criminalizing violations of protection orders. Just over thirty-

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183 DOBASH & DOBASH, supra note 14, at 167.
184 Developments, supra note 55, at 1511, 1521. The unavering enforcement of protection orders, as well as serious sanctions imposed on violators, are necessary to reduce recidivism and prevent escalation of the violence: David A. Ford & Mary J. Regoli, The Criminal Prosecution of Wife Assaulter: Process, Problems, and Effects, in LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATION 140 (N. Zoe Hilton ed., 1993) [hereinafter LEGAL RESPONSES].
two states and the District of Columbia specifically authorize either civil or criminal contempt as a remedy.\textsuperscript{186} About half the states permit violations to be prosecuted both as contempts and misdemeanors.\textsuperscript{187} However, even where not specifically authorized by statute, state judges generally retain

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The use of civil contempt alone to enforce protection orders may not be very effective. Civil contempt sanctions are coercive in nature and are avoidable through obedience. International Union, United Mine Workers v. Bagwell, 114 S. Ct. 2552, 2557 (1994). Civil contempt cannot be used to incarcerate batterers for past acts of violence. If a batterer is incarcerated for some reason under civil contempt, he can purge himself by promising to comply with the protection order and thus “carries the keys of his prison in his own pocket.” Id. at 2558 (quoting\textit{In re Nevit}, 117 Fed. 448, 451 (8th Cir. 1902)). Criminal contempt, on the other hand, can be used to punish a batterer for previous acts committed outside the presence of the court. Id. Under criminal contempt, the batterer is not furnished the keys to his prison.

\textsuperscript{187} At least 23 states allow the punishment of violations of protective orders by contempt or misdemeanor charges. The states are Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Idaho, Illinois, Kansas, Kentucky, Maine, Maryland, Minnesota, New Hampshire, North Carolina, North Dakota, Ohio, Rhode Island, Vermont, Virginia, Washington, and West Virginia.

See note 152 for a list of state statutes allowing contempt charges and note 151 for a list of state statutes providing for misdemeanor charges. The recent statutory trend is to buttress contempt charges with misdemeanor charges. Klein & Orloff, \textit{supra} note 180, at 1097.

\end{footnotesize}
the power to punish violations of court orders by contempt; thus contempt sanctions are available in most jurisdictions.

While statutes providing for criminal contempt vary, there are two major ways of seeking such sanctions—either through prosecutions by the state or through actions prosecuted by the battered women themselves, pro se, or with the assistance of private counsel. While this flexibility is certainly one feature that makes contempt sanctions an attractive remedy, it is more important that contempt sanctions offer an opportunity to empower women; further, they are more practical than criminal prosecutions for violations because they are faster and encounter

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188 But see Fla. Stat. § 741.2901(2) (West Supp. 1995), which eliminated provisions for criminal contempt and mandated that all protection order violations be prosecuted as criminal violations.

189 Some states require that criminal contempt actions be prosecuted only by the state. See e.g., In re Dahlem, 844 P.2d 208 (Or. Ct. App. 1992) (holding that punishment of past contempt must be initiated by district attorney; a private party cannot seek punitive sanctions).

190 If the victims of domestic abuse had to rely on overworked public prosecutors to prosecute their contempt actions, many victims would never see relief, or the relief would come too late to help. See Green v. Green, 642 A.2d 1275 (D.C. 1994) (quoting a letter from the Office of Corporation Counsel in the District of Columbia that indicated that the Office would be “hard pressed” to prosecute all of the contempt motions filed in D.C. Superior Court); State ex rel. O’Brien v. Moreland, 778 S.W.2d 400 (Mo. Ct. App. 1989) (noting the problems inherent in placing the responsibility for prosecuting criminal contempt motions on county prosecuting attorneys). At least two states, North Carolina and Utah, explicitly recognize that pro se contempt motions must sometimes be filed and require that the clerk of court provide help for pro se complainants prosecuting contempt actions. N.C. Gen. Stat. § 50B-4(a) (1989); Utah Code Ann. § 30-6-4 (Supp. 1994).

191 The prosecution of criminal contempt actions by the victim of a domestic battery is not novel. Litigants in domestic relations actions and other civil actions have long enforced a court order through a pro se action or through their own counsel. Joan Meier, The “Right” to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests, 70 Wash. U. L.Q. 85, 89 (1992). The right to prosecute a criminal contempt action will not raise the specter of “private prosecutors.” To the extent this right to prosecute their own action is explicitly extended to battered women by specific domestic violence statutes, safeguards can be built in to limit such actions solely to the enforcement of the civil protection order and not to other aspects of the intra-family litigation such as divorce or child custody.

While I believe that self-prosecuted contempt motions offer the greatest opportunity for empowerment, the difficulties of obtaining counsel and administering a purely private system clearly suggest that a dual state and private prosecution system be authorized. See infra note 199 and accompanying text.

192 See infra notes 199–202 and accompanying text.
less resistance from institutional actors.

B. Criminal Contempt Sanctions for Violation of Civil Protection Orders Will Empower Battered Women

A civil protection order initially empowers the battered woman by giving her a written legal document that legitimizes her right to be free from violence at the hands of her abuser. Many orders boldly highlight that a violation of the order constitutes contempt of court or a criminal offense. Battered women believe that civil protection orders will be effective and are often told by police officers that nothing can be done for them without such an order. Furthermore, all institutional participants support orders and want them obeyed.

Under a civil protection order, the battered woman is placed at the center of the decisionmaking process. She can now fairly easily obtain a temporary order without counsel to provide much needed protection in emergency situations. However, the process also allows her to weigh her options before seeking a permanent order which can be tailored to her specific situation. From initiation of the process, civil protection orders empower women by legitimizing their claims of abuse and demonstrating to them that they have access to and the support of societal institutions.

If the order is violated in a jurisdiction in which the self-help system of


194 Zorza, supra note 20, at 60. Being told by the judicial system that one’s complaint is valid is empowering and may encourage battered women to come to the courts for redress of their problems. Goolkasian, supra note 61, at 277–78.

195 Officers often tell battered women that they cannot take any action unless the women have protection orders. Zorza, supra note 20, at 60–61. Indeed, many police officers may not take any action until they actually see the protection order. Police officers need to know the terms of the order and the date the order expires. If an officer takes action that is not warranted by a valid protection order, or acts upon an expired order, the officer may be exposed to charges of false arrest. Buzawa & Buzawa, supra note 73, at 117.

196 Buzawa & Buzawa, supra note 73, at 114–15.

197 Most statutes authorizing protection orders allow judges to tailor the remedies to suit a particular woman’s need. See supra note 169 for a list of the statutes authorizing protection orders.

198 Buzawa & Buzawa, supra note 73, at 114.
private initiation and prosecution is permitted, the battered woman has the power to file the initial contempt motion and can conduct the hearing herself or through counsel.\textsuperscript{199} This route avoids reliance on overburdened and often unsympathetic prosecutors' offices and provides an opportunity for battered women's groups to establish their own advocacy network.\textsuperscript{200} Even where only the state prosecutor may prosecute the contempt action, the battered woman is still empowered because it is the order she initiated that is the legal source of the conviction rather than the criminal law.

Providing criminal contempt as an option also increases the flexibility of a battered woman's available remedies.\textsuperscript{201} The very experience of having a choice can itself be empowering. For example, one battered woman might trust the court that issued the protection order and would prefer to have the issue litigated there. Another might prefer to force the batterer to face a jury in a criminal case. Multiplying their options empowers battered women while protecting them from further abuse.\textsuperscript{202} Regardless of the method used to obtain the criminal contempt sanction, the significant involvement of the victim in the civil protection order process and the potential for renaming the batterer's conduct as contemptuous make the criminal contempt route both an empowering and

\textsuperscript{199} While in many states criminal contempt hearings can be conducted \textit{pro se}, see \textit{supra} note 191, the results of \textit{pro se} criminal contempt actions are mixed. \textit{See District of Columbia Courts, Final Report of the Task Force on Racial and Ethnic Bias and Task Force on Gender Bias in the Courts} 153–54 & n.272 (May 1992) [hereinafter D.C. Task Force] (finding that in the D.C. Superior Court in 1989, 75% of all contempt actions were \textit{pro se}, but contempt was found in only 55% of cases tried and 14% of all contempts filed). Respondents in criminal contempt proceedings are entitled to all the due process protections including the right to counsel and proof beyond a reasonable doubt. International Union, United Mine Workers v. Bagwell, 114 S. Ct. 2552, 2560 (1994). It is the imbalance between a \textit{pro se} petitioner and a respondent represented by counsel that has led to a low rate of successful \textit{pro se} contempt actions. D.C. Task Force, \textit{supra}, at 154.

\textsuperscript{200} The availability of criminal contempt need not turn into another excuse for police and prosecutors to do nothing. The use of criminal contempt sanctions by women must be augmented by the police and prosecutors. This can be done by allowing them to act in ways consistent with their values, for instance, by requiring mandatory arrests and misdemeanor prosecution only for violent violations of a protective order.

\textsuperscript{201} Contempt proceedings might also allow women to end the violence without ending the relationship with the abuser in that filing a contempt proceeding might be seen by the batterer as a less drastic measure than pursuing criminal charges, even if the potential for incarceration is the same. \textit{See} Kinports & Fischer, \textit{supra} note 81, at 199–200; Topliffe, \textit{supra} note 178, at 1047–48.

\textsuperscript{202} Topliffe, \textit{supra} note 178, at 1049.
transformative experience for the battered woman.

C. Practical Advantages of Criminal Contempt As the Immediate Remedy for Violation of Protection Orders

1. Contempt Is Faster and Faster Is Better

In addition to the empowerment potential of criminal contempt sanctions, this route also offers practical advantages to the traditional criminal process. First and foremost, the criminal contempt route is often faster than the criminal justice system.\textsuperscript{203} Contempt orders can either be filed as emergency orders in the family court, or be transferred over to the criminal division, thus obtaining priority over other cases.\textsuperscript{204}

In the states that explicitly authorize contempt sanctions for violations of protection orders, contempt proceedings are often specifically given an expedited hearing under the statute.\textsuperscript{205} For example, in Connecticut, when

\textsuperscript{203} See Klein & Orloff, supra note 180, at 1126 (noting that contempt actions allow battered women "to obtain swift enforcement of civil protection orders and thereby secure their immediate safety. . . "). For example, in United States v. Dixon, 113 S. Ct. 2849 (1993), it took the prosecutor's office over nine months to indict the defendant after a series of violations and serious assaults. On the other hand, the victim's motions for contempt of the civil protection order of the very same incidents were litigated within just two months of filing. See Brief for Amici Curiae, Women's Legal Defense Fund et al. at 3–5, Foster v. United States (No. 89-449).


\textsuperscript{205} CONN. GEN. STAT. ANN. § 46b-15(g) (West 1986 & Supp. 1994) (providing for expedited hearing held within five days of service of the motion for contempt on the respondent); ILL. ANN. STAT. ch. 750, para. 60/223(b)(2) (Smith-Hurd 1993 & Supp. 1994) (providing for expedited hearing); IOWA CODE § 236.8 (West 1994) (providing for a contempt proceeding not less than five days and not more than 15 days after issuance of a rule to show cause); LA. REV. STAT. ANN. § 46:2137A (West 1982 & Supp. 1995) (providing for hearing within five days of filing motion for contempt); MINN. STAT. ANN. § 518B.01 Subd. 14(e) (Supp. 1995) (requiring
a motion for contempt is filed for a violation of a protection order, a hearing must be held within five days of the service of the motion on the defendant.\textsuperscript{206} Even when no specific time period is stated in the statute, courts have required a speedy hearing to effectuate the legislative intent of ensuring the battered woman’s safety.\textsuperscript{207}

When contempt motions can be heard in the issuing court, there can be additional time savings. While domestic court dockets are by no means under-utilized,\textsuperscript{208} they are usually less crowded than misdemeanor dockets.\textsuperscript{209} Also, because many jurisdictions permit victims to initiate the actions themselves, battered women need not wait for police to make an arrest or prosecutors to file charges.\textsuperscript{210}

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\textsuperscript{206} CONN. GEN. STAT. ANN. § 46b-15(g) (West 1986 & Supp. 1994).

\textsuperscript{207} See, e.g., Snyder v. Snyder, 629 A.2d 977 (Pa. Super. Ct. 1993), in which the court quoted with approval a trial court’s reflections as to the purpose of the enforcement provisions of Pennsylvania’s Protection From Abuse Act, 23 PA. CONS. STAT. ANN. § 6108 (1991): “The emergency nature of the judicial process pursuant to the Protection From Abuse Act requires that this Court act swiftly to prevent continued abuse and deal with contempt situations in an expeditious manner lest the violation giving rise to the contempt become a criminal action for homicide.” Snyder, 629 A.2d at 981.

\textsuperscript{208} Statistics indicate that domestic violence caseloads have grown 38% over the past four years. NATIONAL CENTER FOR STATE COURTS, STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1992 26 (1994) [hereinafter CASELOAD STATISTICS].

\textsuperscript{209} For example, in the Superior Court of the District of Columbia, 18,298 misdemeanor cases were filed in 1993, which averaged out to 550 cases per judge. A manageable caseload per judge is 350. HEARINGS ON THE BUDGET REQUEST OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA BEFORE THE SUBCOMM. ON THE DISTRICT OF COLUMBIA OF THE HOUSE APPROPRIATIONS COMM., 102d Cong., 2d Sess. 2 (1994) (statement of Chief Judge Eugene N. Hamilton), available in WESTLAW, 1994 WL 233373 (F.D.C.H. May 18, 1994). Misdemeanor filings in limited jurisdiction courts throughout the country in 1992 ranged from a low of 1,861 per 100,000 in Colorado to 8,292 per 100,000 in Texas. CASELOAD STATISTICS, supra note 208, at 37.

\textsuperscript{210} This delay should not be underestimated. A family court judge in Florida estimated that it took approximately three weeks to hold a hearing when battered women were permitted to initiate the action, even though state prosecutors had to take
Once initiated, contempt hearings can often be concluded faster than criminal trials. Since contempt is generally punishable by less than six months’ imprisonment, contempt proceedings are tried before a judge, eliminating jury selection and other time-consuming aspects of jury trials. Bench trials also spare the victim the perils and stresses of a jury trial.

Granting a speedy hearing is essential because batterers are more likely to respond to a fast contempt mechanism than a slower criminal prosecution, because deterrence is generally more potent when a quick punishment follows an infraction. From a batterer’s unique psychological perspective, however, contempt also offers distinct advantages. Batterers are manipulative individuals who think they can talk their way out of trouble or evade the constraints that society imposes on individual behavior. Also, because they tend to conceive relationships in terms of over the action. Now that protection order violations must be prosecuted under a criminal statute the police must investigate and the state attorney’s office must review the investigation; only then can the investigation results be placed on the misdemeanor docket. This judge indicated it now takes three to six months to try these cases. Reformers must remember that a major reason victims withdraw criminal complaints is that the criminal justice system is just too slow. See, e.g., Chief Judge H. Joseph Coleman, Final Report of the Washington State Task Force on Gender and Justice in the Courts, Gender and Justice in the Courts 30 (1989).

But see Buzawa & Buzawa, supra note 73, at 112, who claim that “[c]ontempt of court, the traditional mechanism for enforcement, is slow and cumbersome.” These authors, however, cite no authority for this proposition and do not discuss the expedited hearing provisions of modern statutes. See supra notes 205–06 and accompanying text.

A jury is required only in “serious” criminal contempt actions involving possible incarceration for more than six months. International Union, United Mine Workers v. Bagwell, 114 S. Ct. 2552, 2557 (1994).


Some studies have shown that batterers often suffer from communicative skills deficits vis-à-vis their private lives and relationships with their wives. Daniel G. Saunders, Husbands Who Assault: Multiple Profiles Requiring Multiple Responses, in Legal Responses, supra note 184, at 14. But other evidence indicates that it is common for batterers to have disrepancies between their private and public lives. Matthew Mosk, Simpson Case Sets Off Domestic Abuse Alarm, L.A. Times, June 26, 1994, at B1 (quoting Jamie Leigh, Executive Director of the Coalition Against Domestic and Sexual Violence). Men who batter their wives—like O.J. Simpson for example—often appear very charming to people not familiar with their private lifestyles. Id.; Walker, supra note 13, at 26.
power, they tend to respond only to a specific threat from an identifiable person whom they perceive as more powerful. A directive from a family court judge that he or she will lock up the batterer for contempt, which is then followed by a contempt hearing before the same judge, is therefore more effective than the general threat of criminal prosecution—especially since many batterers do not regard their behavior as criminal.

2. Institutional Actors Are Less Resistant to Criminal Contempt Sanctions

Critics frequently complain that participants in the process (i.e., police, prosecutors, and judges) are unwilling to take violations of protection orders seriously and prosecute them vigorously. However, such

215 See Lerman, supra note 74, at 220 (noting that abusive behavior allows men to establish and maintain control in their relationships).

216 See id. (noting that men engage in abusive activity because no one, including friends or other family members, have ever required them to stop).

217 See Goolkarian, supra note 61, at 282-83 (discussing the “powerful message” that judges can deliver to a batterer). Indeed, the threat of criminal sanctions may not deter recidivists who are familiar with the defects in the ability of the criminal justice system to dispense justice. Saunders, supra note 214, at 25.

218 Batterers generally perceive the threat of criminal sanctions as both unfair and unlikely. See Goolkarian, supra note 61, at 283. Thus, the civil protection order and contempt mechanism can be seen as fairer to the batterer and as offering a gradual method for transforming the batterer’s mindset. Unlike immediate criminal prosecution, the civil protection order first puts the batterer on specific notice that his behavior will not be tolerated and then gives him an opportunity to correct himself before contempt sanctions are imposed.

219 See Ford & Regoli, supra note 184, at 130-31.

220 A problem with the implementation of civil protection order statutes has been the judicial practice of issuing mutual protection orders. See Kinports & Fischer, supra note 81, at 167 & n.16 (citing similar problems with Illinois judiciary); Curtis Krueger, Domestic Violence Laws Called Adequate, St. Petersburg Times, Feb. 4, 1994, at 4B (reporting that about 80% of Florida judges who handle domestic violence cases sometimes issued illegal mutual restraining orders). Some states have confronted this problem by explicitly discouraging the use of mutual protection orders. See, e.g., Ariz. Rev. Stat. Ann. § 13-3602G (Supp. 1994) (providing that a mutual order shall not be granted automatically and requiring a verified petition to do so); Ill. Ann. Stat. ch. 750, para. 60/215 (Smith-Hurd Supp. 1994) (prohibiting the use of “mutual orders” completely but allowing “correlative separate orders” if both parties can prove abuse by the other party); Utah Code Ann. § 30-6-6(3) (Supp. 1994) (providing for mutual orders only upon stipulation).

221 The most significant criticism of the judiciary that remains today includes the
criticism fails to differentiate among the various enforcement methods. In many cases, the criminal contempt sanction accommodates the needs of bureaucratic actors better than the other methods and thereby will result in more effective enforcement of protection orders.

Most significantly, implementation of criminal contempt sanctions can be tailored to the resources and commitment level of the various institutional actors. In jurisdictions where the prosecutor’s office is willing to cooperate, separate domestic violence contempt units have been established with some success. Where prosecutors lack the resources or commitment, advocates can devote the financial and human resources of women’s groups and request the pro bono efforts of sympathetic members of the domestic relations bar to provide legal assistance.

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refusal to give jail time for violations of protection orders. Kinports & Fischer, supra note 81, at 232; Karen Freifeld, Abuse Hits Home, Newsday, Sept. 25, 1994, at A4 (reporting that in 1993 in the Bronx. N.Y. of 208 batterers facing criminal contempt charges for violating protection orders, only 38 went to jail). Statistics indicate that actual jail time, if given, is very low. Rule of Thumb, supra note 80, at 44–45. Thus, the potential advantages of immediate arrest, fines, and jail time are often not realized. Johnson, supra note 23, at 240 & n.39 (citing Sandy Clark, N.J. Coalition for Battered Women, Summary of the New Amendments to the Prevention of Domestic Violence Act Proposed by S-2011 (1988)). However, I argue that framing the issue as a contempt of court is still superior to the misdemeanorization of violations. See infra text accompanying notes 239–69.

222 Keeping contempt actions within a specific unit, rather than shuffling cases from one prosecutor to another as in many misdemeanor sections, minimizes the discomfort of forcing women to share intimate details of life with strangers. See Estar Soler, Domestic Violence Is a Crime: A Case Study—San Francisco Family Violence Project, in Domestic Violence on Trial: Psychological and Legal Dimensions of Family Violence 21, 29 (Daniel J. Sonkin ed. 1987). In Pinellas County, Florida, one such unit existed before the Florida legislature abolished criminal contempt as a remedy for domestic violence. See Fla. Stat. Ann. § 741.2901(2) (West Supp. 1995). When one prosecutor was asked what he liked about his job, he replied that he liked putting bad people in jail. He added that he found judges much more likely to incarcerate individuals for violations of orders than for misdemeanors for the same conduct. Interview with Don Gibson, Assistant District Attorney, in Pinellas County, Fla. (Mar. 1993). This anecdote reinforces my belief that criminal contempt as a remedy for violation of protection orders is more in synch with current institutional beliefs and practices than criminal charges for every type of civil protection order violation.

223 The Foster case, discussed supra, began as a contempt hearing brought by a legal services agency called AYUDA on behalf of Mrs. Foster. See supra note 203; Kinports & Fischer, supra note 81, at 174–75; see Topliffe, supra note 178, at 1052–53 (discussing the need for more participation from the bar in enforcing protection orders).
The police, prosecutors, and the courts are also more likely to support criminal contempt actions because they arise in contexts that do not overburden their resources or challenge their long-held notions about domestic violence.\textsuperscript{224} For example, police officers called to the scene of a battery by a repeat violator are more likely to arrest the offender if the complainant has obtained a civil protection order, or in the case of the persistent batterer, if she has subsequently filed contempt charges for additional incidents.\textsuperscript{225} Her behavior demonstrates her consistency and persistence, giving institutional actors reason to believe she will follow through with the prosecution.\textsuperscript{226} The paper trail of repetitive violations signals to the officers that this offender is dangerous and does not respect the legal system.\textsuperscript{227}

There is also hope that courts will be more willing to punish contemnors than domestic violence defendants. Judges simply do not like being disobeyed, particularly when they have issued a direct order to someone.\textsuperscript{228} and studies suggest that judicial behavior can have profound

\textsuperscript{224} I again refer to the Assistant District Attorney in Florida. See supra note 222. He displayed no sign of familiarity with empowerment or battered woman syndrome. To the contrary, he used "prosecutor talk," focusing primarily on his satisfaction with an incarceration result. Thus, when a reform strategy is more consistent with existing institutional objectives, it is likely that less retraining (sensitizing) is necessary.

\textsuperscript{225} BUZAWA & BUZAWA, supra note 73, at 114 (noting that the use of protective orders will give police a method for recognizing recidivists and shows them that the victim is willing to go to court to stop the abuse; this justifies an increased response by the police). Even then, however, a recent national survey shows that police officers frequently refuse to make a misdemeanor arrest for a violation of a protective order unless the violation also appears to constitute a criminal offense. If it is not a criminal offense, they tell the victim to see an attorney or go to court. Knoports & Fischer, supra note 81, at 224–25. The reason for this reluctance to arrest may be that police officers have traditionally tried to minimize their involvement in domestic dispute cases, often because they identify with the husband and consider an intrusion into a man's home a violation of the walls of his castle. Peter G. Jaffe et al., The Impact of Police Laying Charges, in LEGAL RESPONSES, supra note 184, at 66. Apparently, some officers still retain this view and frequently try to avoid an arrest in domestic dispute cases. However, police attitudes have progressed considerably in the past few years as society's views toward women batterers have progressed. See id. at 88.

\textsuperscript{226} BUZAWA & BUZAWA, supra note 73, at 114.

\textsuperscript{227} Id.

\textsuperscript{228} Indeed, contempt sanctions themselves were designed to allow a judge who has been disobeyed to vindicate his or her authority and punish the disobedience. Otherwise the judicial power vested in judges would be a mere mockery. Young v. United States ex rel. Vuitton Et Fils S.A., 481 U.S. 787, 796 (1987).
effects on the outcome of domestic violence cases.\textsuperscript{229}

3. The System for Holding Batterers in Criminal Contempt for Violation of Protection Orders Can Be Improved

Despite the flexibility and empowerment advantages of the criminal contempt route, approximately twenty states\textsuperscript{230} have not yet authorized it as a remedy for violations of protection orders.\textsuperscript{231} To the extent these states have not acted due to perceived flaws in the criminal contempt delivery system, these problems actually can be addressed fairly easily through existing institutions or existing methods of reform.

For example, if judges are refusing to incarcerate domestic violence contemnors, sanctions for the violation of civil protection orders can be stiffened. Some states now require mandatory jail terms for repeat violators of protection orders.\textsuperscript{232} As with other areas of sentencing disparities, courts can be reined in by sentencing guidelines.\textsuperscript{233} For the police, a

\textsuperscript{229} Goolkasian, supra note 61, at 277 (citing B. SMITH, NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, NON-STRANGER VIOLENCE: THE CRIMINAL COURT'S RESPONSE 96 (1983)).

\textsuperscript{230} Some statutes do not differentiate between criminal and civil contempt, making classification of the statute difficult. Civil contempt is a fairly useless remedy in the domestic violence context because it rarely can be invoked to incarcerate the batterer. See supra note 159, for a discussion of the difference between civil and criminal contempt.

\textsuperscript{231} This may be the case because of perceived weaknesses of the contempt remedy. See Developments, supra note 55, at 1512–13. Indeed, Florida abolished the use of indirect criminal contempt sanctions to enforce compliance with domestic violence protection orders. Fla. Stat. Ann. § 741.2901(2) (West Supp. 1995).

\textsuperscript{232} Johnson, supra note 23, at 257–58.

\textsuperscript{233} Dissatisfaction with sentencing disparities in general has led to sentencing reform primarily through the passage of sentencing guidelines, most notably the Federal Sentencing Guidelines. Most criticism of the sentencing guidelines has to do with the underlying statutory mandatory minimums for certain crimes such as drugs rather than the concept of guidelines. See, e.g., Matthew F. Leitman, A Proposed Standard of Equal Protection Review for Classifications Within the Criminal Justice System That Have a Racially Disparate Impact: A Case Study of the Federal Sentencing Guidelines' Classification Between Crack and Powder Cocaine, 25 U. Tol. L. Rev. 215 (1994).

There is clearly a need for similar guideline sentencing for contempt of civil protection orders. Various schemes for mandatory or guideline range sentences for repeat domestic offenders have been adopted in several states, and various others have been proposed. Topliffe, supra note 178, at 1046. One approach adopts the equivalent of mandatory minimum sentences for violations of protection orders with provisions
modified version of the mandatory arrest concept would limit the mandatory arrest scenario to situations in which a batterer has violated an order, a policy more consistent with their own discretionary judgments.234

The most significant area, however, to ensure that criminal contempt sanctions work is the provision of legal services.235 If legislatures fund special units within state attorney’s offices for these prosecutions, at least the financial aspect of this problem will be relieved.236 If battered women are to be responsible for bringing some or all of their own contempt actions, there is a definite need for more lawyers (both full-time and pro bono) to work in this field.237 However, rather than being seen as an obstacle, the provision of legal services for battered women should be allowing for the increase of sentences for repeat violations. Examples of this approach have been adopted in Illinois, Hawaii, and California. Developments, supra note 55, at 1513. The 1991 Prevention of Domestic Violence Act in New Jersey provides that a violation of a protection order is contempt “which if it results in a conviction of a second or non-indictable domestic violence offense, requires a minimum term of thirty days in jail.” Johnson, supra note 23, at 257. Some states have gone further and made some violations of a protection order felonies. See, e.g., N.D. CENT. CODE § 14-07.1-06 (Supp. 1993); OHIO REV. CODE ANN. § 2919.27 (Anderson 1993); TEX. FAM. CODE ANN. § 71.16 (West Supp. 1995); WASH REV. CODE ANN. § 26.50.110(4) (West Supp. 1995).

234 See Johnson, supra note 23, at 257 (noting that under the 1991 Prevention of Domestic Violence Act in New Jersey, probable cause to believe a protection order has been violated requires an arrest and a bail hearing before a judge).

235 It is possible, but difficult for a lay person to prosecute a criminal contempt action pro se. See D.C. TASK FORCE, supra note 199, at 153–54.

236 I still believe that there are empowerment advantages to battered women pursuing these remedies on their own behalf through counsel. See supra text accompanying notes 193–202.

237 Contempt is an option that “does not seem particularly attractive, however, because bringing contempt charges is expensive, time-consuming, and likely to require the services of an attorney.” Kinports & Fischer, supra note 81, at 230–31 (citing a survey that found that almost 75% of respondents think that the contempt process is too lengthy or complicated and that most women do not attempt it). Battered women also have a difficult time retaining counsel on their own as the batterers often control the resources. In addition, few lawyers outside legal services specialize in bringing contempt actions. Many lawyers simply do not want to take domestic cases. Finally, a battered woman may be disqualified for legal aid if her husband’s income is counted. See Langley & Levy, supra note 53, at 178–85 (describing the difficulty women have in retaining sufficient legal services). Thus, it is particularly imperative that local bars, law schools, and firms take responsibility in this area. Topliffe, supra note 178, at 1045. The creation of legal services specifically to assist battered women in obtaining and enforcing civil protection orders should be seen as part of the process of empowerment and social action.
perceived as an organizing tool for mobilizing sympathetic members of the bar. To the extent that *noblesse oblige* may be an insufficient motivation, legal aid rules can be altered to omit the income of the spouse from the eligibility calculation and provisions for payment of attorney's fees to the prevailing party can be added.

D. The Role of Substantive Criminal Charges for Violations of Civil Protection Orders

1. Feminists Are Mistakenly Advocating the Over-Criminalization of Protection Order Violations

Despite the many advantages of criminal contempt outlined above, some battered women advocates are now seeking the criminalization of violations of civil protection orders to the exclusion of other remedies. The most expansive proposals would convert protection order violations


239 Professor Natalie Loder Clark states: “Only vigorous prosecution, brought and continued at the state’s initiative, teaches the abuser that such behavior is unacceptable to society.” Natalie L. Clark, *Crime Begins At Home: Let's Stop Punishing Victims and Perpetuating Violence*, 28 WM. & MARY L. REV. 263, 281 (1987). Professor Clark also argues against victim-initiated remedies. *Id.* at 269. Another advocate in Chicago states: “One of our mistakes [in writing the law] was pushing for those orders of protection. We moved away from prosecution. Now we are going back to prosecute, prosecute.” Burleigh, *supra* note 26, at 1 (quoting Margaret Luft of Uptown Center Hull House Woman Abuse Action Project).

With regard to enforcement of protection orders, Finn and Colson argue for statutes that make protection order violations a misdemeanor. FINN & COLSON, *supra* note 92, at 49. Contempt has been criticized as expensive and time-consuming. Kinports & Fischer, *supra* note 81, at 230.

While clearly there are some advocates explicitly pushing for criminalization of protection order violations, the actual trend of state statutes in this direction may be more the result of an unconscious drift in policy rather than a conscious and uniform decision by domestic violence reformers. For example, the *Model Code on Domestic and Family Violence* drafted by the National Council of Juvenile and Family Court Judges discusses criminal penalties for violations but does not distinguish between criminal charges and contempt sanctions. *See* MODEL CODE ON DOMESTIC AND FAMILY VIOLENCE § 302(3)(a) (Nat'l Couns. of Juv. and Fam. Ct. Judges 1994). In a conversation with the author, a member of the drafting committee acknowledged that this distinction was not considered by the drafters at the time.
into misdemeanors that otherwise would not constitute substantive criminal behavior (i.e., violations of "stay away" and "no contact" provisions).\(^{240}\) Some jurisdictions, such as Florida, recently abolished use of the contempt sanction, requiring that all violations of civil protection orders be referred to the local state attorney’s office for criminal prosecution as misdemeanors.\(^{241}\)

These advocates contend that criminalization of all acts of domestic violence will serve to transform cultural and institutional attitudes toward such violence, so that it will come to be seen as a crime in the ordinary sense.\(^{242}\) They also criticize the use of civil process (e.g., the contempt sanction), characterizing it as a "soft" approach that fails to treat battering as a crime worthy of punishment.\(^{243}\)

This overemphasis on criminal prosecution is misguided for many reasons. First, as discussed above, pursuing a contempt sanction for violation of a civil protection order can be an empowering experience for a

\(^{240}\) Finn & Colson, supra note 92, at 52 (suggesting states convert to criminal prosecution of protection order violations as the preferred remedy, but acknowledging that a statute allowing police to arrest for criminal contempt of a protection order is another option).

\(^{241}\) Fla. Stat. Ann. § 741.2901(2) (West Supp. 1995). The Florida Supreme Court noted that the law abolishing the use of indirect criminal contempt might suffer from a separation of powers problem. The court questioned whether the legislature had the authority to eliminate the judicial power to punish those who violate a court’s orders. In re Report of the Comm’n on Family Courts, 646 So. 2d 178, 180 & n.1 (Fla. 1994).

Florida battered women’s groups supported the pure criminalization approach, in part, due to frustration that not enough was currently being done to enforce protection orders via contempt. They also believed there might be double jeopardy problems with dual enforcement through contempt and criminal sanctions. See infra text accompanying notes 264–68. In retrospect, one Florida battered women’s advocate now believes that the elimination of criminal contempt may have been a mistake. Interview with Linda Osmundson, Director of the CASA Shelter in St. Petersburg, Fla. (Mar. 25, 1995).

\(^{242}\) These advocates rebut charges that this will overburden the criminal justice system by arguing that domestic violence should be a priority and deserves a priority resource allocation. Developments, supra note 55, at 1526–27. This argument begs the question particularly in regard to non-criminal acts such as "stay away" violations. Secondly, while acknowledging that domestic violence is a priority, advocates who argue that it should not be treated differently than other crimes ignore the different psychological aspects of this crime. See id. at 1527 (treating domestic violence as a special crime may have stigmatizing effects for victims).

\(^{243}\) Civil protection orders “merely proscribes . . . future conduct with uncertain enforcement and ineffective sanctions for violations.” Id. at 1511.
battered woman if the system works properly. Second, the criminal justice
system will resist the complete criminalization of civil protection order
violations, despite hopes to the contrary. Third, past experience has shown
that over-reliance on a single solution is a mistake. Fourth, a pure
criminalization approach is overly optimistic about society’s willingness to
brand every protection order violation a criminal act.

Despite the wishes of these advocates, domestic violence does not
behave like an “ordinary” crime and prosecutors and police have legitimate
grievances about being forced to treat it as such. While police and
prosecutors can be blamed for the reluctance of some victims to prosecute,
the battering theory itself acknowledges that many battered women drop
charges because they have not yet realized that the cycle will repeat itself
or the batterer is able to manipulate them into dropping the charge.244 Even
sympathetic prosecutors recognize that criminal prosecution alone is not
going to provide the cure.245

Further, prosecutors have credible institutional concerns with the pure
criminalization approach.246 Overloading the criminal justice system with
more, primarily misdemeanor cases will have several deleterious effects.
More cases mean more delay.247 Misdemeanor cases, particularly in urban
court systems, can take significant time to wend their way to trial.248 More

244 It is true that the attitudes of the prosecutors and the judiciary encourage
women to drop cases, BUZAWA & BUZAWA, supra note 73, at 58, but many women,
rightly or wrongly want these cases dropped, perhaps because of battered woman’s
syndrome, reconciliation, economic fears, or general distrust of the court system. Id.
at 59. Using contempt sanctions as the first line of attack accomplishes two goals.
First, there is a process of self-selection that will weed out many cases. Second and
more importantly, criminal prosecution can be reserved for cases involving physical
violence.

245 “Prosecution isn’t a panacea. It’s like a tourniquet. We put it on when there is
an emergency and we keep it on as long as necessary. But the question is, then what?”
Ingrassia & Beck, supra note 45, at 32 (quoting Mimi Rose, Chief of the Family
Violence and Assault Unit at the Philadelphia District Attorney’s Office).

246 While prosecutorial resources are “free” to battered women complainants, so
goes the old adage that you get what you pay for. Social reform costs money and to
some extent, that money would be better spent on private attorneys committed to
prosecuting contempt actions or on more funds for a smaller group of “domestic
violence” prosecutors rather than adding to the general pool for the district attorney’s
office.

247 The fact remains that in some jurisdictions, over half of all domestic battery
cases are dismissed prior to trial or plea. See sources cited supra note 78. For the
effect that so-called “no-drop” policies might have on prosecution rates, see Corsilles,
supra note 13.

248 Some misdemeanor cases in the District of Columbia can take up to a year to
delay and backlog invariably lead to more dismissals, as witnesses disappear or victims grow weary of endless court appearances.249 Dismissals demoralize victims250 and further frustrate police and prosecutors,251 who are generally interested only in cases with a high likelihood of success (which means a conviction).252 No-drop policies and subpoenas that compel battered women to testify against their will are time-consuming and have significant potential to further victimize women.253 Finally, delayed adjudication is a serious health risk for any woman whose batterer has already ignored a civil protection order. The first concern, therefore, should be a speedy adjudication of the civil protection order violation.

Pure criminalization advocates also ignore entrenched attitudes toward

go to trial. Paul Duggan, Fighting Backlog, D.C. Prosecutors Dismiss Almost 1,000 Cases, WASH. POST, June 13, 1993, at B3. The number of misdemeanor cases clogging the court systems has been previously noted. See supra note 200.

249 See Duggan, supra note 248, at B3 (reporting that because of the heavy caseloads and busy judges, cases get repeatedly delayed until they are finally dismissed).

250 “At the heart of criminal enforcement of domestic violence complaints is the phenomenon of discretionary dismissal by the prosecutor, before the charge can be determined on the merits either by guilty plea or by trial.” MINNESOTA SUPREME COURT TASK FORCE FOR GENDER FAIRNESS IN THE COURTS, FINAL REPORT, reprinted in 15 WM. MITCHELL L. REV. 825, 882–83 (1989) [hereinafter MINNESOTA TASK FORCE]. Especially in misdemeanor cases, dismissal can be as high as 80–90%. Id. at 883.

251 “In studies of courts operating under regular assault statutes, investigators have typically found that approximately 80% of all cases of domestic violence are dismissed by the court either at the victim’s request or because the victim failed to appear in court.” CRIMINAL JUSTICE POLITICS AND WOMEN: THE AFTERMATH OF LEGALLY MANDATED CHANGE 33 (Claudine SchWeber & Clarice Feinman eds., 1985). Some prosecutor offices may resist “no-drop” policies for domestic violence cases as interfering with their discretion and as a drain on resources for the prosecution of other crime. Corsilles, supra note 13, at 875.

252 See supra note 80 and accompanying text.

253 Corsilles, supra note 13, at 875. If the subpoena power is not used properly, it may lead to further victimization. If a battered woman is subpoenaed to appear but later refuses to do so because she has reconciled or any other reason, a contempt filed against her would be a second victimization. See MINNESOTA TASK FORCE, supra note 250, at 885–86; SCHRÖDER, supra note 13, at 175; see also PARNAS, supra note 12, at 134. No-drop policies also impose significant work load burdens on prosecutors preparing for trial. The amount of time needed to prepare for a case involving a non-cooperative witness should not be underestimated. It may require multiple efforts to serve subpoenas and force the prosecutor to put the victim on the witness stand without the opportunity to prepare her.
misdemeanor cases, particularly those tried before juries.\footnote{254} Misdemeanor
cases usually have the lowest conviction rate, as jurors are more willing to
find a reasonable doubt for what they perceive as a minor crime.\footnote{255} This is
sure to be exacerbated when a jury is presented with criminal charges for
incidents such as a violation of a stay-away or no-contact order.\footnote{256} Further,
rules of evidence, such as the general prohibition on the introduction of
prior bad acts, will often exclude pertinent evidence of a prior battering
relationship.\footnote{257}

With respect to the courts, these arguments ignore the realities of bail
and sentencing in criminal courts. Pretrial detention or high bail are
usually reserved for defendants who have committed the most violent
offenses or those persons likely to flee.\footnote{258} Judges are reluctant to detain
defendants who are employed, particularly if they are providing for
minors. The pure criminalization approach is unlikely to result in
immediate detention pending trial in all but the most violent cases.

In addition, criminal docket judges hear about an extraordinary amount
of violence on a day-to-day basis. It is unrealistic to assume that
incarceration rates for nonviolent violations of protection orders will be
significant. As suggested, however, judges as a group tend to look
particularly unfavorably on those who directly challenge their authority,
such as by disobeying a civil protection order. Thus, pure criminalization
advocates miss an opportunity to take advantage of an institutional bias in
favor of incarceration by presenting the case as a contempt of court issue,
preferably before the court that issued the protection order. Ultimately,
criminalization advocates must recognize that single solutions for a
complex social problem are bound to fail.\footnote{259} Particularly in the criminal

\footnote{254} As noted earlier, such cases traditionally get the fewest resources and the least
experienced prosecutors. \textit{See supra} note 80 and accompanying text. While some
jurisdictions have had success with specialized domestic violence units, ultimately the
most experienced prosecutors will still prefer felonies and other higher profile cases.

\footnote{255} This is most often true in cases where the sole witness is the victim.

\footnote{256} From a libertarian perspective, one could also argue that our society already
criminalizes enough conduct and creating even more criminal statutes in and of itself
is not good for society.

\footnote{257} \textit{See, e.g.}, Fed. R. Evid. 404.

1994) (requiring a judicial officer to detain a person prior to trial if no conditions can
reasonably assure the appearance of the person at trial or the safety of the community).

\footnote{259} Drunk driving represents another serious public policy problem that has seen
a broadening of sanctions beyond criminal prosecution such as revocation of driver’s
licenses for the failure to take a breathalyzer test. \textit{See} M. Elizabeth Fuller, Comment,
justice system, for which discretion is so fundamental a component, inflexible directives will be resisted.\textsuperscript{260} As with any crime, there is an upper limit on full enforcement of criminal laws against domestic violence.\textsuperscript{261}

On a theoretical level, the pure criminalization advocates are too far ahead of current cultural values.\textsuperscript{262} Given the high level of violence in our society, and especially in some communities, juries resist branding an individual a criminal when there is no act of violence, as in the violation of a stay-away order.\textsuperscript{263} Therefore, this attempt to transform public opinion through labeling all acts associated with a domestic violence as criminal simply goes too far. While words can open the door to change, those words must bridge existing beliefs with new facts, such as in the separation assault context. While more severe criminal penalties for domestic violence are necessary and the criminalization of protection order violations can be a useful step, alone they will not be effective. On the other hand, because the legal and everyday label of contempt is a better mesh with societal values,

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\textsuperscript{260} The general point that mandatory provisions and criminalization of all aspects of domestic violence is counterproductive receives strong support from Parnas, see supra note 12. He forcefully states that it is time for victim advocates to "stop their narrow, gender-focused arguments for further change. More important, it is time for policy makers to resist pressures from them." \textit{Id.} at 191-92.

\textsuperscript{261} A critique of full enforcement is that police ignore a broad range of other offenses. DONALD BLACK, THE MANNERS AND CUSTOMS OF THE POLICE 185 (1980). The failure of efforts at full enforcement can be seen in other areas such as the Reagan-Bush zero tolerance for drugs and mandatory minimum sentencing. Battered women advocates must be realistic. They must recognize that "a budget-constrained legal system will never devote significant post-arrest resources to the prosecution, incarceration and rehabilitation of offenders who have, after all, usually been guilty only of a simple misdemeanor." Daniel Polsby, \textit{Suppressing Domestic Violence with Law Reforms}, 83 J. CRIM. L. & CRIMINOLOGY 250, 251 (1992).

\textsuperscript{262} See Schneider, supra note 152 (discussing the need for close attention to the interrelationship of theory and practice in this area and cautioning against too much "grand theory" and personal narrative which characterize much of recent feminist legal scholarship).

\textsuperscript{263} As the level of violence in our society escalates, prosecutors and courts may be reluctant to put much effort into prosecuting and convicting people who are guilty of only a misdemeanor. Polsby, supra note 261, at 251. In this era of fiscal constraint, many prosecutors and courts would like to see even fewer acts characterized as misdemeanors so that more resources can be devoted to the most serious violent crimes. Richard Barbieri, \textit{Saving Money on Misdemeanors; Faced With a Statewide Budget Crisis, a Few Prosecutors Are Rethinking Their Opposition to ADR and Other Cost-Saving Alternatives to Prosecution}, RECORDER, June 1, 1993, at 1.
\end{quote}
a resulting incarceration for violation of a protection order is more apt to be accepted as a just result.

Lastly, the pure criminalization approach is sometimes justified on the ground that successive prosecutions of the same act of domestic violence for contempt of a protection order and the criminal law might constitute double jeopardy. This was a particular concern after the Supreme Court’s double jeopardy decision in *Grady v. Corbin*. However, the Supreme Court reversed *Grady* in *United States v. Dixon*, which specifically considered the double jeopardy consequences of successive prosecutions for contempt and a criminal offense arising from the same acts of domestic violence. In *Dixon*, a sharply divided Court reinstated serious felony charges against a batterer who had already been held in contempt for all but one of a series of acts. While ambiguous language in the *Dixon* decision may still present a double jeopardy issue, careful consideration of that issue before pursuing the contempt remedy can avoid a double jeopardy bar to criminal prosecution or serious incidents of domestic violence. In less serious cases, particularly non-violent cases where criminal prosecution is unlikely, the double jeopardy issue should not dissuade legislatures from authorizing both remedies for violations of protection orders.

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266 113 S. Ct. 2849 (1993).
267 Note that the criminal prosecution was an offense under a traditional criminal statute, not a “new” misdemeanor for violation of a protection order. Dual prosecution for contempt and a misdemeanor violation of a protection order still present a double jeopardy problem. For those batteries for which both sanctions are sought, traditional criminal statutes must be used.
269 See forthcoming article by author. In *Dixon*, Justice Scalia’s opinion requires a court to compare the language of the contempt order or finding of contempt with the statutory language of the criminal offense under the “elements test.” If the contempt order or finding too closely tracks the criminal statute’s language, the criminal charge can be found to be a lesser included offense of the contempt, even if it carries a more severe penalty, and thus violative of the double jeopardy rule. See also Kirsten Pace, *Fifth Amendment—The Adoption of the “Same Elements” Test: The Supreme Court’s Failure to Adequately Protect Defendants from Double Jeopardy*, 84 J. CRIM. L. & CRIMINOLOGY 769 (1994).
V. CONCLUSION: THE PROPER CHRONOLOGICAL MIX: CONTEMPT FIRST, CRIMINAL PROSECUTION SECOND

While contempt sanctions have substantial benefits and a pure criminalization approach is unwise, the question that still remains is: What is the best approach for punishing violations of civil protection orders? Consistent with the current comprehensive approach, a system that includes a mix of contempt and criminal prosecution would likely produce the best results.

More specifically, contempt should be the preferred initial remedy because it can be faster\(^\text{270}\) and it offers a better chance of some sobering jail time before a sufficiently violent act yields the rare pretrial detention. Second, contempt sanctions as the initial remedy will serve the empowerment goal by enabling battered women to psychologically break the binds to their batterers.

However, just as a pure criminalization approach will not work, contempt sanctions, while offering certain advantages, are not a panacea that will effectively punish and deter all batterers. The average maximum sentence under contempt statutes, of sixty to one-hundred-eighty days, will not always be sufficient to punish violations of protection orders. For cases involving assaultive conduct, traditional criminal charges such as assault and battery must be available to take advantage of the greater penalties for first degree misdemeanors and the substantial sentences for felonies. In some jurisdictions, newly created misdemeanors for violations of protection orders could serve the same function in some cases.

For the most hard-core violent batterer, severe criminal penalties will still be the only solution\(^\text{271}\). Any domestic violence reform package must treat such batterers as the most violent criminals are treated, including preventive detention and high bail\(^\text{272}\). On the other hand, in cases involving purely technical violations of specific provisions of a protection order such as a stay-away clause, criminal contempt sanctions alone should generally

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\(^\text{270}\) See supra notes 180–89 and accompanying text. If in a particular case or jurisdiction, criminal prosecution turns out to be as fast or faster, the contempt and criminal charge can always be consolidated and tried by the state in criminal court.

\(^\text{271}\) Contempt appears to be effective against batterers who are not extremely violent but less effective against extremely violent batterers. Topliffe, supra note 178, at 1046.

\(^\text{272}\) Additional measures that can be taken in the most serious cases include notice to victims and confidentiality of their addresses, prohibition on reduction in bail without the knowledge of the initial court’s reasons, and determination of the defendant’s criminal record prior to setting bail. Johnson, supra note 23, at 243 n.60.
be sufficient and will offer the best chance for incarceration, if necessary. In cases involving violent acts, however, contempt can still be the first remedy pursued by the victim, independent of criminal prosecution, although cognizant of the potential double jeopardy issue. This strategy allows prosecutors to retain their traditional discretion273 without permitting the batterer to escape swift punishment.

An approach taking advantage of the speed and empowerment features of contempt and the stiffer penalties under criminal law is consistent with the comprehensive approach to domestic violence reform that seems to yield the best results.274 A contempt and criminal sanction approach also can be easily integrated with domestic violence courts and specialized prosecution units. Lastly, the need for attorneys to prosecute these actions in some jurisdictions can be seen as a positive avenue for concerned attorneys and advocacy organizations to take beneficial social action. Thus, in most significant respects, using contempt and criminal sanctions in unison is a winning proposition for battered women and the institutional actors involved in domestic violence control.

273 Such factors include the seriousness of the assault, assessment of future dangerousness, and the interests of the complainant in proceeding. Certainly, in the most violent cases, or cases involving weapons or a risk to minors, prosecutors should have a decided bias in favor of proceeding even in the absence of the complainant's cooperation.

274 See, for example, Minn. Stat. Ann. § 518B.01, subd. 14 (West 1990 & Supp. 1995) which provides that a violation of a protection order is both a misdemeanor and contempt of court. Id.
BATTERED WOMEN & JUSTICE SCALIA

David M. Zlotnick*

I. INTRODUCTION

This Article explores the human cost of one justice’s intellectual dishonesty. The beginning of the story is chillingly familiar. Ana Cruz and Michael Foster married in 1987. Just a few months into the marriage, Foster became violent and abusive. With the help of a legal services organization, Ana obtained a civil protection order which directed her husband not to “molest, assault, or in any manner threaten or physically abuse” her or her mother.1 Despite the order, Foster continued to harass and threaten them for over nine months. He followed Ana on the street, twice kidnapped her, and repeatedly threatened her in person and by phone. His physical abuse culminated in a brutal assault in which he lay in wait for Ana at her mother’s house, attacked her, pushed her down a flight of stairs, and kicked and beat her until she was bloodied and unconscious.2 Ana Foster’s attorney moved to have Foster held in contempt for violating the protection order. Ultimately, Foster was found guilty of four counts of misdemeanor contempt. However, because of the six-month maximum for misdemeanor contempt, Foster received only 150 days on each count, even for the most serious attack on Ana.3

Although the police were called to the scene of several of these incidents,4 Foster was not indicted until one and a half years later.5 Foster moved

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3. See id. at 6.
5. The United States Attorney’s Office for the District of Columbia, which
to dismiss the charges, claiming that he had already been placed in jeopardy for this conduct in the contempt proceeding. The District of Columbia Court of Appeals agreed and dismissed the charges. His case was later consolidated with another contempt and double jeopardy case and granted certiorari to the Supreme Court as United States v. Dixon.

Writing for a badly fractured Court, Justice Scalia affirmed in part and reversed in part the lower court’s decision. The day of the Dixon decision, Ana Foster’s attorney proclaimed the opinion, “a significant victory for battered women,” because Scalia stated that the more serious felony assault and felony threats charges could go forward, while only one count of misdemeanor simple assault was barred by the Double Jeopardy Clause. The years since the decision, however, have proven to the contrary. In reality, Scalia’s failure to articulate a clear and workable double jeopardy rule for contempt cases has created substantial uncertainty and confusion in the lower courts about the effect of contempt actions on subsequent domestic violence prosecutions. As a result, battered women now run the risk that the swifter but less severe penalties for contempt—often necessary to protect their safety—may later bar more serious criminal charges by the state.

Scalia’s opinion in Dixon continues to baffle commentators. Scalia resolved Foster’s case with arguments advanced by neither the parties nor by amici curiae, and each of the six dissenting and concurring justices, both liberal and conservative, excoriated his flawed logic. This Article reveals the reason for Scalia’s belabored efforts in Dixon, and shows that the convergence of double jeopardy and contempt doctrines in the case created a conflict between Scalia’s avowed methodology for constitutional analysis, and his distinct ideological motivation for the methodology—his hostility to judicial power.

prosecutes all adult felonies in the Capital, had filed charges against Foster before the contempt hearing. In the D.C. Superior Court, however, a grand jury indictment is required for felony charges to proceed. That indictment was not handed down for almost nine months after the initial criminal charges were lodged. See Dixon, 598 A.2d at 727.

6. See id.
7. See id. at 731.
9. See infra notes 246–249.
10. George Lardner, Court Allows Successive Prosecutions, WASH. POST, June 29, 1993, at A6 (“The decision sends a clear message to batterers that domestic violence is a crime and that the state will be able to prosecute it just like any other crime.” (quoting Anna Foster’s lawyer, Leslye Orloff)).
11. Even for Ana Foster, justice was never completely served. The United States Attorney’s Office never pursued the counts the Supreme Court let stand.
12. See infra notes 517, 528–529 and accompanying text.
Part II lays out the components of Scalia’s constitutional methodology: textualism, faint-hearted originalism, and the clear rules principle.\textsuperscript{14} Separately, Part II discusses his motivating ideology—the belief that only a methodology that restricts the intrusion of judicial bias can properly confine the Court to its limited constitutional role. Part III discusses the complex evolution of the same offense issue in double jeopardy doctrine and examines Scalia’s pre-	extit{Dixon} double jeopardy opinions. Part IV analyzes Scalia’s 	extit{Dixon} opinion. This Part shows that, had Scalia faithfully applied his methodology, he would have affirmed the common law rules for contempt and double jeopardy, thereby allowing successive prosecutions for contempt and criminal sanctions in domestic violence cases. Instead, Scalia manipulated his already patchwork double jeopardy doctrine to create an entirely new test for double jeopardy cases involving contempt. Not only does this test depend on subtle, often unintelligible distinctions, but his supporting analysis repeatedly violates his constitutional methodology and contradicts his own arguments in earlier double jeopardy cases.

Part V argues that, although 	extit{Dixon} came to the Court as a double jeopardy case, the driving issue for Scalia was judicial contempt power. Scalia’s opinions demonstrate a marked hostility toward contempt power, which flows from his distrust of the judicial branch and his focus on the separation of powers principle as a fundamental guarantee of liberty. In 	extit{Dixon}, Scalia’s hostility to contempt power essentially infected his double jeopardy analysis and led him to discard his methodology in order to reach a result consistent with his ideological views. Part V also reveals Scalia’s most egregious error in 	extit{Dixon}. Scalia relied on common law practices and, in particular, on an Eighteenth Century English case, 	extit{Rex. v. Lord Ossulston}, to support his contention that modern contempt practices so differ from their historical antecedents that the common law rules for double jeopardy and contempt are now irrelevant. In fact, Scalia misread 	extit{Lord Ossulston}. Moreover, additional historical materials demonstrate that a true originalist analysis actually refutes Scalia’s assertions about contempt doctrine.

Part VI returns to the impact of Scalia’s 	extit{Dixon} opinion on domestic violence enforcement. Part VI documents the lower courts’ struggle and ultimate failure to implement the 	extit{Dixon} test. Because of the confusion created by 	extit{Dixon}, battered women and their allies in law enforcement and the legal community have been unable to take advantage of one of the best tools for combating domestic violence—civil protection orders enforced by swift criminal contempt sanctions. Thus, apart from the theoretical debate over constitutional interpretation, public policy reasons compel us to take Justice Scalia to task for failing to adhere to his methodology in this case.

II. JUSTICE SCALIA’S CONSTITUTIONAL METHODOLOGY

A. The Motivation for the Methodology

More than any other modern Supreme Court Justice, Scalia has laid out an explicit methodology for interpreting the Constitution. However, no language in Article III, or anywhere else in the Constitution, mandates any system of interpretation, including Scalia’s. The true source of Scalia’s conception of the Court’s role must therefore lie outside the Constitution.

As Scalia has made clear in his many scathing dissents, he believes the greatest danger to the Constitution is the Court’s willingness to use open-ended interpretation to implement the Justices’ own values. In Scalia’s view, the Constitution delegates the law-making function to the elected branches, leaving the Court to secure only explicitly enumerated rights and to enforce the provisions of the text and the separation of powers principle. This approach is not unique. Rather, it can be fairly identified as one ideological approach to the role of judicial review in a constitutional democracy. Sometimes referred to as the countermajoritarian difficulty, this philosophy requires tight restrictions on the role of an unelected judiciary, lest it usurp the power of the legislature to make new laws and, ultimately, the power of the people to amend the Constitution.

Accordingly, insofar as possible, Scalia seeks to articulate a methodology in which substantive constitutional doctrines are merely the byproduct of the proper application of neutral methods to specific issues. “Scalia’s ambition in this regard is to convert a judge, in Thomas Jefferson’s words, into ‘a mere machine’ that accurately transcribes and applies the popular will.” Toward that goal, Scalia offers a vision of the Constitution as a “dead” document, with its meaning fixed at


the time of ratification. He believes the Supreme Court should implement this fixed meaning and no more. For Scalia, this requires that the Court use only the plain meaning of the Constitution’s text, either as its words were defined at the time, or limited by the historical practices of that period. To the extent that further interpretation of the Constitution is necessary, this exegesis should be in the form of clear rules that constrain a judge’s discretion in future cases. In Scalia’s terms, this methodology consists of three-tier hierarchy: “textualism,” “originalism,” and a preference for “general rules.” While Scalia does not claim that this methodology is flawless, he does assert its superiority over the view that the Constitution is a living, evolving document. The organic approach, Scalia maintains, is ultimately nothing more than a cloak that hides the imposition of personal judicial preferences. Therefore, in Scalia’s words, his system should prevail because you “can’t beat somebody with nobody.” While the components of Scalia’s methodology are not sui generis, to truly understand whether he faithfully implemented them in Dixon, it is necessary to describe how Scalia claims the components of the methodology operate, both independently and as part of a system.

B. The Components of the Methodology

1. Scalia’s Semantic Textualism

Consistent with his underlying motivation, Scalia sees textualism as both a constitutionally mandated end in itself, and a means to restrict the judiciary to its proper role. “Judges should be restricted to the text in front of them.... According to my judicial philosophy, I feel bound not by what I think...but by what the text and tradition actually say.” At the core of Scalia’s textualism is his belief that the Constitution is “an enactment that has a fixed meaning ascertainable through the usual devices familiar to those learned in the law.” Scalia therefore flatly rejects


21. See id. at 37–38.

22. Scalia, supra note 14, at 1176.


24. See id. at 864.


27. Scalia, supra note 23, at 854.
all claims of modern hermeneutic theory about the indeterminacy of language. Scalia believes the words that make up the Constitution are definable; that they have "meaning enough" for purposes of judicial decision-making.

Scalia’s proclamation of his fidelity to constitutional text and his general belief that the law supplies the necessary tools of interpretation is only a starting point. The devil is in the details, namely, how to ascertain the meaning of the Constitution’s often broad aspirational clauses and how to apply a two-hundred-year old text to modern scenarios beyond the conception of the document’s drafters. Thus, Scalia’s textualism requires an interpretive technique. It is the technique he has chosen, and the degree of confidence he has in its results, that distinguishes Scalia’s textualism.

For Scalia, the ordinary social and dictionary meaning of individual words is the most important, and often the decisive, ingredient of his analysis of a constitutional provision. Moreover, Scalia requires that the interpretation of text be done “in as semantically precise a way as possible,” with close attention to formal rules of grammar.

Scalia’s opinions generally reflect his theoretical bias to narrowly define words, and correspondingly, to marginalize broader meanings that could be attributed to the immediate text or to the document as a whole. This is most obvious in statutory interpretation because such cases often require interpretation of specific words or phrases. In these cases, Scalia often places exclusive reliance on the dictionary definition of the operative word or phrase. The broadly

28. Scalia mischaracterizes and then dismisses indeterminacy theory in his Originalism article. See Scalia, supra note 23, at 856 ("Not that I agree with, or even take very seriously, the intricately elaborated scholarly criticisms to the effect that (believe it or not) words have no meaning.").

29. Scalia, supra note 23, at 856. Scalia has asserted that “while the good textualist is not a literalist, neither is he a nihilist. Words do have a limited range of meaning, and no interpretation that goes beyond that range is permissible.” Scalia, supra note 20, at 24.

30. See Kannar, supra note 26, at 1307–08.

31. Id. at 1308.

32. See, e.g., Walton v. Arizona, 497 U.S. 639, 670 (1990) (Scalia, J., concurring in part and concurring in the judgment) (stating that the “and” in the Eighth Amendment requires that punishments be both cruel and unusual to violate the text). See also Scalia, supra note 20, at 25 (“Of course its formalistic! The rule of law is about form.”) (emphasis in original).

33. Compare Coy v. Iowa, 487 U.S. 1012, 1020–21 (1988) (Scalia’s majority opinion focusing solely on the “irreducible literal meaning” of the Confrontation Clause and admitting no exceptions), with id. at 1025–26 (Blackmun, J., dissenting) (looking first to the framers’ “primary object” for the clause).


written and judicially glossed language of the Constitution provides fewer opportunities for this mode of interpretation. Nevertheless, even here, the impact of Scalia’s semantic textualism is detectable in cases that involve specific clauses or phrases. As in statutory interpretation cases, Scalia’s first option in these cases is to turn to dictionary definitions of the pertinent words at the time the text was adopted.\textsuperscript{36} For constitutional analysis, this means late Eighteenth and early Nineteenth Century dictionaries.\textsuperscript{37} Sometimes, he buttresses his dictionary definition with historical usage, etymology, and literature.\textsuperscript{38} However, in other cases, the plain meaning is so clear to Scalia that he simply declares the definition he finds obvious without a dictionary citation.\textsuperscript{39}

Nevertheless, constitutional text that can be conclusively defined by an ancient \textit{Webster’s} volume is infrequent. Most constitutional litigation concerns the more abstract phrases of the Constitution, such as the Due Process Clause, which are less amenable to semantic dissection or have layers of meaning added by prior decisions.\textsuperscript{40} In these cases, Scalia’s semantic textualism functions predominantly as a nay-sayer, or as he puts it, “a brake” on the expansion of constitutional rights.\textsuperscript{41} By narrowly focusing on the precise semantic meaning of each word or phrase, he routinely finds no justification for unenumerated rights that the modern Court has upheld.\textsuperscript{42}

\begin{flushright}
(citing \textit{Webster’s Second New International Dictionary} 2114 (1950) on the meaning of “representatives” to exclude elected judges from Voting Rights Act).
\end{flushright}

\textsuperscript{36} See California v. Hodari D., 499 U.S. 621, 624 (1991) Modern case law held that a “seizure” under the Fourth Amendment occurs when a reasonable person would not feel free to leave. Scalia narrowed the definition to mean “physically grasped” for situations in which a suspect refuses to submit relying on an 1828 version of \textit{Webster’s Dictionary}. Scalia wrote, “[f]rom the time of the founding to the present, the word ‘seizure’ has meant a ‘taking possession.’” \textit{Id. See also} National Endowment for the Arts v. Finley, 118 S. Ct. 2168, 2182 (1998) (Scalia, J., concurring in the judgment) (using a 1796 dictionary to define “abridging” to determine if the statute violated the First Amendment’s freedom of speech guarantee).

\textsuperscript{37} See \textit{id.}

\textsuperscript{38} See Coy, 487 U.S. at 1015–17 (stating that Confrontation Clause requires “face-to-face” meeting citing confrontation’s Latin derivation, Shakespeare’s Richard II, Act. I. sc.1, and President Eisenhower’s description of his hometown code of Abilene, Kansas).

\textsuperscript{39} See Maryland v. Craig, 497 U.S. 836, 862 (1990) (Scalia, J., dissenting) (quoting Coy v. Iowa, 487 U.S. 1017, 1016 (1988) (quoting in turn, California v. Green, 399 U.S. 149, 175 (1970) (Harlan, J., concurring) and arguing that the meaning of “confrontation” in the Sixth Amendment must include a “face-to-face” meeting)). \textit{See also} Minnesota v. Carter, 119 S. Ct. 469, 474–75 (1998) (Scalia, J., concurring) (use of the word “their” in the Fourth Amendment limits protection to the owner of the property).


\textsuperscript{41} See Kannar, \textit{supra} note 26, at 1306 (\textit{citing} Address by Justice Antonin Scalia, Remarks at the 24th Australian Legal Convention 12 (Sept. 21, 1987)).

\textsuperscript{42} These cases are the most representative of Scalia’s textualism in constitutional law. \textit{See} e.g., Hodgson v. Minnesota, 497 U.S. 417, 480–84 (1990); Ohio v.
Scalia’s opinions rarely rest solely on textualist analysis. Instead, either to support a plain meaning argument, or for the cases that are not amenable to textualist analysis, Scalia turns to the second prong of his methodology: his version of originalism, which he alternately calls original meaning or faint-hearted originalism.

2. Historical Practices and Scalia’s Not So “Faint-Hearted” Originalism

The core tenet of originalism, broadly defined, requires judges “to ascertain and give effect to the original intentions of the framers and ratifiers.”

Beginning with his confirmation hearing, Scalia took pains to distinguish this generic version of originalism, which he calls “original intent,” from his approach, which he describes as “original meaning.”

Scalia asserts that for his “original meaning” approach, the beginning and end is the text of the Constitution. Therefore, while he recognizes the importance of understanding the Constitution in terms of “what it meant to the society that adopted it,” it is the final text that counts, not the actual intentions of the drafters or ratifiers of the document. While the proponents of “original intent” and Scalia share similar motives, Scalia’s focus on the Framers’ end product rather than their pre- or post-drafting debates has significant implications for how he implements his originalism. Unlike many versions of originalism, Scalia does not use the statements and writings of individual drafters as authoritative sources for the meaning of the text. Rather, Scalia only consults these sources “because their writings, like those of other intelligent and informed people of the time, display how the text of the Constitution was originally understood.”

Because the extra-textual statements of the drafters are not authoritative, Scalia is left with the problem of how to find a specific historical meaning for the text, especially when the words are too broad to be amenable to a semantic textualism reading. In his oft cited article, Originalism, the Lesser Evil, Scalia offers only vague, inspirational advice that a judge immerse himself “in the political and intellectual atmosphere of the time.”

44. Hearings on the Nomination of Judge Antonin Scalia Before the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 108 (1986) (“If somebody should discover that the secret intent of the framers was quite different from what the words seem to connote, it would not make a difference.”).
45. Id.
46. Classic “original intent” theory places heavy reliance on the statements and writings of the individual framers; in essence, the legislative history of the constitution. See Mark Tushnet, Interdisciplinary Legal Scholarship: The Case of History-In-Law, 71 Chi.-Kent L. Rev. 909, 913 (1996).
47. Scalia, supra note 20, at 38.
48. In particular, cases involving the due process clause of the Fourteenth Amendment present this problem. See supra note 40.
however, recognize that his theory needs a firmer footing to avoid subjectivism.\textsuperscript{50} In practice, therefore, Scalia has grounded his originalism in longstanding historical practices to define, and often to limit, the scope of the Constitution’s language.

His “historical practices” originalism operates as follows: when confronted with a claim of constitutional right not resolved by a plain reading of the text, Scalia asks whether the activity existed in the common law and in the drafting/ratification period. Activities not in existence or without a very close historical analog are not protected by constitutional text.\textsuperscript{51} Similarly, if the activity was known and illegal, it can be restricted without offending the Constitution.\textsuperscript{52} On the other hand, if the period permitted a specific practice, its protected status cannot be eliminated. Thus, Scalia’s originalism sometimes defends a historic practice now under attack.\textsuperscript{53} However, like his semantic textualism, Scalia’s “historical practices” approach more often results in no protection for a modern practice, either because a practice was condemned under the religious or moral precepts of that earlier time,\textsuperscript{54} or because the modern situation was unknown to the Framers.\textsuperscript{55}

Although Scalia’s use of historical practices is not unique to this or previous Courts,\textsuperscript{56} two things distinguish his originalism. First is his virtual insistence that in the absence of historical support for a practice, the Court should not recognize behavior as protected by the Constitution.\textsuperscript{57} Second is his method of selecting the appropriate historical practice. In theory, Scalia has said that originalism could include exploration of the “political and intellectual atmosphere of the time.”\textsuperscript{58} In his opinions, however, Scalia states that the Court should seek


\textsuperscript{53} For example, Scalia dissented from the successful First Amendment challenge to religious invocations at public school ceremonies in Lee v. Weisman, claiming that such invocations had a long historical pedigree. Scalia said that “the Court—with nary a mention that it is doing so—lays waste a tradition that is as old as public-school graduation ceremonies themselves...” 505 U.S. 577, 631–32 (1992) (Scalia, J., dissenting); Clinton v. New York, 118 S. Ct. 2091, 2116–17 (1998) (Scalia, J., concurring in part, dissenting in part) (history and tradition support line item veto legislation); Rutan v. Republican Party of Illinois, 497 U.S. 62, 96 (1990) (Scalia, J., dissenting) (defending the political patronage system).

\textsuperscript{54} See Casey, 505 U.S. at 984.

\textsuperscript{55} See 44 Liquormart, 517 U.S. at 517 (Scalia, J., concurring in part and concurring in judgment) (bemoaning fact that parties did not discuss state legislative practices regulating commercial speech at time it was adopted).

\textsuperscript{56} See Scalia, supra note 23, at 851 (citing Myers v. United States, 272 U.S. 52 (1926) (exploring historical roots of the President’s removal power)).


\textsuperscript{58} Scalia, supra note 23, at 856–57.
out the most specific historical practice of which the Framers were aware that is analogous to the practice at issue.\footnote{59}

Scalia's focus on the most specific historical analogue fulfills his motivating principle that his originalism be fixed in reasonably verifiable extra-textual sources. Moreover, the more specific the historical analogue, the closer the current interpretation of the text to the original compact (and correspondingly, the less likely that the opinion will incorporate the subjective views of the Justices). This results in judicial opinions laden with nuts-and-bolts historiography.\footnote{60} While Scalia recognizes that judges do not always have the time or training for this kind of research,\footnote{61} he once again falls back on the argument that at least this methodology tells him what to look for.\footnote{62}

Aside from the difficulty of historical research, Scalia's dedication to Eighteenth Century mores presents a further dilemma for his originalism. As Scalia willingly admits, some features of early American society are simply unpalatable to modern sensibilities.\footnote{63} He attempts to accommodate this limitation with the final component of his originalism—his so-called "faint-hearted" principle.\footnote{64} This principle permits him to depart from a historical rule, but only when it is absolutely clear that an "evolution in social attitudes has occurred."\footnote{65} While Scalia has never definitively spelled out the parameters of his faint-hearted

\footnote{59. In Michael H. v. Gerald D., 491 U.S. 110, 125 (1989), Scalia denied a due process challenge by a biological father who sought parental rights for a child conceived during his relationship with a married woman. He found substantial common law roots for the statute, based on an aversion to illegitimacy and the protection of the "peace and tranquility of States and families...." Id. Furthermore, finding no historical support for "adulterous natural fathers" in the common law, Scalia refused to find that this biological father had any due process rights. Id. at 125–27. In an extended footnote, Scalia argued that the Court should refer to "the most specific level at which a relevant tradition protecting or denying protection to, the asserted right can be identified." Id. at 127 n.6. But see Lawrence H. Tribe & Michael C. Dorf, Levels of Generality in the Definition of Rights, 57 U. Chi. L. Rev. 1057, 1086, 1108 n.172 (1990).}


\footnote{61. As practical matter, Scalia acknowledges the difficulties of applying it correctly—the need for an "enormous mass" of materials of often questionable reliability and the discipline to put on the "beliefs, attitudes and philosophies, prejudices and loyalties" of an "earlier age." Scalia, supra note 23, at 856–57. These tasks, Scalia recognizes are "sometimes better suited to the historian than the lawyer." See id.}

\footnote{62. See Scalia, supra note 20, at 45. All too often, Scalia’s historical assertions remain unchallenged by other Justices who prefer to contest him on a higher methodological plane. Compare Gerald D., 491 U.S. at 124–26 with id. (Brennan, J., dissenting).}

\footnote{63. See Scalia, supra note 23, at 864.}

\footnote{64. Scalia, supra note 23. at 861. 864 ("[I]n its undiluted form, at least,...is medicine that seems too strong to swallow," and therefore, "in a crunch I may prove [to be] a faint-hearted originalist."). Scalia is also willing to "adulterate" originalism with the doctrine of stare decisis. See id. at 864.}

\footnote{65. Id. at 864.}
exception, he has said that such a societal shift must appear in "extant" sources. The sole example he has offered of an extant source is widespread and one-sided state legislation permitting or condemning the practice.

The requirement for widespread extant verification of social evolution, however, reveals the limited reach of Scalia’s faint-heartedness. In his Originalism article, Scalia used public flogging as an example of a historical practice permissible at ratification, but one he would be unlikely to sustain if reenacted by a legislature today. Without specific proof, Scalia asserted that there is sufficient evidence of an evolution of societal attitudes towards flogging. In the next breath, however, Scalia stated that he also could not “imagine such a case’s arising either.” In other words, to demonstrate that societal attitudes have truly evolved, Scalia wants democracy’s hard proof in “extant legislation.” Neither opinion polls nor, even worse, the Court’s finger in the wind will suffice. But, if societal mores have changed so significantly that a practice now is either basically forbidden by statutes or no longer imposed by state action, it is doubtful that the issue would reach the Court. Thus, Scalia’s threshold for departing from originalism is so high that while theoretically possible, its conditions could rarely, if ever, be met. Not surprisingly, Scalia has yet to concede that the conditions for faint-hearted originalism have been met while he has been a sitting Justice.

Even with faithfulness to text and history, Scalia recognizes that the open-ended nature of much of the Constitution’s language requires the Court to create constitutional doctrine in a manner similar to the development of the common law. It is in these waters that the final leg of Scalia’s methodology comes into play—the clear rules principle.

3. The Clear Rules Principle

The conventional wisdom has always been that the common law, case-by-case approach is “the course of judicial restraint, ‘making’ as little law as possible in order to decide the case at hand.” Scalia disagrees. He asserts that

67. See id. at 865 (focusing on objective signs such as legislation to assess the evolution of society’s views towards punishing minors as adults). Scalia argues that to permit judges to make nuanced decisions about the level of societal change necessary to shrug off the constraints of history invites personal values back into the process. Thus, he prefers to err on the side of restraint—in his words, to be a “librarian who talks too softly.” Scalia, supra note 23. See, e.g., Montana v. Egelhoff, 518 U.S. 37, 47 (1996) (declining to adopt a “new common-law” rule which would allow intoxication to be considered in determining specific intent, because such a rule is inconsistent with historical practices.).
68. See Scalia, supra note 23 at 861–62 (stating that flogging is unlikely to withstand an Eighth Amendment cruel and unusual analysis).
69. Id. at 864.
70. For example, in Pacific Mutual Life Ins. Co. v. Haslip, Scalia concurred only in the judgment stating that “punitive damages assessed under common-law procedures are far from a fossil or even an endangered species.” 499 U.S. 1, 39 (1991) (Scalia, J., concurring in judgment).
71. Scalia, supra note 14, at 1179.
both the common law approach and its modern equivalent, the balancing test, actually leave judges free to decide the next case according to their own preferences. Moreover, because balancing tests use multiple factors, it is even more difficult to prove inconsistent reasoning from case to case, allowing the re-intrusion of judicial bias. On the other hand, Scalia asserts that clear rules of general application constrain not just the lower courts, but the Supreme Court as well. "Only by announcing rules do we hedge ourselves in." Scalia recognizes, however, the prevalence of balancing tests in precedent and that some constitutional language inevitably requires their usage. Therefore, all he urges is that "those modes of analysis be avoided where possible; that the Rule of law, the law of rules, be extended as far as the nature of the question allows...."

Although framed only as a preference, Scalia's insistence on clear rules rather than balancing tests in constitutional cases should not be underestimated. According to Kathleen Sullivan, it is the rules versus standards divide that is most responsible for the frequent rifts between Scalia and other Justices on the current Court. Scalia's opinions chide these Justices for a host of clear rule violations, including creating new, unclear rules, applying flexible balancing tests that fail to

72. See id. at 1179. See also Eric J. Segall, Justice Scalia, Critical Legal Studies and the Rule of Law, 62 Geo. Wash. L. Rev. 991, 1002 (1994) ("Although many scholars believe that the legal realists forever cast doubt on rule-oriented jurisprudence, Justice Scalia's message is that the realists were wrong and that rules and language can and should constrain judicial choice.").

73. See Scalia, supra note 14, at 1180.

74. See id. at 1183; See also Jones v. Thomas, 491 U.S. 376, 388 (1989) (Scalia, J., dissenting) (criticizing majority for departing from clear rule for multiple punishment cases); Employment Division v. Smith, 494 U.S. 872 (1990) (attempting to discern a clear rule in the Court's free exercise cases).

75. Scalia, supra note 14, at 1179–80 (arguing that general rules control even if "the next case should have such different facts that my political or policy preferences regarding the outcome are quite opposite... ").

76. Scalia uses the Fourth Amendment's "reasonableness" requirement as an example of constitutional language that calls for elaboration by the Court. See California v. Acevedo, 500 U.S. 565, 583 (1991) (Scalia, J., concurring in judgment).

77. Scalia, supra note 14, at 1187. Scalia advances additional reasons for his clear rules preference including the value of uniformity and predictability. See id. He also argues that clear rules embolden judges to be courageous in the face of an unpopular decision such as to protect a criminal defendant's rights. See id. at 1180. Lastly, Scalia suggests that the case-by-case approach is even more ill suited to our system, because the Supreme Court reviews only a small percentage of cases. See id. at 1178.


79. See United States v. Fordice, 505 U.S. 717, 750 (1992) (Scalia, J., concurring in part and dissenting in part) (Court's rule that "'substantially restrict[ing] a person's choice of which institution to enter' is not clear.").
provide guidance or restrain judicial discretion, and undermining previously clear rules by creating new exceptions, all to justify their preferred outcome.

In addition to the conflict between flexible standards and clear rules, another important mode of legal argument conflicts with Scalia's clear rules principle—metaphoric reasoning. A metaphor is essentially a vehicle to assert a condensed analogy. But a metaphor may also contain a "concealed argument" because it "asserts a resemblance but does not usually explain it," leaving the similarities to be drawn "to the reader's imagination." Thus, metaphors allow judges to create new law without explicit acknowledgment or setting precise boundaries. This imprecision leaves metaphors open to disparate, yet supportable, interpretations. Thus understood, metaphoric reasoning is clearly contrary to Scalia's clear rules principle, and indeed, to his motivating principle to limit judicial discretion. Therefore, it is not surprising that Scalia has also used clear rule arguments to criticize the Court for resorting to metaphoric reasoning in a number of cases.

80. See Granfinanciera v. Nordberg, 492 U.S. 33, 70 (1989) (Scalia, J. concurring in part and concurring in the judgment) (arguing that "public rights" doctrine exception to the Seventh Amendment jury requirement should require that government be a party and central features of the Constitution must be "anchored in rules, not set adrift in some multi-factor balancing test"); Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) (Scalia dissenting) (arguing for all or nothing rules on standard of limitations question because any other rule permits judicial law making).


83. Boudin, supra note 82, at 406. See also Hibbits, supra note 82, at 234 ("In extreme circumstances, a good metaphor may be so compelling that it altogether subverts its referent's original meaning. No longer recognized as a metaphor, it redefines truth on its own limited terms."); Steven Winter, The Metaphor of Standing and the Problem of Self Governance, 40 STAN. L. REV. 1371, 1387 (1988). See generally METAPHOR AND THOUGHT (A. Ortony ed., 1979). Thus, metaphor has "a natural appeal to lawyers versed in common law reasoning." Boudin, supra note 82, at 406.

84. See Boudin, supra note 82 (arguing that metaphors have been integral to growth and development of antitrust doctrine).

85. Metaphoric reasoning fails to constrain discretion because the next judge may understand the metaphor differently. Moreover, by purporting to stand for rules, judicial metaphors hide judicial discretion under the cover of evocative language. In addition, metaphors are antagonistic to textualism both by nature and by design. The metaphor resists and in fact, is a substitute for plain meaning.

86. See American Dredging Co. v. Miller, 510 U.S. 443, 467 (1994); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 679 (1990). However, as shown later,
4. The Interplay of the Methods: Hierarchy and Compatibility

Scalia’s contention that he has established a cohesive methodology rather than three independent tools of constitutional analysis is dependent upon several additional assertions. First, to be capable of consistent application, the components of a methodology must be arranged in a definite hierarchy. Otherwise, the choice of components can be influenced by the desired result. Scalia’s stated hierarchy of constitutional analysis is the plain meaning of the text, followed by historical practices, if necessary, and then clear rules.87 Scalia also asserts that each component relates back to the text of the Constitution as its ultimate source of authority. For example, in the context of the clear rules principle, Scalia has said that the Court cannot create rules “out of whole cloth,” but must find some basis for them “in the text that...the Constitution has provided.”88

Moreover, Scalia contends that his components are compatible and, indeed, mutually reinforcing. For example, he asserts that each component operates to constrain judicial discretion.89 Thus, whatever part or parts of the methodology come into play in a given case, the resulting analysis still advances the motivating principle of the methodology. Each component also employs similar analytic tools. For example, textualism and the clear rules principle share a central faith in clarity of language to express and control meaning in judicial interpretation.90 Therefore, Scalia claims that, in most cases, analysis under any component leads to the same outcome.91 Thus, even when the text provides a clear answer, he will often cite historical practices to buttress his textual interpretation.92

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87. See Scalia, supra note 14, at 1184–85.
88. Id. at 1183.
89. For textualism and clear rules, close attention to a semantic exegesis, either of the Constitution or prior precedent, is the primary means of judicial self-restraint. See id. at 1184. For originalism, Scalia believes the “raw material for the general rule is readily apparent” in historical practices. Id. at 1184.
90. “Of course, the extent to which one can elaborate general rules from a statutory or constitutional command depends considerably upon how clear and categorical one understands the command to be, which in turn depends considerably upon one’s method of textual exegesis. For example, it is perhaps easier for me than it is for some judges to develop general rules, because I am more inclined to adhere closely to the plain meaning of a text.” Id. at 1183–84.
91. See id. at 1183.
Scalia also relies on the protessed compatibility of the components to adjust to the circumstances of different cases. Thus, where constitutional language is too open-ended to be amenable to a plain meaning approach, Scalia either falls back on historical practices to limit the scope of the text or he grafts (or crafts) a general rule out of historical practices or precedent.\(^\text{93}\) Therefore, while each component of the methodology is important in its own right, the principles of hierarchy and compatibility lie at the heart of his claim that he has achieved a consistent constitutional methodology with resilience against judicial discretion.

5. The Methodology and the Ideology

When examined in depth, it is clear that despite Scalia's desire to turn judges into Jeffersonian "automatons,"\(^\text{94}\) his methodology still requires difficult judgments and tasks. In particular, originalism requires not just difficult historical research, but also nuanced decisions about the import of often incomplete and conflicting records.\(^\text{96}\) Moreover, Scalia is often faced with precedent that conflicts with his methodology. While Scalia contends that "stare decisis is not part of my originalist philosophy: it is a pragmatic exception to it,"\(^\text{96}\) he still has no clear rule that settles whether, in a particular case, he should submit to the existing doctrine for stability and predictability or overturn precedent in favor of an outcome consistent with his methodology.\(^\text{97}\) Thus, like any system of interpretation, Scalia's

more limited scope for judicial discretion than would rejecting the common law in *Burns.*" Popkin, *supra* note 34, at 1187 n.37.

93. See 44 Liquormart, Inc. v Rhode Island, 517 U.S. 484, 517 (1996) (Scalia, J., concurring in part and concurring in the judgment) (interpreting the broad guarantees of the freedom of expression by examining state legislative practices prevalent at the adoption of the First Amendment in order to define free speech).


95. Scalia agrees that judges can honestly reach different outcomes, for example, based on different interpretations of the historical record. See Scalia, *supra* note 20, at 45.


97. Scalia acknowledges that stare decisis brings "certainty and stability into the law and protect[s] expectations of individuals and institutions that have acted in reliance on existing rules." Walton v. Arizona, 497 U.S. 639, 673 (1990). Therefore, Scalia sometimes votes to uphold precedents that conflict with his reading of text and tradition. See Granfinanciera v. Nordberg, 492 U.S. 33, 66 (1989) (public rights exception is inconsistent with absolute language of Article III but Scalia is willing to accept the doctrine based on its pedigree in *Murray's Lessee* and its sensible rationale). See id. (citing Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272 (1855)). Scalia acknowledges that "*stare decisis* affords some opportunity for arbitrariness—though I attempt to constrain my own use of the doctrine by consistent rules." Scalia, *supra* note 96, at 140. A review of his various statements on this subject reveals what is, at best, a flexible standard and, at worst, a series of contradictory and malleable axioms. For example, in *Planned Parenthood v. Casey*, Scalia states he will abide by precedent when either: (1) the case was correctly decided, or (2) the case has "succeeded in producing a settled body of law." Planned Parenthood v. Casey, 505 U.S. 833, 983 (1992) (Scalia, J., concurring in part and dissenting in part) (stating that he is not bound by *Roe v. Wade* because that case was "plainly
constitutional methodology leaves ample room for manipulation. And because the material is complex, subterfuge is not easy to detect without retracing each analytic or historical step.

In addition, although the methodology is motivated by Scalia's antipathy to judicial discretion, his motivating ideology and the components of his methodology are distinct. Thus, while each of the components arguably tends to be biased against an expansive reading of the Constitution, the methodology itself does not guarantee that in every case, a reasonable interpretation of the text or historical practices will necessarily yield a decision that is hostile to more openended judicial powers of interpretation. In fact, given the broad law-making authority of the common law courts, Scalia's historical practices approach might yield quite the opposite result on a number of judicial power issues, and thus come into conflict with his ideology. In fact, this is the very conflict Scalia faced in Dixon. Before turning to that case, however, the next Part explores Scalia's opinions to establish a baseline for his pre-Dixon double jeopardy doctrine before that 1993 decision.

III. J U S T I C E S C A L I A A N D D O U B L E J E O P A R D Y

A. An Overview of the Same Offense Doctrine

The Fifth Amendment states, in pertinent part, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." In recent decades, courts and commentators have struggled mightily to define when two crimes are the "same offence" for purposes of the Double Jeopardy Clause. This issue caused a doctrinal meltdown between 1989 and 1993, when the Supreme Court first narrowly endorsed an expansive new test in Grady v. Corbin, only to reverse itself just three years later in the fractured United States v. Dixon opinion. In light of this unusual about-face, some doctrinal and historical background is necessary to place Scalia's participation in the 'same offense' controversy in context.

1. The Doctrinal Debate: The "Elements Test" Versus Conduct Tests

The Court has long viewed the Double Jeopardy Clause as protection against two evils: successive prosecutions and multiple punishment. Successive

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prosecution involves a second prosecution by the same sovereign for what the defendant contends is the "same offence" after either a conviction or an acquittal. Multiple punishment involves one trial but with multiple charges. Here the claim is that two or more of the charges, although named differently, are really the "same offence." Because the Court has viewed the prohibition on successive prosecutions as the core guarantee embodied in the Fifth Amendment, it has been this definition of "same offence" in successive prosecution cases that has engendered the most controversy. Under a narrow definition of sameness, successive prosecution of the same underlying conduct is often possible by charging the defendant under two slightly different statutes. A broader definition, on the other hand, is more likely to force the government to bring all charges stemming from a criminal event in one indictment, thus sparing a defendant the risks and burdens of repeated trials.

Proponents of a narrow interpretation endorse the common law elements test. The elements test looks only at the statutory elements of each offense. If each offense contains an element that the other does not, then double jeopardy is not offended. For example, rape and statutory rape are not the "same offence" under this test. Although each involves sexual intercourse, rape contains the separate element of force, and statutory rape the element that the female was underage. A greater offense and a lesser-included offense are considered the "same" under the elements test because the lesser offense has no elements not contained in the greater offense. For example, robbery is a lesser-included offense of armed robbery because all the elements of robbery are contained in armed robbery. Therefore, successive prosecution of greater and lesser-included offenses is also prohibited under the elements test.

Ashe v. Swenson, 397 U.S. 436 (1970); George C. Thomas III, Double Jeopardy: The History, The Law at 15–16 (1998) (setting forth a theory that double jeopardy protects equally against both). A separate issue has been whether the same or different tests should apply to each prong. See Vandana Venkatesh, Double Jeopardy and the Excessive Fines Clause, 48 Tax Law. 911, 920 (1995) (noting "considerable blurring between the multiple punishment and successive prosecution prongs of double jeopardy analysis."). Scalia no longer believes the multiple punishment prong is required by the text and he would abolish it. See infra note 218.


103. See id.

104. See Abney v. United States, 431 U.S. 651, 660–62 (1977). Under the multiple punishment prong, a court's duty is simply to ensure that the defendant's punishment is not more than the legislature intended. See Missouri v. Hunter, 459 U.S. 359, 368 (1983). But see Thomas, supra note 101, at 98 (arguing there is no historical, textual, or theoretical support for distinguishing between two prongs; both protect against two punishments for same blameworthy act).

105. See Thomas, supra note 102 at 1391–94.


108. See D.C. Pattern Jury Instructions §§ 4.60, 4.63.

The elements test is a predictable, bright line rule. It accords traditional deference to the legislative and executive branches to define and enforce the criminal law. The critical defect of the elements test is that it essentially cedes to the legislature the question of when successive prosecutions are permitted. If the legislature defines two offenses so that each contains a single distinct element, then, no matter how trivial these different elements may be, the Double Jeopardy Clause is not offended. No matter how congruent the underlying conduct is, or how unfair successive trials may be under the circumstances, the sole inquiry is whether each offense contains an element the other does not.\textsuperscript{110}

Opponents of the elements test have advanced a variety of standards that would find more offenses the same, and thus bar more successive prosecutions. The key feature of these tests, called same conduct or same transaction tests, is that all mandate some inquiry beyond the statutory elements into the facts of the event charged.\textsuperscript{111} If the requisite overlap of conduct or transaction exists between the government's evidence on each charge, the offenses are the same. Varying differ over the core unit by which to determine the requisite sameness.\textsuperscript{112} Putting aside questions of constitutional legitimacy for the moment, from a policy perspective, it has been argued that conduct-based tests overly constrict prosecutorial discretion.\textsuperscript{113} In addition, conduct tests require a fact-intensive review, making them more difficult to implement than the elements test.\textsuperscript{114}

Alas, the controversy over the same offence clause has not been merely a two-way battle between the common law elements tests and some modern conduct-based replacement. Although changes in the substantive criminal law and

\textsuperscript{110} See Garrett v. United States, 471 U.S. 773, 778 (1985) ("The rule stated in Blockburger was applied in as a rule of statutory construction to help determine legislative intent."). See also Ohio v. Johnson, 467 U.S. 493, 499 (1984) (stating that the question under the Double Jeopardy Clause whether punishments are multiple is essentially one of legislative intent); Albernaz v. United States, 450 U.S. 333, 337 (1980).


\textsuperscript{113} To completely insure against a double jeopardy bar under a conduct rule, the government would have to charge all offenses arising out of a transaction in a single prosecution. See, e.g., Ashe, 397 U.S. at 468–70 (Burger, C.J., dissenting); United States v. Felix, 503 U.S. 37, 107 (1992); Phillip S. Khinda, Undesired Results Under Halper and Grady: Double Jeopardy Bars on Criminal RICO Against Civilly-Sanctioned Defendants, 25 COLUM. J.L. & SOC. PROBS. 117, 145–46 (1991); Kirschheimer, supra note 111, at 534 ("result[s] in disadvantage for the state"). This is particularly problematic under modern statutes designed to attack complex criminal organizations that often employ predicate offenses within their definition.

\textsuperscript{114} See infra Parts III.C.3, V.C.2.
prosecutorial practices revealed the flaws of the common law elements test, the Supreme Court was loath to openly or fully abandon it. Instead, the Court responded by manipulating or avoiding the elements test to create limited exceptions. These exceptions looked to conduct, but only in certain contexts, and to a lesser extent than required by a true conduct test.

2. The Historical Development of the Elements Test

At common law, an intentional homicide was indicted as a single count of murder. If found guilty, the defendant was sentenced to death: Steal a horse; face indictment for horse thievery; and receive punishment by hanging. Darkly put, the early criminal law’s emphasis on capital punishment left little room for successive prosecutions of the same offense, at least after conviction. As a result, double jeopardy issues rarely arose in the early common law period, and the few existing cases are unclear about the doctrinal basis for the result. Even if a defendant was acquitted, under the early and simpler criminal offenses of the common law, there generally was only one applicable offense. For that reason, the early double jeopardy cases involved an acquitted defendant who was re prosecuted for exactly the same offense. The common law’s response to successive prosecution for the exact same offense was the double jeopardy pleas: autrefois acquit, autrefois convict, and autrefois attaint. Typical of the

115. See infra Part III.C.
116. See infra Part III.C.
117. See infra Part III.C.
119. English legal writers make almost no mention of double jeopardy until Hale in the 17th Century, and even his discussion of the autrefois plea does not really encompass the modern concept. See Jill Hunter, The Development of the Rule Against Double Jeopardy, 5 J. LEGAL HIST. 3, 11–16 (1984). In 1642, Lord Coke’s Second Institutes gave the first formulation of what would become modern double jeopardy. See id. at 17. However, historians now suggest that Coke’s approach was more opinion of how the law ought to be rather than a restatement of English law as it existed. See id. at 18–20. See also Marion S. Kirk, Jeopardy During the Period of the Year Books, 82 U. PA. L. REV. 602, 616–17 (1934); Donald E. Burton, Note, A Closer Look at the Supreme Court and the Double Jeopardy Clause, 49 OHIO ST. L.J. 799, 800 (1988).
120. This was sometimes possible under a system that allowed both private prosecution (appeal) and indictment by the king, and trials in different courts with overlapping jurisdiction (ecclesiastic courts and the king’s courts). See THOMAS, supra note 101, at 28, 74–75, 77.
121. Autrefois means formerly or at another time. See Black’s Law Dictionary 134 (6th ed. 1990). Autrefois acquit is a bar to prosecution for an offense for which the defendant was previously acquitted of. See id. Autrefois convict bars prosecution if the defendant had been convicted of the same crime. See id. Autrefois attaint means that the defendant had been attained for one felony, and therefore cannot be criminally prosecuted for another. See id. In addition, these principles extended to forbid a new prosecution for the same offense after conviction in a foreign jurisdiction. See 4 William Blackstone, Commentaries *329–31, 335. See also Grady v. Corbin, 495 U.S. 508, 530 (1990) (Scalia, J., dissenting) (discussing the historic import of these writs).
convoluted rules of the common law, these pleas provided some, but not complete, protection from successive prosecutions. 122

The elements test was not born until the Eighteenth Century, when the first successive prosecution cases involving different offenses were recorded. Interestingly, these cases were not the result of prosecutorial vindictiveness, but of prosecutorial error. Under the formalistic writ system, crimes had to be pleaded very specifically (e.g., burglary with intent to steal rather than just generic burglary). 123 If the evidence at trial proved a slightly different offense (even by one element), then the defendant had to be acquitted. With the newly conceived elements test, however, there was no bar to a new indictment charging the correct crime. 124 For example, in the frequently cited case, The King v. Vandercomb & Abbot, the defendants were incorrectly charged with “burglary and stealing goods” and obtained a mid-trial acquittal. 125 The court upheld a second indictment under the elements test for “burglary with intent to steal” because the new offense required proof of larceny while the prior charge was based upon proof of intent to commit a felony. 126 With this historical background, the development of the elements test can be seen as a reasonable effort by the common law courts to foreclose a technical windfall for criminals, rather than as insensitivity to the inchoate, but deeply rooted double jeopardy principle. 127

122. See Thomas, supra note 101, at 31.
123. This formalism also extended to victims named in the indictment, which explains why a second indictment charging the same offense but a different victim was also permissible. See 2 W. Hawkins, Pleas of the Crown, ch. 2 § 35 (4th ed. 1762). English criminal procedure also severely restricted the prosecutor’s ability to bring more than one charge in a single trial. See Ashe v. Swenson, 397 U.S. 436, 453 (1970) (Brennan, J., concurring); Martin L. Friedland, Double Jeopardy 163–64 (1969).
124. As a treatise of the period stated, “The plea of auterfoit acquit will be vicious if the offences charged in the two indictments be perfectly distinct in point of law, however nearly they may be connected in fact.” 1 T. Starkie, Criminal Pleading 322–23 (2d ed. 1822). See also 2 W. Hawkins, Pleas of the Crown, ch. 35 § 5 (4th ed. 1762) (stating that the same conduct may be prosecuted twice if it constitutes different offenses).
125. 168 Eng. Rep. 455, 457 (K.B. 1796). The prosecution was technically flawed because on the date of the offense noted in the indictment, the defendants had been caught in the house before they were able to remove any goods, although they had previously broken into this vacant house and stole items. See id. at 459–60.
126. Id. See also Turner’s Case, 84 Eng. Rep. 1068 (K.B. 1708) (acquittal for burglary of home did not bar indictment for theft of property of servant of that home); Vaux’s Case, 76 Eng. Rep. 992 (Q.B. 1591) (“if a man be convicted...by verdict...upon an insufficient indictment, and no judgment thereupon, he may be again indicted and arraigned, because his life was never in jeopardy....”); 2 M. Hale, Pleas of the Crown, ch. 31, p. 245–46 (1736 ed.); 2 W. Hawkins, Pleas of the Crown, ch. 36, § 7, p. 526 (4th ed. 1762); 2 C. Petersdorff, Abridgment 738 (1825); 1 T. Starkie, Criminal Pleading, ch xix, p. 322 (2d ed. 1822).
Despite some claims to the contrary, some form of the common law elements test was therefore likely to have been the double jeopardy test with which the drafters of the Bill of Rights were familiar. Moreover, while historians have not discovered the drafters' intent in choosing the "same offence" language for the final version of the Fifth Amendment, the state courts and the Supreme Court readily adopted the common law elements test as the proper standard when the first American cases arose. For example, in Morey v. Commonwealth, the Massachusetts high court upheld successive prosecutions for the separate crimes of "lewd and lascivious cohabitation" and "adultery." In its opinion, the court stated that the double jeopardy clause is not offended if "each statute requires proof of an additional fact which the other does not." The Morey formulation was adopted by the Supreme Court in United States v. Gavieres, which permitted successive prosecutions for "behaving in an indecent manner in a public place" and "insulting a public officer in his presence."

The emergence of the "same offence" question as a difficult constitutional issue can be traced to the emergence of modern criminal codes and the unrestrained use of these codes by prosecutors. As society grew more complex during the Nineteenth and Twentieth Centuries, legislatures responded

128. One leading historian of double jeopardy finds some early American support for a conduct based test. See JAY A. SIGLER, DOUBLE JEOPARDY 14, 67 (1969). However, the majority of the early cases Professor Sigler cites do not seem to stand for this proposition. See Holiday v. Johnson, 313 U.S. 342 (1940); Ball v. United States, 163 U.S. 662 (1896). But see Copperthwaite v. United States, 37 F.2d 846 (6th Cir. 1930).

129. The Fifth Amendment went through several versions in committee. While earlier drafts may have been rejected as unclear or misleading, the specific reason(s) for final changes went unrecorded. See Sigler, supra note 128, at 28–33. The "same offence" was a term from the common law, which suggests that the drafters intended to adopt common law practices. On the other hand, the final language of the Amendment was different from all forms of double jeopardy then existing. In the final analysis, Professor Sigler is probably correct in saying that "[t]he drafters of the double jeopardy clause were so steeped in common law that they tended to perpetuate its inadequacies rather than declare a precise protection for a criminal defendant." Id. at 32–33.

130. These cases most often arose on appeals from the territories because the Double Jeopardy Clause did not apply to the states until 1969. See Benton v. Maryland, 395 U.S. 784, 786 (1969). State criminal proceedings needed only to comply with state double jeopardy principles or Fourteenth Amendment due process.

131. 108 Mass. 433 (1871).

132. Id.

133. Id. at 434.

134. 220 U.S. 338 (1911).

135. Id. at 344 (discussing offenses defined under the United States criminal code then governing the Philippines territory). Harkening back to the debate on originalism, however, this extant history still tells us nothing about whether the drafters intended the Double Jeopardy Clause to be a static enshrinement of the common law test or an aspirational principle that would adapt with the times.

136. See Charles C. Cantrell, Double Jeopardy and Multiple Punishment: An Historical and Constitutional Analysis, 245 S. TEX. L. REV. 735, 750 (1983) (arguing that double jeopardy doctrine evolved to respond to "the dangers and realities of the existing legal system").
with comprehensive criminal codes. The multiplication of criminal offenses with overlapping coverage resulted in more opportunities for successive prosecutions of the same criminal event with slightly differing offenses. The development of full-time, politically motivated prosecutors' offices at both the state and federal levels also created a large pool of government litigators who had incentives to pursue defendants when they were not satisfied with the outcome of a first proceeding. As fighting crime became seen as good politics, aggressive prosecution, including successive prosecutions, of the reviled crime of the moment became appealing. Separately, fragmentation of state prosecutorial authority among counties and townships also gave rise to multiple prosecutions as different prosecutorial offices, although legally the same sovereign, each pursued their own agendas.

These developments spurred some courts and commentators to recognize that the common law elements test might no longer provide sufficient protection from successive prosecutions. The Supreme Court's response has proceeded on two independent tracks. At first, the Court employed a back-door approach: it created partial exceptions to the elements test but did not acknowledge that it was undermining the common law rule. After the Double Jeopardy Clause was extended to the states in 1969 in Benton v. Maryland, the Supreme Court was forced to confront the same offense issue more frequently. This led a minority, spearheaded by Justice Brennan, to openly express dissatisfaction with the elements test and call for its abandonment in favor of a same transaction test.

3. The Back Door: The "Species" of Lesser-included Offense and Collateral Estoppel Exceptions

In theory, the common law elements test and the conduct-based tests are exclusive propositions: either the statutory elements are the end of the question or some additional, case-specific inquiry is required. However, beginning in the Nineteenth Century, the Court blurred this distinction in some lesser-included offense cases. Thus, although the common law elements test did not distinguish

139. Therefore, it is not surprising that the offenses charged in successive prosecution cases over the years reveal a great deal about the politics of crime. see In re Nielsen, 131 U.S. 176 (1889) (prosecuting bigamy in the 1880s to suppress Mormonism); Garrett v. United States, 471 U.S. 773 (1985) (prosecuting drugs in the 1980s); United States v. Dixon, 509 U.S. 688 (1993) (prosecuting domestic violence in the 1990s).
140. Sometimes, this was a case of one prosecutorial entity not knowing what another was doing. See Illinois v. Vitale, 447 U.S. 410, 412–13 (1980).
141. See Horack, supra note 111, at 812; Kirschcheimer, supra note 111, at 542–44.
142. See infra notes 145–174 and accompanying text.
144. See infra notes 182–189 and accompanying text.
between offenses that were simply the "same" and offenses that were the "same" because one was a lesser-included of the other, the Supreme Court began to develop a slightly different test for the lesser-included subset of same offense cases.

a. In re Nielsen

The earliest Supreme Court case of this ilk was In re Nielsen. As in the Morey case, Nielsen involved successive prosecutions for illicit cohabitation and adultery. Unlike Morey, the Supreme Court found a double jeopardy violation, despite the fact each statute clearly contained an element that the other did not. Many have therefore claimed that Nielsen employed a conduct test. As best explained by Akhil Amar and Jonathan Marcus, Nielsen was not a same conduct case. Rather, what the Nielsen Court did was "shoehorn" one offense into becoming a lesser-included of the other with some inventive statutory interpretation. Still, Nielsen is important for three reasons. First, it laid the foundation for the Court's use of lesser-included offense analysis to avoid a literal application of the elements test. Second, Nielsen changed the elements test's analysis of greater and lesser-included offenses by importing legislative intent analysis, albeit creative, into the test. Prior to Nielsen, the elements test meant

145. 131 U.S. 176 (1889).
146. Cohabitation required proof that a man was living with more than one woman and the adultery statute required proof that the man or woman was married. See id. at 185–86.

147. See Akhil Reed Amar & Jonathan L. Marcus, Double Jeopardy After Rodney King, 95 Colum. L. Rev. 1, 41–43 (1995). Conduct test proponents rely on Nielsen's use of the word "incidents" for their claim that the case supports their approach. See United States v. Dixon, 509 U.S. 688, 753 (1993) (Souter, J., concurring in the judgment in part and dissenting in part). Justice Scalia and others, however, are probably correct that in light of the Court's reliance on Morey, Nielsen must have used "incidents" synonymously with "elements." See id. at 705.

148. See Amar & Marcus, supra note 147, at 42. The Court claimed, without any citation, that "[i]t is well known" that the cohabitation statute "was aimed against polygamy, or the having of two or more wives and it is construed by this court as requiring, in order to obtain a conviction under it, that the parties should live together as husband and wives." Nielsen, 131 U.S. at 189. Based upon this inferred statutory intent, the Court took it upon itself to rewrite the elements of the cohabitation statute in such a way as to make adultery a lesser-included offense of cohabitation. Thus interpreted, the elements of cohabitation were: (1) a man living with more than one woman, (2) as husband and wives, and (3) sexual intercourse between this man and the women. The elements of adultery were; (1) sexual intercourse between a man and woman, and (2) one of whom was married to someone else. Since, it was impossible to be legally married to more than one woman at a time, a cohabiting defendant was always a married man (to one of the putative wives) while having sexual intercourse with at least one woman not his wife. Thus, all the elements of adultery, marriage of a party and sex, were necessarily included in the cohabitation offense. Amar's understanding of Nielsen as a bastardized application of the elements test is supported by the opinion's favorable citation to Morey for the applicable rule, even though the Court spent most of the opinion woefully struggling to distinguish Morey on the facts. See id. at 187–89.
comparison of the statutory elements—period. See Amar & Marcus, supra note 147, at 29.

150. See id.

151. Adultery, the putative lesser offense, was punishable by three years imprisonment, whereas unlawful cohabitation, the putative greater offense, had an upper limit of a $300 fine or six months in jail. See Nielsen, 131 U.S. at 176–77.


156. "The essential elements of robbery with a firearm are: a wrongful taking of personal property in the possession of another from his person or presence against his will, by means of force or fear, and with the use of firearms." Id. (citing Okla. Stat. tit. 21, § 801 (1971)). “[T]he elements [of felony-murder] are: homicide accompanied by a premeditated design to effect the death of the person killed, or homicide perpetrated by a person engaged in the commission of any felony.” Id. (citing Okla. Stat. tit. 21, § 801 (1971)).

157. Brennan concurred on the grounds that a same transaction test should apply to all successive prosecution cases. See Harris v. Oklahoma, 433 U.S. 682, 683 (1977) (Brennan, J., concurring).

158. The Court wrote, “‘[a] person [who] has been tried and convicted for a crime which has various incidents included in it, ... cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.’” See id. at 683 (alteration in original) (quoting In re Nielsen, 131 U.S. 176, 188 (1889)).
However, the Court engaged in no further analysis of the elements of the felony-murder statute.

Beneath the surface a bit more was going on. As in Nielsen, the Court actually had to massage the statutory elements to achieve the result it wanted. The Court substituted the predicate felony proved in the felony-murder trial, "robbery with a firearm," for the statutory element, "any felony" in the felony-murder statute. This done, "robbery with a firearm" became a lesser-included of felony-murder in this case. This step, however, violated the elements test's sole focus on statutory elements because either the indictment or the trial record had to be consulted. Thus, Harris was an unacknowledged move in the direction of a case-specific, conduct-based test, at least in the context of compound statutes.

The Court's substitution of the predicate felony charged for the general felony element in the statute was not illogical. After all, the felony-murder statute expressly referred to all felonies. Thus, the Harris Court could have argued that an exception to the traditional elements test was warranted to effectuate the apparent intent of the Oklahoma legislature. But Harris made no legislative intent argument. Instead, Harris' obscure holding can be boiled down to this: if the Court finds that two offenses resemble a traditional greater and lesser-included, it can so hold, without resort to legislative intent and despite a different result under the elements test.

Harris' failure to either openly proclaim a new successive prosecution test for compound offenses or to resort to legislative intent to justify that test illuminates the Court's central dilemma in modern successive prosecution cases. If the successive prosecution prong is to have independent force to safeguard the core protections enshrined in the Double Jeopardy Clause, the Court must reserve the power to reject a legislative determination that two offenses are distinct. Neither the elements test, which is a proxy for legislative intent, nor an explicit appeal to legislative intent so empower the Court. Thus, the Harris Court could not argue that legislative intent controlled without weakening an argument that it could override that intent in a different case. On the other hand, the majority of the Court was apparently unwilling to abandon precedent and openly engage in judicial lawmaking. Therefore, while at common law the elements test had defined the extent of judicial power in successive prosecution cases, buried in Harris was

159. See id. at 682–83.
160. Id. at 682.
161. Id.
162. See id.
163. See id.
164. The Court has held that the Double Jeopardy Clause protects the defendant's interest in finality, deters the government from wearing down defendants with its superior resources, honing its case in successive proceedings, or seeking additional penalties (due to either acquittal or judicial leniency), and to safeguard defendants' personal interests in being free from continual anxiety, embarrassment, and fear from repeated efforts to convict. See Green v. United States, 355 U.S. 184, 187–88 (1957). See also Jones v. Thomas, 491 U.S. 376, 394–95 (1989) (Scalia, J., dissenting) (holding that finality is the key interest in the clause). But see Thomas, supra note 101, at 58–60 (disagreeing that harassment is a value protected by the Double Jeopardy Clause).
a subtle expansion of that power. The Court’s treatment of Harris in later cases also demonstrates the Court’s unwillingness to admit that Harris broke new ground. For example, in Illinois v. Vitale, the Court encapsulated the essence of Harris’ holding in a subtle legal metaphor, one so commonplace that its import can easily be overlooked. Specifically, the Vitale Court stated that the robbery in Harris was treated “as a species of lesser-included offense.”

Metaphoric reasoning in judicial opinions, however, is often used to mask a weak argument or an attempt to modify a doctrinal rule. Both are at work in the “species of lesser-included offense” metaphor. The word “species” has several definitions. Sometimes it is used merely as a synonym for “kind” or “sort.” As a term in biology, however, “species” describes organisms that are sufficiently genetically similar such that they are considered “related.” It is this latter, scientific definition that is ripe for metaphoric usage. For example, although they belong to the same species, Poodles and Great Danes are strikingly dissimilar in appearance. By focusing on their common scientific “dog-hood” (i.e., species), a biologist can easily reframe an observer back to underlying sameness of the two breeds. It is the familiarity and accessibility of this scientific principle of underlying sameness despite surface differences that makes the “species” metaphor appealing to legal writers.

However, the “species” metaphor, as with all legal metaphors, has the potential to mislead by short-circuiting the analysis. To logically show a relationship of sameness despite apparent differences requires two steps. First is an assertion that the two things are of the same type or kind. Second is an explanation that shows why the two things are essentially the same despite their differences (e.g., negligence and libel are the same kind of legal action because they are both torts). However, when there are logical or qualitative differences between the two things that a court wants to classify together for purposes of a legal rule, the “why” step may not be persuasive. In these instances, the evocative connotations of the “species” metaphor can be used as substitute for the second explanatory step.

165. The significance of the Court’s failure to articulate its reasoning in Harris is supported by the stark contrast between Harris and Whalen v. United States, 445 U.S. 684 (1980), a multiple prosecution case that came just three years later. Whalen involved an almost identical compound felony-murder statute, but in that case, all the Justices agreed that that legislative intent was the sole issue in question.

166. 447 U.S. 410 (1980).

167. Id. at 420 (emphasis added). The lesser-included “species” metaphor first appears in Vitale, but Justice White may have borrowed the term from the multiple punishment case, Whalen, which referred to species of felony murder statutes without referring to the lesser-included concept. See Whalen, 445 U.S. at 684.

168. See Hibbits, supra note 82, at 233.


170. Id.

171. See Hibbits, supra note 82, at 238, 300 (exploring the appeal of visual and aural metaphors); Yelnosky, supra note 82, at 823 (defending baseball metaphors in judicial opinions because of the shared cultural understanding of the game).
This is exactly what the Vitale Court did when it noted that Harris treated "a killing in the course of a robbery as itself a separate statutory offense, and the robbery as a species of lesser-included offense."\textsuperscript{172} The Court asserted a sameness between traditional lesser-included offenses and the Oklahoma felony-murder statute and its predicate felonies but never explained how or why it could do so. The Vitale Court did not argue legislative intent or that equating felony-murder and its predicate felonies with traditional greater and lesser-included offenses was necessary to be fair in some abstract sense. Instead, the Court used the "species" metaphor to convey an evocative image of sameness despite superficial differences without further explanation.

Still, why is the species metaphor in Harris significant? Even if the Court did metaphorize its Harris holding, the result in Harris seems eminently fair, and it was not obviously inconsistent with the statutory language or intent.\textsuperscript{173} The substitution of the "species" metaphor in place of a clear statement of a new rule for lesser-included offenses in double jeopardy doctrine had two important effects. First, the Vitale "species" metaphor disguised the fact that Harris broadened the common law rule for which offenses could be considered lesser-included offenses under the elements test; lesser-included offenses no longer had to be included in the statutory language of the greater offense. Second, the Vitale metaphor left unclear just how far the Court's authority to redefine the elements of offenses could be extended under this exception.\textsuperscript{174}

\textbf{c. Ashe v. Swenson}

The other pre-Dixon exception to the elements test involved the constitutionalization of criminal collateral estoppel. In Ashe v. Swenson,\textsuperscript{175} the defendant was acquitted of one count of robbery at a six-man poker game. The state reindicted and convicted the defendant for robbing a different player at the same game.\textsuperscript{176} Although this type of successive prosecution was permitted at

\textsuperscript{172} See Vitale, 447 U.S. at 420.

\textsuperscript{173} Felony-murder at common law would not have permitted this successive prosecution. Thus, it seems reasonable to alter the elements test to ensure the same outcome. Moreover, the result seems consistent with, or at least not contrary to, any unexpressed legislative intent. Felony murder in Oklahoma carried either the death penalty or a life sentence; thus, any punishment for robbery was necessarily included in that sentence. See Okla. Stat. tit. 21, § 701.7 (1971).

\textsuperscript{174} Thus, while Vitale hinted that under Harris, the Court might have the power to decide what constitutes a lesser-included offense without regard to legislative intent, the use of the "species" metaphor allowed the Court to sidestep an explicit discussion of this issue. Scalia seized upon this subtle distinction in the Dixon opinion. See infra notes 309–316 and accompanying text.

\textsuperscript{175} 397 U.S. 436 (1970). While collateral estoppel had been applied in federal criminal cases before, Ashe held that the principle was part of the Fifth Amendment. See id. at 441–42. While the Due Process Clause of the Fourteenth Amendment might have been the more natural resting place, that option was precluded by a contrary holding in Hoag v. New Jersey, 356 U.S. 464, 467 (1958).

\textsuperscript{176} In the first trial, the jury found the defendant "not guilty due to insufficient evidence." Ashe, 397 U.S. at 439. With some refinements, the state obtained a conviction in the second trial. See id. at 440.
common law, the Supreme Court overturned the conviction. The Court framed the issue as a collateral estoppel issue, a heretofore non-constitutional doctrine. In this way, the Court was able to finesse the fact that it established a new line of double jeopardy analysis independent of the elements test. The Court also ignored its fundamental departure from the elements test's basic premise that only the elements of offenses, not the facts of the case, should be examined. As explained by the Court in Ashe, a collateral estoppel inquiry requires an examination of the complete record, testimony and evidence included, to determine what issues of ultimate fact, if any, were determined by the prior proceeding. Thus, as in Harris, the Court moved toward a case-specific, conduct test without confronting that the traditional constitutional test was being undermined.

4. Justice Brennan's Crusade for a Same-Transaction Test

In his concurrence in Ashe, Justice Brennan went further and argued that the Double Jeopardy Clause should now be read to require the government to bring all charges relating to a single transaction in one trial. That view never managed to garner a majority, although Brennan continued to argue for the transaction test well into the Burger Court era. Instead, the Court only hinted in dicta that a broader test for successive prosecutions might be constitutionally required without actually so holding.

177. See infra Part IV.C.3.
178. The Court held that because the initial acquittal meant that the jury found that Ashe was not one of the robbers, collateral estoppel precluded the government from relitigating the issue of identity in a second trial. See Ashe, 397 U.S. at 445–46. The Court stated that the Fifth Amendment's guarantee "surely protects a man who has been acquitted from having to 'run the gantlet' a second time." Id. at 446.
180. See Ashe, 397 U.S. at 444.
181. In a footnote in Ashe, however, the Court was at least clear about its motive. It frankly stated that the need to constitutionalize collateral estoppel was the direct result of the evolution of complex criminal codes, thus confronting the true policy issue at stake. See Ashe, 397 U.S. at 445 n.10. While still good law, the criminal collateral estoppel has not been extended much beyond the facts of Ashe. See Anne Bowen Poulin, Double Jeopardy: Grady and Dowling Stir the Muddy Water, 43 RUTGERS L.J. 889, 915 (1991).
182. See Ashe, 397 U.S. at 449–52 (Brennan, J., concurring) (concluding that the current opportunities for multiple prosecutions were "frightening" and the potential for abuse "simply intolerable"). Brennan reasoned that given the traditional deference accorded prosecutors to initiate a criminal case, there was no other basis on which to restrict a successive prosecution that passed muster under the elements test. See id. at 452.
184. See Brown v. Ohio, 432 U.S. 161, 166 n.6 (1977) (noting that the elements test was "not the only standard for determining whether successive prosecutions impermissibly involve the same offense"). Dicta in Vitale went further. In discussing various scenarios possible on remand, the Court noted that even if the elements test did not bar a successive prosecution, the defendant might have a substantial double jeopardy claim if the state had to rely on the traffic offense or the conduct underlying the traffic offense to
For Justice Brennan, the dicta of the post-Adhe cases fell far short of his goal, and with each new conservative appointee, his chances for revolutionizing the same offense doctrine seemed more unreachable. Then, with his time on the Court growing short, Brennan doubly surprised Court watchers in 1989. In Grady v. Corbin, Brennan abandoned his pure same transaction proposal. Instead, he argued for a test which he claimed was a middle ground between the elements test and the same transaction test. Further, he was able to cobble together a bare majority for this result.

Under Brennan's Grady test the Double Jeopardy clause was violated if "to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." Despite Brennan's claim that this was not a same transaction test, Grady for the first time openly mandated an examination of the underlying conduct for all successive prosecution cases. Thus, Grady formally broke the same elements test's hold on the same offense doctrine. However, the distinction between the "conduct that constitutes" an element of an offense and the underlying transaction proved elusive to many commentators and to the courts that tried to implement the Grady test in the three years that followed. Thus, the ink was barely dry on Grady when state prosecutors and the Justice Department called for it to be overruled and the Court obliged in Dixon. Whether the Grady test

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186. See id. at 521–22.
187. See id. at 510.
188. Id. In Grady, Brennan attempted to create a test that looked past the statutory elements of the offense to underlying conduct, but limited the examination of the underlying transaction to determine what actual evidence would be used to prove the overlapping elements of each crime. The question he tried to formulate was not whether the underlying transactions were substantially the same, but whether the evidence used to prove the elements of those offenses was the same. See id. at 521.
189. See Sharpton v. Turner, 964 F.2d 1284, 1287 (2d Cir.1992) (noting that Grady test "has proven difficult to apply"); Ladner v. Smith, 941 F.2d 356, 362–64 (5th Cir.1992) (similar); see also Anne Bowen Poulin, Double Jeopardy Protection Against Successive Prosecution in Complex Criminal Cases: A Model, 25 CONN. L. REV. 95, 123 (1992); George C. Thomas, III, A Modest Proposal to Save the Double Jeopardy Clause, 69 WASH. U.L.Q. 195, 201–02 (1991). To the extent that the ultimate outcome of the Grady test might depend on the evidence as it came out at the second trial, prosecutors still faced the risk of losing a conviction to the double jeopardy bar, even after trial and conviction. See id. at 542 (Scalia, J., dissenting).
190. See Ellis v. Oklahoma, 498 U.S. 977 (1990); Tidwell v. United States, 498 U.S. 801 (1990). The year before Dixon, the Court affirmatively chose to sidestep the issue in United States v. Felix, 503 U.S. 378 (1992). In Felix, the Court held that the existing rule that conspiracy and the underlying substantive offense were not the same for purposes of double jeopardy had not been overruled by Grady, while acknowledging that a strict reading of Grady might lead to the opposite conclusion. See id. at 389–91.
191. See infra Part III.
could have been implemented short of a same transaction test was never determined, as Dixon overruled Grady on this issue and held that the elements test should be used to determine the “same offence” question for all double jeopardy cases, or so it seemed.\textsuperscript{192}

B. Scalia’s Same Offense Doctrine Before Dixon

The remainder of this Part examines Scalia’s pre-Dixon same offense opinions for three purposes: (1) to establish a baseline for his pre-Dixon position on the same offense issue and show how he diverged from the Court’s approach to double jeopardy; (2) to discern how Scalia applied his methodology in double jeopardy cases before Dixon; and (3) to analyze these cases for methodological consistency. The importance of these aspects of Scalia’s pre-Dixon cases becomes clear in the analysis of Dixon in Part IV which shows that preexisting inconsistencies in his opinions created room for his novel analysis of successive prosecutions involving contempt.

Scalia’s two significant opinions in double jeopardy cases before Dixon were his dissents in Grady v. Corbin and Jones v. Thomas.\textsuperscript{193} In these two cases, Scalia firmly staked out his position on the key issues in the same offense doctrine. In Grady, Scalia argued that the elements test is the only historically legitimate standard for measuring when two offenses are the same for purposes of the Fifth Amendment.\textsuperscript{194} In some detail, Scalia laid out the originalist case for the elements test.\textsuperscript{195} Scalia recounted the test’s historical roots in the common law, and then traced its passage to colonial America and its acceptance in the early days of the republic.\textsuperscript{196} He also quoted the early British treatises, which were known to the


\textsuperscript{193} 491 U.S. 376 (1989). Jones was actually a multiple punishment case but some of the positions Scalia staked out are relevant to both the multiple punishment and successive prosecution prongs of the double jeopardy protection.


\textsuperscript{195} Scalia first gamely tried to prove that the text of the Fifth Amendment requires the elements test. He argued that the “in jeopardy” language of the amendment required a pretrial determination of the same offense. Because Brennan’s test depended on the government’s proof at the second trial, Scalia argued the text could not support it. Scalia also cited to dictionaries from the late Eighteenth and early Nineteenth Century which defined “offence” as “transgression,” that is, “the Violation or Breaking of a Law.” For Scalia, this showed that the elements test’s focus on the statutory elements came closer to that era’s understanding of offenses. See Grady, 495 U.S. at 529 (Scalia, J., dissenting) (citing Dictionarium Britannicum (Bailey ed., 1730)); J. Kersey, A New English Dictionary (1702); 2 T. Sheridan, A General Dictionary of the English Language (1780); J. Walker, A Critical Pronouncing Dictionary (1791); 2 N. Webster, An American Dictionary of the English Language (1828)). Typically overconfident, Scalia asserted these arguments alone proved that the text supported the elements test over Brennan’s test. See Grady, 495 U.S. at 530. Of course, a plain reading of “same offence,” supports only that “same” means exactly the same. See infra notes 213–218 and accompanying text. Regardless of Scalia’s textualist puffing, the bulk of his dissent and its methodological heart was based upon historical practices.

\textsuperscript{196} See Grady, 495 U.S. at 532–36 (citing Turner’s Case, 86 Eng. Rep. 1068 (K.B. 1708); State v. Standifer, 5 Port. 523 (Ala. 1837); Commonwealth v. Roby, 12 Pick.
Framers and the First Congress, for their support of the elements test. On those grounds, Scalia argued that the elements test reflected "a venerable understanding" of double jeopardy and was the controlling law "as understood in 1791" when the Fifth Amendment was adopted.

Also in Grady, however, Scalia briefly noted without disapproval the two existing exceptions to the elements test established by Harris and Ashe. His discussion of the collateral estoppel exception was brief and without substantive content. His treatment of Harris, however, is a superb example of Scalia's effort to read precedent to find the clearest rule a case will yield. Even though Harris itself was terse and Vitale's discussion of Harris metaphorical, Scalia had no difficulty discerning a clear rule in Harris. He wrote in Grady that the Harris exception only applied when "a statutory offense expressly incorporates another statutory offense without specifying the latter's elements." This interpretation basically reduces Harris to a question of statutory interpretation. Scalia thereby foreclosed what Harris seemed to imply: that the lesser-included subrule of the elements test might apply where two statutes did not explicitly refer to one another but the Court perceived a relationship that makes one crime a "species" of lesser-included offense of another. In other words, Scalia's Grady dissent demetaphorized the Harris exception. Part IV will show that he backslid on this commitment in Dixon.

In both Grady and Jones v. Thomas, Scalia emphasized the importance of his clear rules principle in double jeopardy cases. In Grady, Scalia's arguments can be broken down into two parts. First, he made a straightforward clear rules critique of the Grady test. Scalia complained "it is not at all apparent how a court is to go about deciding whether evidence that has been introduced...at the second trial 'proves conduct' that constitutes an offense...." Second, he claimed that inserting the ahistorical Grady rule into double jeopardy doctrine would distort the criminal trial process in ways that would subject the legal system to "ridicule."

496 (Mass. 1832); State v. Sonnernalb, 2 Nott & McC. 280 (S.C. 1820)).
197. See Grady, 495 U.S. at 530–32.
198. See id. at 530, 535.
199. See id. at 528–29.
200. See id.
201. Id. at 528 (emphasis added).
202. Id. at 521. Scalia gave this example of the uncertainty in the Grady test:
   Is the judge in the second trial supposed to pretend that he is the judge in
   the first one, and to let the second trial proceed only if the evidence
   would not be enough to go to the jury on the earlier charge? Or (as the
   language of the Court's test more readily suggests) is the judge in the
   second trial supposed to decide on his own whether the evidence before
   him really 'proves' the earlier charge (perhaps beyond a reasonable
   doubt)?
Id. (emphasis added).
203. Scalia's argument here is a good example of how he tries to show that the components of his methodology are mutually reinforcing. Historical rules are also clearer rules because they mesh better with the existing legal framework which is still largely a historical product.
Here, Scalia provided a parade of horribles. He claimed that both prosecutors and defense attorneys would be forced to alter their traditional roles to adapt to the prescriptions of *Grady*. As his most outrageous example, Scalia hypothesized a second trial involving the same transaction but different offenses. He claimed that even if the prosecutor properly limited the evidence to avoid violating the *Grady* rule, a defense attorney would “presumably seek to provoke the prosecutor into (or assist him in) proving the defendant guilty of the earlier crime,” in order to trigger double jeopardy. To Scalia, “[t]his delicious role reversal, discovered to have been mandated by the Double Jeopardy Clause in these 200 years, makes for high comedy but inferior justice.”

In *Jones v. Thomas*, Scalia argued that under a line of multiple punishment precedents going back to 1874, a defendant convicted of felony-murder had to go free on a technicality after serving a short sentence for attempted robbery. Scalia made short work of the majority’s efforts to distinguish the earlier cases and he excoriated his colleagues for creating a specious, outcome-driven exception. While the double jeopardy rule at stake in *Jones* did not concern the definition of “same offense” in successive prosecution cases, Scalia used this dissent to make a broader point about the importance of the clear rules principle for all double jeopardy cases. Scalia stated,

> The Double Jeopardy Clause is and has always been, not a provision designed to assure reason and justice in the particular case, but the embodiment of technical, prophylactic rules that require the Government to turn square corners.... There are many ways in which these technical rules might be designed.... With technical rules, above all others, it is imperative that we adhere strictly to what we have stated the rules to be. A technical rule with equitable exceptions is no rule at all.

204. *See Grady*, 495 U.S. at 540–41.
205. *Id.* at 542.
206. *Id.* at 542. He also argued that the new rule would straitjacket prosecutors even where successive prosecutions might be permissible under *Grady*. In a first trial, prosecutors would introduce only as much evidence as was necessary to prove the charge but attempt to avoid crossing whatever line or quantum might trigger double jeopardy if a second prosecution was initiated. *See id.* at 542. Scalia’s ultimate contention was that despite *Grady*’s efforts to find a middle ground, prudent prosecutors would be forced by uncertainty and the distortions to the criminal justice process to join all offenses arising from a transaction in a single proceeding—in other words, the same transaction test that Brennan has sought all along. *See id.* at 540.
207. *See Jones v. Thomas*, 491 U.S. 376, 379 (1989). The defendant was sentenced to consecutive terms for attempted robbery and felony-murder, with the shorter robbery sentence to be served first. Although as greater and lesser-included offenses, the sentences should have been merged, by the time the error was corrected, the defendant had completed the first sentence for attempted robbery. *See id.*
209. *Id.* at 396. This excerpt also shows how Scalia used *Jones* as a platform to spread the gospel of his clear rule principle and, more generally, as support for his claim that he elevates methodology over result. If politically conservative Scalia advocated the early release of a murderer—surely he must have a consistent and value-neutral
These cases show that before Dixon, Scalia relied on the historical practices and clear rules components of his methodology to carry his analysis in double jeopardy cases. Before turning to Dixon, however, I examine whether Scalia’s use of these two components was both internally consistent and in accord with the methodological principle of hierarchy.

C. A Critique of Scalia’s Pre-Dixon Same Offense Doctrine

Taken individually, Scalia’s pre-Dixon same offense opinions could serve as poster children for his methodology. He makes a great show of employing historical practices and the clear rules principle while disparaging the Court for failing to adhere to his principles for constitutional fidelity. Moreover, his chosen test for the same offense question appears to meet his methodological requirements. Some form of the elements test was the applicable rule when the Fifth Amendment was drafted and it is a clear rule that leaves little room for judicial discretion.\textsuperscript{210} Subjecting Scalia’s pre-Dixon same offense doctrine to critique under the framework from Part II, however, reveals some major methodological inconsistencies that detract from its facial legitimacy.\textsuperscript{211}

1. The Hierarchy Problem: Originalism Versus Plain Meaning

The fundamental problem with Scalia’s pre-Dixon same offense doctrine is that he does not start with a plain reading of the text of the Fifth Amendment. Instead, Scalia’s opinion rests on his historical practices justification for the elements test.\textsuperscript{212} However, according to Akhil Amar, the Double Jeopardy Clause could mean exactly what it says—“same means same.”\textsuperscript{213} For Amar, the elements test is a legal and logical mess; it “insist[s] that day is night and that different offenses are really the same.”\textsuperscript{214} Furthermore, as developed by Amar, a plain reading of “same offense” would be neither impracticable nor unfair, so long as many of its current doctrinal rules were rehoused under the Due Process Clause where they more properly belong.\textsuperscript{215}

methodology after all. See supra Part III.A.2.

\textsuperscript{210} See supra notes 107, 128–135 and accompanying text.

\textsuperscript{211} Scalia’s adherence to historical practice here can also be criticized because the elements test arguably fails to protect the interests the Court has stated underlie the Double Jeopardy Clause. See Green v. United States, 355 U.S. 184, 187–88 (1957) (deterring the government from wearing down defendants with its superior resources, honing its case in successive proceedings, and sparing defendants the continual anxiety, embarrassment, and fear from repeated efforts to convict). Several post-Dixon cases illustrate these issues. See United States v. Liller, 999 F.2d 61 (2d Cir. 1993); United States v. White, 1 F.3d 13 (D.C. 1993); State v. Gocken, 896 P.2d 1267 (Wash. 1995) (en banc); Baggett v. State, 860 S.W.2d 207 (Tex. Ct. App. 1993).

\textsuperscript{212} In Grady, Scalia advanced some claims that the elements test was closer to the text than Brennan’s test but he ignored the more textually based “same means same” interpretation. See supra note 151.

\textsuperscript{213} Amar, supra note 13, at 1813; Amar & Marcus, supra note 147, at 10, 36.

\textsuperscript{214} See Amar & Marcus, supra note 147, at 36.

\textsuperscript{215} Amar, supra note 13, at 1812. Amar also argues that a same means same approach “enjoys clear textual, historical, and logical advantages over the Blockburger
If a plain reading of same offense has such appeal to a sophisticated textualist like Amar,\textsuperscript{216} it is all the more surprising that "Justice Scalia, who usually claims he believes in plain meaning and common sense,"\textsuperscript{217} has never raised this possibility. Nor did Scalia use stare decisis as an excuse for disregarding the apparent plain meaning of the text. He never argued in \textit{Grady} that although "same" should mean "same," he was compelled by precedent to follow the elements test. Thus, on this most fundamental issue, Scalia's same offense doctrine fails the critical hierarchy test for methodological integrity because he simply skips his first step—textualism.\textsuperscript{218}

2. The Precedent Problem: The Exceptions Versus the Elements Test

Scalia's arguments for the elements test in his \textit{Grady} dissent are classic Scalian originalism. To avoid judicial lawmaking, he argued that the Court should adopt the "same offense" test that existed at common law.\textsuperscript{219} Thus, even where the actual intent of the drafters is unknown, the Court can take refuge in the extant practices of this earlier time.

Scalia's originalism only prevents judicial discretion, however, if the rule found in the history books is the sole rule governing that constitutional question. In the beginning of his \textit{Grady} dissent, Scalia acknowledged that the Court has departed from the elements test's "exclusive focus on the statutory elements of crimes in only two situations," those of \textit{Harris} and \textit{Ashe}.\textsuperscript{220} Without any real explanation, Scalia accepted these two exceptions as legitimate but then condemned the majority for its departure from the elements test.\textsuperscript{221}

The collateral estoppel exception in particular violates Scalia's originalism and the clear rules principle. Successive prosecutions based on different victims of one criminal event were permissible at common law. By accepting \textit{Ashe}, Scalia therefore condoned a same offense doctrine that contains

\textsuperscript{216} Id. at 1818 (emphasis added). Here, Amar is mistaken. Although at early common law, same offense meant exactly the same offense, the historical record suggests that, by ratification, the elements test was the applicable historical practice. See supra Part III.A.2.

\textsuperscript{217} I say sophisticated because unlike Scalia, Amar rejects hyper literalism when context and history do not support it. For example, Amar reads the phrase "life or limb" as a "vivid and poetic metaphor for all criminal punishments." Amar, supra note 13, at 1809.

\textsuperscript{218} Amar, supra note 13, at 1832.

\textsuperscript{219} This point becomes even clearer when Scalia's post-Dixon flip-flop on the multiple punishment prong is considered. For seven years, Scalia accepted that the Double Jeopardy Clause forbade multiple punishments for the same offense. In fact, as noted earlier, he used his dissent in \textit{Jones v. Thomas} to stress the importance of his clear rules principle for ensuring judicial consistency in these cases. See \textit{Jones v. Thomas}, 491 U.S. 376, 388 (1989) (Scalia, J., dissenting). Then, in \textit{Kurth Ranch}, Scalia switched methodological gears and decided that the multiple punishment prong had no basis in the text, and therefore, should not exist at all. See Department of Revenue v. Kurth Ranch, 511 U.S. 767, 798 (1994) (Scalia, J., dissenting).


\textsuperscript{221} Id. at 523 (referring to \textit{Harris v. Oklahoma}, 355 U.S. 184 (1977) and \textit{Ashe v. Swenson}, 397 U.S. 436 (1970)).
rules that contradict common law practices. Moreover, like the Grady test he criticized, Ashe requires an intensive review of the record of the prior trial. While Harris is also inconsistent with the common law elements test, my main point is that by agreeing to any exceptions to common law practices, Scalia steps off the hallowed ground of original meaning and back into the real world of judicial discretion.

While Scalia’s defense of these exceptions could have been “stare decisis made me do it,” he never advanced this argument in Grady. Nor did he have a principled reason why the Ashe and Harris exceptions are acceptable modifications to the historical elements test but the Grady rule was not. The only real difference between them and Grady is one of magnitude, not substance. The Grady test affected all successive prosecutions whereas the two existing exceptions cover just a small subset of cases. However, with his originalist lens focused in Grady on attacking Brennan’s test, Scalia ignored the methodological conflict created by his acceptance of these other exceptions to the common law elements test.

3. The Originalism Problem

The final methodological flaw in Scalia’s pre-Dixon opinions was his failure to consider whether his faint-hearted originalism principle should apply. Theoretically, Scalia is willing to depart from a historical practice when there has been a fundamental change in society’s understanding of that practice and that the change is reflected in widespread extant sources. Here, a strong argument can be made that a true faint-hearted originalist would abandon the elements test in light of modern developments in the criminal law.

At the time of the Framers, a criminal offense and a criminal transaction were essentially synonymous because each criminal act generally gave rise to only one charge and pleading rules permitted only one crime per indictment. In this

222. See supra notes 123–124 and accompanying text.
223. Given the speculative nature of determining what issues the first jury decided, collateral estoppel also leaves ample room for judicial discretion in its application.
224. Scalia might have argued that Ashe and Harris were more longstanding precedent (18 and 12 years respectively) and therefore had to be accepted. However, Scalia’s “rules” on stare decisis are so flexible that it is impossible to predict whether these cases would pass muster. See David M. Zlotnick, Justice Scalia & His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology, 51 EMORY L.J. (forthcoming 1999). In any event, one could as easily argue that Ashe and Harris began a transformation of same offense law that culminated in Grady.
225. Scalia’s defense of the elements test is also subject to a historian’s critique. The two leading historical studies on double jeopardy are Sigler’s DOUBLE JEOPARDY and Friedland’s DOUBLE JEOPARDY. See SIGLER, supra note 128; FRIEDLAND, supra note 123 (1969). Although these books are cited in virtually every academic article, Scalia mentions neither. Nor is it surprising since these inquiries provide a more ambiguous picture, which make Scalia’s originalist case for the elements test look very much like a “lawyer’s history.”
226. See supra notes 63–70 and accompanying text.
227. THOMAS, supra note 101, at 76–78, 111.
context, the elements test evolved to prevent defendants from using the rules of pleading to avoid punishment, not to encapsulate the extent of the common law's respect for the double jeopardy principle.228

Now, changes in substantive and procedural criminal law have undercut the ability of this common law rule to fulfill the interests of the Double Jeopardy Clause.229 Most fundamentally, the term offense is no longer understood to be coextensive with criminal transaction. Rather, it is well recognized that one criminal transaction can give rise to multiple criminal offenses.230 Moreover, as required by Scalia's faint-hearted principle, this change is reflected in extant sources. Modern criminal codes are replete with offenses that have overlapping elements, allowing multiple offenses to be charged for all but the most simple criminal transactions.231 In addition, the pleading practices that gave rise to the elements test as a method to prevent a windfall to defendants no longer exist.232 The liberalization of the rules of criminal procedure now permits the charging of multiple offenses in one indictment thus, prosecutors rarely need to worry about charging the "wrong" offense for a transaction and suffering a mid-trial dismissal. Consistent with the principle of faint-hearted originalism, one could argue that since the legal and policy issues that gave rise to the elements test no longer exist, the historical elements test need not be the defining guidepost for defining "same offense" in the Fifth Amendment. Therefore, judicial invention of an alternative test in accord with modern notions of the double jeopardy concept is permissible. In fact, prior to Grady, both the organized bar and most commentators had called for the elements test to be replaced with a test that better protected defendants from successive prosecutions for the same transaction.234 Despite this plausible faint-hearted approach, Scalia failed to even raise the possibility in Grady.235

Thus, before Dixon, Scalia had articulated a consistent methodological justification for his same offense doctrine. However, at the same time, these cases uncritically accepted precedents that conflicted with his primary justifications for

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228. See supra notes 123–127 and accompanying text.
229. See Thomas, supra note 102, at 1392–93.
230. See Thomas, supra note 101, at 29, 77–78, 111.
231. Modern criminal codes subsumed highly specific common law crimes into broadly defined offenses. Compare, e.g., various common law theft and burglary offenses, with Model Penal Code's simpler definitions of these crimes.
232. See FED. R. CRIM. P. 8(a).
234. See Model Penal Code §§ 1.07(2), 1.09(1)(b) (Proposed Official Draft 1962). Even the English courts have chosen to abandon a strict elements test. See Connelly v. Director of Public Prosecutions, 1964 App. Cas. 1254, 1354 ("The courts cannot contemplate for a moment the transference to the Executive of the responsibility for seeing that the process of law is not abused.").
235. Scalia could have argued that the most direct evidence that society's view of the Double Jeopardy Clause has not evolved are state statutes and court decisions that continue to endorse the elements test. Thus, although legal commentators and other "law-trained" elites believe a change is required, this view has not sufficiently permeated downward to permit the Court to act. However, his utter silence on this issue pointedly reveals the inconsistency of his faint-hearted originalism in practice.
the elements test and contained reasoning that contradicted his methodological principles of hierarchy and faint-hearted originalism. With this background, I now turn to two main questions. First, in *Dixon*, was Scalia faithful to the core methodological principles, originalism, and the clear rules principle, that underlay his earlier same double jeopardy opinions? Second, what role did the pre-existing, although previously benign, inconsistencies in Scalia’s double jeopardy doctrine play in his *Dixon* opinion?

IV. JUSTICE SCALIA AND *DIXON*: THE METHODOLOGY BETRAYED

A. An Introduction to *United States v. Dixon*

*United States v. Dixon* involved two consolidated cases. In the lead case, Alvin Dixon was released on bond on a second degree murder charge. His release papers notified him that if he committed "any criminal offense," he was subject to prosecution for contempt. Dixon was then arrested on a new felony cocaine charge. The judge in the murder case issued a show cause order. After a hearing, Dixon was found guilty of criminal contempt and sentenced to 180 days confinement. Dixon moved to dismiss the drug indictment on double jeopardy grounds.

The companion case, *United States v. Foster*, was the domestic violence case. The defendant’s estranged wife, Ana Foster, obtained a civil protection order in the District of Columbia Family Court that required Foster, to “not molest, assault, or in any manner threaten or physically abuse” Ana or her mother. After a series of escalating incidents culminating in a violent beating that rendered Ana unconscious, her legal aid attorney filed motions alleging sixteen separate violations of the protection order. After a three day bench trial, the court found Foster guilty of criminal contempt for four incidents, three of which involved attacks on Ana, but entered judgments of acquittal on the other counts. One and a half years after Foster began violating the order, the United States Attorney’s Office for the District of Columbia obtained an indictment for five of the

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237. Id. (quoting D.C. CODE ANN. § 23-1329(a) (1989)). He was also subject to revocation of release. See id.
238. See id. at 691–92. The court’s order was *sua sponte*, although the U.S. Attorney’s Office did file a motion requesting modification of the conditions of Dixon’s release. See *United States v. Dixon*, 598 A.2d 724, 728 (D.C. 1991).
239. See *Dixon*, 509 U.S. at 692.
240. See id.
241. Id. (citation omitted).
242. See id. These counts also alleged violations of the order protecting Ana’s mother. See id.
243. See id. at 692–93. Foster was also found in criminal contempt for one count involving Ana Foster’s mother. See id. at 693.
244. See id. at 693. The United States Attorney’s Office for the District of Columbia has dual jurisdiction, handling federal matters in U.S. District Court while also prosecuting all felonies and misdemeanors punishable by one year incarceration or more under the D.C. CODE. See D.C. CODE ANN. §§ 23-101 (a)–(c) (1996).
incidents involving Ana that had been the subject of the contempt trial. The indictment charged one count of simple assault, one count of assault with intent to kill, and three counts of threats with intent to injure or kidnap. Foster moved for dismissal of the indictment. Based upon Grady, the District of Columbia Court of Appeals held en banc that the Double Jeopardy Clause barred all charges against both Dixon and Foster.

Scalia’s opinion for the Court garnered a majority on two issues. Four justices joined Scalia to overrule Grady and return to the elements test as the primary test for successive prosecution of substantive criminal offenses. Seven justices agreed with Scalia that the Double Jeopardy Clause applies to criminal contempts for out-of-court violations (nonsummary contempt). However, only one justice joined Scalia’s opinion on how to apply the double jeopardy protection to contempt. Moreover, Scalia’s divergent analyses of the individual contempts in the case spawned four separate opinions, each of which found fault with different parts of his idiosyncratic approach.

B. What Scalia Should Have Done in Dixon

Before critiquing Scalia’s analysis of contempt and double jeopardy in Dixon, it is useful to explore how a faithful application of Scalia’s methodology would have resolved the issue. This section shows that there were two

245. See Dixon, 509 U.S. at 693.
247. See Dixon, 509 U.S. at 704. Chief Justice Rehnquist, along with Justices Kennedy, O’Connor, and Thomas. As in Grady, the Court did not overturn the pre-existing collateral estoppel and compound statute exceptions. In this part of his opinion, Scalia held that Grady’s conduct-based test was “wholly inconsistent with earlier Supreme Court precedent and with the clear common law understanding of double jeopardy.” Id. Justices Souter, Stevens and White, disagreed and argued that Nielsen, Brown, Harris, and Vitale supported a broader test. See id. at 749-59 (Souter, J., concurring in part and dissenting in part).
248. Id. at 694. Joining Part II of Scalia’s opinion were Chief Justice Rehnquist and Justices Kennedy, O’Connor, Souter, Stevens, Thomas, and White. See id.
249. Id. at 697. Justice Kennedy joined all parts of Scalia’s opinion. See id. Justices Stevens, Souter, and White would have preserved the Grady rule and, as applied to these cases, all successive charges would have been barred. See id. at 743 (Souter, J., concurring in the judgement in part and dissenting in part); id. at 720 (White, J., concurring in the judgement in part and dissenting in part). Chief Justice Rehnquist, joined by Justices Thomas and O’Connor, conceded that double jeopardy could theoretically apply to contempt. Id. at 718 (Rehnquist, C.J., concurring in part and dissenting in part). However, under their straightforward application of the elements test, none of the successive charges in either case would have been barred. Justice Blackmun argued that, because contempt power was and is essential to vindicating the authority of the court (and private litigants), only the common law and early American rule that contempt is exempt from double jeopardy ensured that judicial prerogatives would be completely protected. See id. at 742-43 (Blackmun, J., concurring in part and dissenting in part).
250. See Dixon, 509 U.S. at 713 (1993) (Rehnquist, C.J., concurring in part and dissenting in part); Id. at 720 (White, J., concurring in part and dissenting in part); See id. at 741 (Blackmun, J., concurring in part and dissenting in part); Id. at 743 (Souter, J., concurring in part and dissenting in part).
alternatives that were clearly consistent with Scalia's methodological precepts and his pre-Dixon same offense opinions: (a) the common law rule that contempt was exempt from double jeopardy analysis, and (b) a straightforward application of the elements test.

1. Originalism and the Common Law "Contempt-is-Exempt" Rule

Scalia's originalist methodology requires that in the absence of a plain directive from constitutional text, he look for the most specific common law or ratification era rule that is analogous to the issue in the case. The most specific formulation of the issue in Dixon was: Does the successive prosecution of contempt and a substantive criminal offense violate the double jeopardy protection? For that issue, history provides a clear and definite answer.

At common law, a contempt conviction was never a bar to a criminal prosecution for the same act. Contempt was exempt from double jeopardy analysis because the common law viewed contempt and criminal offenses as diverso intuiti: the former necessary to protect the court's authority and the latter to protect the king's peace. This common law rule was carried to the Colonies and continued to be the American rule at the drafting of the Fifth Amendment and well after. For example, in an 1834 opinion concerning the successive prosecution of General Sam Houston for assault and contempt of Congress, then-Attorney General B.F. Butler stated, "The Fifth Amendment...does not apply to cases of this sort.... Technically, therefore, General Houston has not been twice tried for the same offence."

The issue reached the Supreme Court for the first time in 1895 and the Court confirmed that the common law contempt-is-exempt rule passed constitutional muster in In re Debs. The Court stated "that the penalty for a violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in the course of such violation." This principle was

251. See supra notes 51-62 and accompanying text.
252. For example, in Dominus Rex v. Lord Ossulston, the defendants conspired to get a young woman away from her guardian appointed by the Chancery Court to another location where she voluntarily married. See Dominus Rex v. Lord Ossulston, 93 Eng. Rep. 1063 (K.B. 1738). Although the defendants had been held in contempt by the Chancery Court, they were held to answer a later criminal information. See id.
253. In re Chapman, 166 U.S. 661, 672 (1897). See also Black's Law Dictionary 564 (4th ed. 1968) (defining diverso intuiti as "[w]ith a different view, purpose, or design; in a different view or point of view; by a different course or process"); JOHN C. FOX; THE HISTORY OF CONTEMPT OF COURT 1, 54 (1972). Cf. Ex Parte Robinson, 86 U.S. 505, 509 (1873).
254. See In re Morris, 194 Cal. 63, 68 (1924); Pompano Horse Club v. State, 111 So. 801, 808 (Fla. 1927); State ex rel. Duensing v. Roby, 41 N.E. 145, 151-52 (Ind. 1895); State v. Yancey, 4 N.C. (Car. L. Rep.) 133, 134 (1813); Ex parte Allison, 90 S.W. 870, 871 (Tex. 1906). See also F. WHARTON, CRIMINAL PLEADING AND PRACTICE, § 444 at 309 (9th ed. 1889); 21 AM. JUR. 2d Criminal Law § 250 (1981).
256. 158 U.S. 564 (1895).
257. Id. at 599-600.
reaffirmed through the early Twentieth Century.\textsuperscript{258} Although the issue then dropped off the federal radar screen for many years, state courts continued to hold that contempt was exempt from double jeopardy, even as those same courts modified the elements test to moderate the harsh results created by the evolution of overlapping criminal codes.\textsuperscript{259}

The common law contempt-is-exempt rule therefore meets Scalia's originalist criteria: it has a common law pedigree and was well accepted at the time of ratification and beyond.\textsuperscript{260} The rule also satisfies Scalia's clear rules requirement; a rule that double jeopardy never bars successive contempt and substantive criminal charges is the clearest of rules.\textsuperscript{261}

The contempt-is-exempt rule is also consistent with another core Scalia concern—the separation of powers principle.\textsuperscript{262} The Constitution assigns the prosecutorial function to the executive branch. Therefore, with very few exceptions, courts do not interfere with basic prosecutorial decisions such as whether to prosecute and what charges to seek.\textsuperscript{263} Separately, however, judges have the power to initiate contempt proceedings to punish violations of their orders.\textsuperscript{264} Thus, holding that the Double Jeopardy Clause applies to contempt actions creates a separation of powers conflict because a court-initiated contempt proceeding can later preclude criminal charges by the executive branch arising out of the same events.\textsuperscript{265} Nor is there any constitutional mechanism whereby a prosecutor can prevent a contempt prosecution initiated by a court from going


\textsuperscript{259} See State v. Sammons, 656 S.W.2d 862, 868–69 (Tenn. Crim. App. 1982) (stating that prosecution for violation of custody order was not barred in a kidnapping case). In fact, even after Dixon, some state courts have maintained that double jeopardy does not bar contempt actions brought to vindicate the interests of the court and third party beneficiaries of court orders. See State v. Rhodes, 938 S.W.2d 192, 194 (Tex. Ct. App. 1997), rev’d, Ex parte Rhodes, 974 S.W.2d 735 (Tex. Crim. App. 1998) (reaffirming that post-Dixon, contempt sought by private party does not implicate double jeopardy on charges brought by state).

\textsuperscript{260} See supra notes 45–55 and accompanying text.

\textsuperscript{261} See supra notes 74–81 and accompanying text.

\textsuperscript{262} See infra notes 384–388 and accompanying text, for a discussion of how Scalia is deeply wedded to an absolutist interpretation of the separation of powers principle.


\textsuperscript{264} See infra Part VI.A.

\textsuperscript{265} This is exactly what happened in Dixon and Foster. Alvin Dixon’s felony drug charge and Michael Foster’s simple assault count were precluded by their misdemeanor contempt convictions. See United States v. Dixon, 509 U.S. 688, 700 (1993).
forward. The contempt-is-exempt rule was the only option available to Scalia in *Dixon* that would have completely avoided this separation of powers problem.\footnote{266}

In addition to consistency with Scalia’s methodology, core jurisprudential concerns, and prior double jeopardy opinions, resolving *Dixon* through the contempt-is-exempt rule would have permitted the Court to decide the case on the narrowest grounds presented, a principle of judicial restraint to which Scalia generally subscribes.\footnote{267} The Court could have left *Grady* in place, respecting stare decisis and allowing the lower federal and state courts more time to determine whether the *Grady* test was workable.\footnote{268}

Finally, the contempt-is-exempt rule has a strong policy argument in its favor. Although Scalia’s methodology does not consider policy arguments authoritative in constitutional cases, his opinions sometimes include such arguments as secondary support.\footnote{269} Here, the rule’s underlying rationale—the ability of a court to vindicate a breach of its authority—is at least as important today as it was in the common law period.\footnote{270} Therefore, while criminal contemnor now have trial rights substantially similar to criminal defendants;\footnote{271} there are important policy considerations that support continuation of the exemption for contempt from the Double Jeopardy Clause.

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\footnote{266}{The *Grady* test, by barring more successive prosecutions, makes the separation of powers conflict more likely. Under Rehnquist’s generic elements test, some newer kinds of criminal charges can be barred by a prior contempt proceeding when they include the violation of a court order as an element. See, e.g., Fla. Stat. 741.31 (1994) (violation of a domestic restraining order is a misdemeanor). Nevertheless, while raised by the government in its brief, Scalia failed to discuss this issue when he rejected the contempt is exempt rule. See Brief for Petitioner at 19–20, United States v. Dixon, 509 U.S. 688 (1993) (1992 WL 511934) [hereinafter *Brief for Petitioner*].}

\footnote{267}{See Almendarez-Torres v. United States, 523 U.S. 224 (1998).}

\footnote{268}{Creating a historical exception for contempt also would have been consistent with other post-*Grady* decisions such as *Felix*, which created a historical exception for conspiracy and double jeopardy without overruling *Grady*. See United States v. Felix, 503 U.S. 378, 389 (1992). The government seemed understandably acquiescent to this strategy in its brief in *Dixon* where it argued for reversal of *Grady* only as its last resort. The government’s first arguments were for a historical/precedent exception from *Grady* for contempt or that *Grady* should read narrowly. See *Brief for Petitioner*, supra note 266, at 12–13.}

\footnote{269}{See California v. Ilodari D., 499 U.S. 621, 627 (1991) (writing that in addition to a textual argument, “[w]e do not think it desirable, even as a policy matter, to stretch the Fourth Amendment...as respondent urges”); Board of Comm’rs of Wabashnee County v. Umbehr, 116 S. Ct. 2361, 2367–69 (1996) (Scalia, J., dissenting) (adding policy and docket management arguments to defend political patronage); Rutan v. Republican Party of Ill., 497 U.S. 62, 105 (1990) (Scalia, J., dissenting) (discussing policy implication of dismantling the patronage system); McCoy v. North Carolina, 494 U.S. 433, 469 (1990) (Scalia, J., dissenting) (arguing that decision weakens intended function of the jury in sentencing).}

\footnote{270}{Today, injunctive relief, backed by contempt power, plays a significant role in a variety of settings ranging from domestic violence to judicial supervision of public institutions such as schools and prisons. See *infra* note 387.}

\footnote{271}{See Bloom v. Illinois, 391 U.S. 194, 198 (1968).}
2. A Straightforward Application of the Elements Test

Although the contempt-is-exempt rule was clearly the option in Dixon most consistent with his historical practices methodology, Scalia also could have reconciled a straightforward application of the elements test with his originalist principles. As Chief Justice Rehnquist advocated in his Dixon opinion, a straightforward application of the elements test to contempt would have been simple.272 Contempt of court comprises of two elements: (i) a court order made known to the defendant, followed by (ii) willful violation of that order.273 Neither of these elements "is necessarily satisfied by proof that a defendant has committed the substantive offenses of assault or drug distribution. Likewise, no elements of those substantive offenses is necessarily satisfied by proof that a defendant has been found guilty of contempt of court."274 Under this approach, none of the offenses in either Dixon or Foster would be barred.275

Thus, a straightforward elements test approach to the elements of contempt has the advantage of being a clear rule and would result in the same test for contempt and substantive crimes. This approach also would have been consistent with Scalia's Grady and Jones dissents which strenuously argued against the creation of new double jeopardy tests.276 Resort to the elements test would also be consistent with Scalia's reason for rejecting the more specific historical test for contempt. Scalia declined to follow the contempt-is-exempt rule because he believed that the Court now viewed contempt "as 'a crime in the ordinary sense.'"277 Accepting this argument for the moment, the natural place for Scalia to turn was to the historical same offense test for ordinary crimes—the common law elements test—for if contempt is now just like an ordinary crime, the historical double jeopardy test for ordinary crimes should apply to contempt as well.278 Thus, the traditional elements test should have been Scalia's originalist alternative in Dixon.279

273. Id. at 716.
274. Id.
275. Since neither contempt element overlaps with any element of any substantive offense, the Double Jeopardy clause is not offended.
278. The common law elements test for criminal offenses is also closely analogous to, and a slightly more general formulation of, the contempt and double jeopardy issue presented by the case. See Tribe & Dorf, supra note 59, at 1108.
279. Scalia could have justified the choice of a straightforward elements test in Dixon as judiciously expedient. If he had chosen this route, Scalia likely would have written for a full majority, leaving no room for doubt in the lower courts about the Court's holding. Chief Justice Rehnquist's separate opinion, with O'Connor and Thomas concurring, advocated the generic elements test. See Dixon, 509 U.S. at 715–16 (Rehnquist, C.J., concurring in part and dissenting in part). If Scalia had agreed, and assuming Justice Kennedy had signed on, this approach would have garnered five votes.
C. How Scalia Violated His Methodology in Dixon

Although Scalia had two viable options in Dixon consistent with his methodology and all of his core concerns, he chose neither. Instead of either common law rule, Scalia’s Dixon opinion created a new analytical framework for double jeopardy cases involving contempt. To determine the elements of contempt, he substituted the specific language in each contemnor’s injunction for the generic elements of contempt. Scalia tried to justify this novel approach based on the “conditional” nature of contempt and by analogy to the Harris exception. When Scalia applied his new successive prosecution test for contempt cases to the contempt cases in the Dixon and Foster cases, his analysis resulted in an outright victory for Dixon and a split decision on the offenses in Foster’s indictment; the simple assault count was dismissed but the assault with intent to kill and threat counts could proceed. The rest of this Part examines each step in Scalia’s analysis in more detail and shows how he violated his methodology and contradicted his prior double jeopardy opinions.

1. The Redefinition of the Elements of Contempt

The first step in Scalia’s doctrinal shenanigans in Dixon was his novel approach to defining the elements of contempt in double jeopardy cases. Rather than use the generic elements of contempt, which is all that the common law elements test required, Scalia contended that the specific term of the court order had to be incorporated as an element of each contempt charge.

Under Scalia’s incorporation approach, the elements of Alvin Dixon’s contempt offense became: (1) knowledge of a court order not to violate any criminal laws (including the drug laws); and (2) a willful violation of that order by committing a felony drug offense. Thus redefined, Dixon’s drug offense became a lesser-included offense of contempt because all the elements of the drug offense were contained in the second element of contempt. Foster’s restraining order contained multiple directives, including a prohibition on assaults and threats. Similarly, Scalia held that the elements of each of Foster’s contempt charges had to be separately defined, depending on which prohibition in the court order each contempt charge incorporated. For example, the elements of the contempt based upon the assault prohibition in the protection order became: (1) knowledge of the

280. See id. at 696, 700.
281. See id. at 698.
282. See id. at 700–01, 711–12.
283. See id. at 698.
284. See id.
285. As noted above, under Scalia’s analysis, the second element of Dixon’s contempt was defined as a willful violation of the court order by committing a felony drug offense. By substituting the felony drug offense for the traditional second element of contempt—a generic violation of the court order—all the elements of the felony drug offense became incorporated into this element of contempt. See id
286. See id. at 692.
287. See id. at 697–98, 700.
court order not to assault Ana Foster or her mother; and (2) willful violation of the court order by assaulting Ana Foster or her mother.

Under this approach, there can be a different "crime" of contempt for every contemnor and for distinct violations of an order containing multiple prohibitions. Moreover, the variety of potential elements is limited not by any statutory language, but only by the imagination of a court in drafting the order that becomes the basis for the contempt.

Scalia justified his modification of the traditional elements test upon a distinction between contempt and substantive criminal offenses. Examining one of the contempt statutes, he stated that "[o]bviously, Dixon could not commit an 'offence' under this provision until an order setting out conditions was issued. The statute by itself imposes no legal obligation on anyone." To Scalia, the conditional nature of contempt offenses "resemble[d] the situation that produced our judgment of double jeopardy in *Harris v. Oklahoma*." Because contemnor could not commit an offense until an order setting out conditions was issued, "[s]o too here, the 'crime' of violating a condition of release cannot be abstracted from the 'element' of the violated condition." Quoting *Vitale*, Scalia therefore concluded that substantive criminal offenses could become "a species of lesser-included offense" of contempt.

2. A Critique of Scalia’s Dixon Test

My critique of Scalia’s *Dixon* test is threefold. First, although Scalia’s analysis has a superficial appeal, upon a closer view, his reworking of the elements of contempt contains contradictory assertions about contempt. Second, Scalia’s modification of the elements test in *Dixon* violates his clear rules principle for constitutional cases. Third, Scalia’s use of the *Harris* exception undermines his earlier understanding of that case in *Grady*.

a. The Contradictory Assertions

Scalia’s incorporation approach to the elements of contempt rests upon several inconsistent and contradictory assertions about criminal contempt that are worth noting. In summarily rejecting the contempt-is-exempt rule, Scalia asserted that it was “obvious” that the Double Jeopardy Clause applies to criminal contempt because contempt is “a crime in the ordinary sense.” When it was time, however, to apply the traditional elements test, Scalia refused on the grounds that the “conditional” nature of contempt offenses rendered them unlike regular

288. *Id.* at 697.
289. *Id.* at 698 (citation omitted).
290. *Id.* at 697–98.
291. *Id.* (citation omitted).
292. *Id.* at 696 (quoting *Bloom v. Illinois*, 391 U.S. 194, 201 (1968)). Justice White, although ultimately concuring that contempt was governed by double jeopardy, felt that Justice Scalia’s analysis here was “conclusory” and did not deal “adequately with either the Government’s arguments or the practical consequences” of the decision. *Id.* at 721 (White, J., concurring in the judgment in part and dissenting in part).
criminal offenses.293 Basically, Scalia tried to have his cake and eat it too. Either contempt is an ordinary crime and the traditional elements test should apply or contempt is different. If contempt is different, under Scalia’s originalist methodology, the common law’s special exemption for contempt should control. Only by arguing both points simultaneously could Scalia carve out an artificial place in the double jeopardy doctrine for his approach to elements of contempt.294

In addition, it is not clear why the “conditional” nature of contempt should matter to double jeopardy analysis. At the time of the contemptuous act, the order is in existence and the potential contemnor knows that a willful violation will result in contempt. To the potential contemnor, the generic elements of contempt serve the same function as the generic elements of ordinary crimes.295 These internal contradictions suggest that Scalia’s Dixon analysis had more in common with the malleable logic of the common law than with the rigid rules of his constitutional methodology.296 A methodological analysis of Scalia’s test confirms this suspicion.

b. The Clear Rules Principle

In many of his “clear rules” dissents, Scalia complains that the Court has seized upon a factual distinction which previously, had no significance to an existing rule.297 Scalia then argues that modification of a clear rule based upon a heretofore irrelevant factor constitutes result-driven, judicial activism that undermines the rule of law.298 Yet, in Dixon, Scalia engaged in the same

293. Id. at 697–98.
294. This contradiction is highlighted by Scalia’s approach to the elements of Foster’s substantive offenses. Here, Scalia acknowledged that the District of Columbia Court of Appeal’s definitions should control because, as the equivalent of a state high court, its determinations were entitled to deference, even in constitutional cases. See id. at 702 n.6. See also Board of Comm’rs of Wabaunsee County v. Umbehr, 116 S. Ct. 2361, 2368 (1996) (Scalia, J., dissenting) (“State law frequently plays a dispositive role in the issue of whether a constitutional provision is applicable.”). Yet, just paragraphs later, Scalia ignored the fact that this same court had used the generic elements of contempt in its double jeopardy analysis in opinion below. Thus, once again, Scalia treated contempt differently despite his foundational argument that contempt is now “a crime in ordinary sense.” Dixon, 509 U.S. at 696 (quoting Bloom v. Illinois, 392 U.S. 194, 201 (1968)). See D.C. CODE ANN. § 16-1005 (f) (1997); In re Thompson, 454 A.2d 1324, 1326 (D.C. 1982).
295. An example involving a different kind of court order demonstrates this point. A husband who takes the family auto out for a spin does not commit a crime. After a court order in a divorce action is served that awards ownership of the vehicle to his wife, this same act might now constitute theft or criminal unauthorized use. See D.C. CODE ANN. § 22-3815 (1996) (unauthorized use of motor vehicles); D.C. CODE ANN. § 22-3811 (1996) (theft). If this kind of individualized court order which changes a legal act to an illegal act is not relevant to the definition of the elements of theft, why should individualized court orders matter in the contempt context?
296. See Scalia, supra note 20, at 7–8.
297. See supra notes 79–81 and accompanying text.
298. See supra notes 79–81 and accompanying text.
exception-creation game when he rewrote the elements of contempt in lieu of either the contempt-is-exempt rule or the common law elements test. 299

The existing clear rule Scalia claimed to apply was the traditional elements test. 300 In Dixon, however, Scalia modified the elements test to accommodate what he saw as a meaningful difference in context—its application to contempt. To justify this departure, Scalia relied on a distinction between contempt and substantive crimes—the “conditional” nature of contempt—that heretofore had not been recognized as having consequences in double jeopardy analysis. 301 From a Scalian methodological perspective, the “conditional” nature of contempt is nothing more than a judicially created distinction employed to alter the result of an existing rule. Moreover, this distinction is not based on constitutional text or historical practices; therefore, it should be illegitimate under his clear rules principle. 302

c. The Realphabetization of the Harris Exception

As discussed in Part III, although the Harris opinion is a cipher, Scalia was able, consistent with his approach to precedent, to extract a clear rule from Harris in his Grady dissent. 303 There, he limited Harris to situations “where a statutory offense expressly incorporates another statutory offense without specifying the latter’s elements,” 304 turning the Harris exception into nothing more than a judicial tool to effectuate legislative intent. Under this understanding of Harris, the felony-murder statute in Harris is critically different than the contempt statutes in Dixon.

Foster was prosecuted under a section of the D.C. code which made contempt available as a sanction for violation of a protection order. 305 Neither that section nor any other provision of the D.C. civil protection order regime incorporated any criminal offense into the definition of contempt. 306 Moreover,
applying double jeopardy principles to this contempt provision violated the express intent of Congress. The introductory section to the protection order statute provided, "[T]he institution of criminal charges by the United States Attorney shall be in addition to, and shall not affect[,] the rights of the complainant to seek any other relief under this subchapter." Because Congress expressly favored successive prosecutions for contempt and criminal offenses under this statute, it could not have intended that contempt ever be considered either a greater or a lesser-included of any criminal offense. Thus, Scalia's use of Harris to justify his redefinition of the elements of contempt contradicted Scalia's Grady explanation of both the central rule of and the rationale for Harris.

More than just ignoring his previous understanding of Harris, Scalia relied on Vitale's "species" metaphor to make his analogy work, thus resorting to reasoning that is antithetical to his clear rules imperative. Scalia's remetaphorization of Harris can be demonstrated by isolating the language Scalia chose to use, and to avoid, in his discussion of Harris. First, Scalia never quoted his Grady dissent's clear rule for Harris, nor did he use any language from the Harris opinion itself. Rather, Scalia plucked a description of Harris from Vitale v. Illinois, the source of the "species of lesser-included offense" metaphor. He
counseling, vacating a residence and awarding temporary custody. Section 16-1005(c)(1) also permits the court to order the respondent to refrain from "the conduct committed or threatened," but does not phrase this prohibition in terms of the criminal law. Subsection (c)(10) contains a catchall provision, but as drafted, neither 16-1005(c) nor (f) which authorize contempt, refer or suggest that the issuing court incorporate the criminal law. See D.C. CODE ANN. § 16-1005 (1997).


308. Scalia acknowledged only one difference between his incorporation approach to the elements of contempt and the Harris situation. He conceded that the incorporation of other offenses into contempt was done by a judge on a case-by-case basis rather than by the legislature. Scalia argued that because the court's power to impose contempt was conferred by statute, the legislature was still the ultimate source of both offenses. This limited defense utterly failed to address the issues created by transposing the Harris exception to an analysis of contempt and double jeopardy. If Scalia was correct in Grady that the Harris rule is merely a tool to implement legislative intent, Scalia should have addressed why a Harris-type rule for contempt was appropriate when it clearly violated Congress' express desire to keep double jeopardy inapplicable to these contempt statutes. In addition, Scalia ignored that the source of a court's contempt power is not solely legislative. Although legislatures have the power to modify a court's contempt powers, courts still have inherent power to punish contempt irrespective of legislative authorization. By disregarding this fundamental difference between contempt and substantive criminal offenses, Scalia could also overlook the rationale for having one rule for contempt and double jeopardy—the contempt-is-exempt rule—and then some variation of the elements test for all substantive offenses, including the Harris subrule for compound statutes.

309. See supra notes 82–86 and accompanying text.

310. Scalia first quoted Vitale to assert that Harris stood not for a clear rule, but for the "proposition that...the crime generally described as felony murder is not a separate offense distinct from its various elements." United States v. Dixon, 509 U.S. 688, 698 (1993). This exact sentence, however, is the one Justice Souter cited in his dissent in Dixon for his argument that various precedents, including Harris and Vitale, support a conduct-based test like the Grady rule. See id. at 756 (Souter, J., concurring in the judgement in part and dissenting in part). The very fact that Vitale's take on Harris was given opposite
argued that "[t]he Dixon court order incorporated the entire governing criminal code in the same manner as the Harris felony-murder statute incorporated the several enumerated felonies. Here, as in Harris, the underlying substantive criminal offense is a "species of lesser-included offense."\textsuperscript{311}

For Scalia’s use of the metaphor "species of lesser-included offense" to be significant, however, this language must obscure a gap in a logical argument or hide the modification of existing doctrine. In Dixon, Scalia used the "species" metaphor to accomplish both.

First, he asserts a sameness between the Harris felony-murder statute and the Dixon contempts when he states that the Dixon court order incorporated the criminal code ""in the same manner"\textsuperscript{312} as the enumerated felonies in Harris. However, he never explains why there is an underlying sameness in the face of the critical difference in legislative intent between the two statutes. Instead, Scalia invoked the Vitale ""species" metaphor—a metaphor of sameness despite superficial differences—as a substitute for this second analytic step. The substitution of the ""species" metaphor for an explicit discussion of the differences between the statutes allowed Scalia to mask the contradictions between his Dixon and Grady opinions on when two statutes could be considered greater and lesser offenses under the Harris exception.

Second, and more importantly, the ""species" metaphor obscured Scalia’s contradictory assertions in Dixon about the critical constitutional issue in successive prosecution doctrine: whether the judiciary or the legislature has final authority on whether two offenses could be considered the same.\textsuperscript{313} In both Grady and Dixon, Scalia asserted that the elements test, with its deference to legislative power, is the only constitutionally legitimate test.\textsuperscript{314} While Grady briefly gave the Court the authority to trump legislative intent in successive prosecution cases, Scalia claimed to overrule Brennan’s brief victory on this issue in Dixon. However, at the same time Scalia claimed to overturn the Grady test, his Dixon test for contempt offenses holds that contempt and substantive criminal offenses can be the same under the Double Jeopardy Clause even though congressional intent is to the contrary.

Thus, despite Scalia’s claim that Dixon utterly rejected Grady, Scalia’s Dixon test for contempt is akin to the Grady test on this fundamental issue of judicial power. Under both Brennan’s Grady test or Scalia’s Dixon test, the Court, not the legislature, is the final arbiter of the double jeopardy protection.\textsuperscript{315} Only by

\footnotesize{meanings by Scalia and Souter is a strong clue that a metaphor is lurking in the house.

\textsuperscript{311} Id. at 698 (citing Illinois v. Vitale, 447 U.S. 410, 420 (1980)).

\textsuperscript{312} Id.

\textsuperscript{313} THOMAS, supra note 101 at 8–12.

\textsuperscript{314} As noted earlier, Scalia essentially ignored that the collateral estoppel exception had neither textual or historical roots when he accepted its existence in Grady. See supra notes 220–225 and accompanying text.

\textsuperscript{315} In fact, the Dixon test for contempt extends judicial veto power over legislative intent far beyond any prior cases involving greater and lesser-included offenses. Prior to Dixon, no case had held that the lesser-included subrule of the elements test separately justified judicial supremacy over the definition of the elements of offenses.
dressing his analysis in Vitale’s “species” metaphor could Scalia obscure this assertion of judicial authority in contempt cases while denying that the Court had this same power in regular successive prosecution cases. That Scalia was able to do this in the case that purported to overrule Grady reflects the remarkable power of metaphoric subterfuge.

Certainly, the groundwork for Scalia’s manipulation of same offense doctrine in Dixon was laid in Grady, where he uncritically accepted both the Harris and collateral estoppel exceptions to the elements test.316 Prior to Dixon, however, Scalia’s understanding of the Harris exception could arguably coexist with the elements test based upon a shared legislative intent rationale.317 Scalia’s reliance on Harris in Dixon, especially where the legislature actually intended to permit successive prosecutions, cut the Harris exception loose from these moorings. Thus, after Dixon, Scalia’s double jeopardy doctrine is bereft not only of textual and historical support and methodological consistency, but also of any unifying rationale.318

3. Scalia’s Application of His Dixon Test

After formulating his Dixon test, Scalia then had to apply the test to the contempts in the case. The restraining order directed Foster not to “molest, assault, or in any manner threaten or physically abuse” his wife or her mother.319 The two contempt charges that involved physical abuse fell under the “assault” term.320 The contempt judge required Ana Foster to prove these two “assault” contempt charges by proving all the elements of simple assault as defined by the criminal law.321 Although Scalia recognized that it was consistent with the civil protection order statute to define “assault” in Foster’s court order to be broader than simple assault under the criminal law (e.g., tortious assaults),322 Scalia asserted that he was foreclosed from any other interpretation by the contempt court’s definition.323 Using this narrow definition of assault, Scalia held that the crime of simple assault

Certainly, the Harris holding was consistent with such a rule, but Harris is also explainable as a statutory intent case. In Vitale, the Court’s “species” metaphor hinted at this power. However, the Vitale Court’s discussion of the Harris exception and the “species” metaphor were dicta because the case was remanded for an interpretation of state law. Moreover, Vitale’s suggestion that the defendant might have a substantial double jeopardy claim apart from a strict elements test analysis seemed interwoven with the broader debate over the elements test rather than a distinct discussion of the lesser-included subrule.

317. See supra notes 194–201 and accompanying text.
318. Other than legislative intent, the only other rationale for the Double Jeopardy Clause that Scalia has endorsed is the principle of finality. See Jones v. Thomas, 491 U.S. 376, 393 (1989) (Scalia, J., dissenting).
320. See id. at 700.
321. See id. at 701.
322. See id. at 700 n.3.
323. See id. at 700 n.3.
had been incorporated into the elements of contempt and was barred as a lesser-included offense.\textsuperscript{324}

On the assault with intent to kill count, Scalia reasoned that the contempt court’s limited definition of “assault” actually aided the government’s cause in the criminal case.\textsuperscript{325} Under Scalia’s test, the elements of the contempt conviction for this more serious assault were: (1) knowledge of a court order not to commit simple assault; and (2) violation of that order by committing a simple assault.\textsuperscript{326} So defined, assault with intent to kill had an element not contained in the contempt charge, an intent to kill, and contempt separately required knowledge of the court order. Therefore, each offense had an element not contained in the other, and the assault with intent to kill count could go forward.

Scalia’s analysis of the felony threat counts was the most confusing. The statute required proof that the defendant “threate[n]...to kidnap any person or to injure the person or another or physically damage the property of any person.”\textsuperscript{327} The court order instructed Foster not to “in any manner threaten”\textsuperscript{328} his wife. This time, without reference to the contempt proceeding, Scalia defined the “in any manner threaten” term to proscribe conduct broader than the felony threat statute, and indeed, broader than any criminal offense in the District of Columbia Code. He reasoned that the “in any manner threaten” term could be met by noncriminal acts such as threats “to cause intentional embarrassment, to make harassing phone calls, [or] to make false reports to employers....”\textsuperscript{329} Based on this definition, Scalia concluded that the “in any manner threaten” element of the contempt charge and the “kidnap” or “injure” element of felony threats were distinct, and therefore the contempt acquittals did not bar the criminal threats counts.\textsuperscript{330}

4. A Critique of Scalia’s Application of His Dixon Test

Analysis of Scalia’s treatment of Foster’s charges further reveals the logical and methodological weaknesses of his opinion.\textsuperscript{331} I first examine the logical inconsistencies in this part of the opinion and then consider their methodological implications.

\begin{itemize}
  \item \textsuperscript{324} See id. at 700.
  \item \textsuperscript{325} Id. at 702–03.
  \item \textsuperscript{326} See id. at 701.
  \item \textsuperscript{327} Id. at 702.
  \item \textsuperscript{328} Id. at 692.
  \item \textsuperscript{329} Id. at 702 n.8.
  \item \textsuperscript{330} Foster also moved to dismiss the threat counts based on collateral estoppel. The Court did not address this issue because the lower court had not reached it. See id. at 712 n.17.
  \item \textsuperscript{331} Alvin Dixon’s contempt was the easy case for Scalia. Dixon’s release order explicitly stated that the commission of any new criminal offense was punishable by contempt. Under Scalia’s test, this meant that every substantive crime in the criminal code could potentially become a lesser-included offense of contempt. In other words, under Scalia’s incorporation test, Dixon could never be successively prosecuted for contempt and any criminal offense, hence, Scalia held that the drug felony was barred. See id. at 697–98.
\end{itemize}
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a. The Analytic Problems

Scalia’s decision to limit the “assault” element of contempt to simple assault but to define the “in any manner threaten” element to include both criminal and noncriminal threats created a variety of anomalies. First, defining related terms in the same clause in a document in disparate ways violates both common sense and the canons of interpretation upon which Scalia generally relies. Yet, here Scalia gave the “assault” and “in any manner threaten” terms different scopes on an issue that was critical to Scalia’s double jeopardy analysis; whether the term included civil wrongs or was limited to criminal conduct.

Second, the double jeopardy consequences that flowed from Scalia’s definition of each term were entirely counter-intuitive. The narrow definition given to “assault” in the protection order created a double jeopardy bar to criminal simple assault. On the other hand, the more inclusive term in the order, “threaten in any manner,” did not bar the felony threat counts. Thus, a consequence of Scalia’s analysis, taken to the extreme, is that a broadly written order that incorporates criminal and noncriminal acts which increases the chance of a conviction for contempt also increases the likelihood that a defendant-contemnor can be successively prosecuted for a substantive criminal offense that was certainly prohibited by the order.

Third, Scalia’s belief that the noncriminal component of “in any manner threaten” distinguished these contempts from the elements of felony threats seems incorrect under Scalia’s own test and illogical under traditional lesser-included offense doctrine. Seemingly, under Scalia’s definition of the “in any manner threaten” term, the incorporated elements of these contempts would be: (1) knowledge of the court order not to threaten in any manner (including all criminal and non-criminal threats); and (2) willful violation of the court order by making a criminal or noncriminal threat. Therefore, all the elements of felony threats to “kidnap” or “injure” would be incorporated into the contempt because any kind of criminal threat is included in the second element. Nor should the fact that the second contempt element is broader than the criminal law make it a distinct element. Under traditional lesser-included doctrine, the only issue is whether one element of the greater offense contains all the elements of the lesser-included offense. Thus, the noncriminal component of the “in any manner threaten” contempt should have been irrelevant to Scalia’s analysis.


333. See Dixon, 509 U.S. at 702 n.8.

334. An example from the criminal law illustrates this point. Under the Model Penal Code, the mental state “purposely” includes the lesser mental state, “knowingly.” See MODEL PENAL CODE §§107(4)(c), 2.02 (1962). If one offense contains the elements “purposely,” and “element A,” it is considered the greater offense of a crime which includes the elements “knowingly,” and “element A.” The fact that the greater offense of “purposely” can be satisfied by proof other than the mental “knowingly” does not alter the
Scalia insisted that the inconsistency between the breadth of his definitions for the “assault” and “threaten in any manner” terms was caused by the contempt court’s definition rather than flaws in his analysis.335 Scalia’s interpretation of the contempt record, however, was neither consistent nor accurate. Certainly, the contempt court did define the “assault” prohibition to mean criminal simple assault.336 However, it is not clear that Scalia was bound by the contempt court’s definition of “assault”337 or that he correctly interpreted the contempt court’s definition of “in any manner threaten.”338

b. A Methodological Critique

One need look no further than Scalia’s historical arguments in Grady for proof that Scalia’s application of his new test in Dixon also violated his methodology. In Grady, Scalia argued that historical practices did not support a test that looked beyond the elements of offenses to underlying conduct or evidence.339 While Scalia tried to characterize his Dixon test as a species of the analysis. See id. See also Keeble v. United States, 412 U.S. 205, 213 (1973) (“[A]n intent to commit serious bodily injury is a necessary element of the crime with which petitioner was charged, but not of the crime of simple assault. Since the nature of petitioner’s intent was very much in dispute at trial, the jury could rationally have convicted him of simple assault if that option had been presented.”).

335. See Dixon, 495 U.S. at 700 n.3 & 702 n.8.
336. See id. at 700 n.3.
337. Scalia could have ruled that while the contempt court’s definition of “assault” favored Foster at the contempt hearing, that court’s analysis was wrong and he would not use that error to assist Foster again in his double jeopardy motion in the criminal case. Nor did double jeopardy require him to do so. Because Foster could never be convicted in a criminal trial for assaultive conduct that was only tortious, the contempt proceeding was the only opportunity to punish him criminally for such conduct. Thus, Scalia fairly could have redefined “assault” in the protection order for purposes of the criminal case to include non-criminal assaults, as he did for the “threaten in any manner” term. This would have reconciled both the scope of each term and ensured more consistent double jeopardy results in the case.

338. The contempt court had only cryptically referred to Mrs. Foster’s need to prove a “legal threat.” Parsing this language, Justice White argued in dissent that, given the contempt court’s definition of “assault” to mean criminal assault, the contempt court likely meant “legal threats” to refer only to criminal threats. United States v. Dixon, 509 U.S. 688, 732 n.7 (1993) (White, J., concurring in part and dissenting in part). In contrast, Scalia’s discussion on the “threaten in any manner” term was an abstract discussion of plain meaning and statutory intent. He never quoted the contempt court’s “legal threat” reference, even in the footnote where he disputed Justice White’s interpretation of this term. Thus, it was Scalia’s inconsistent approach to defining the terms in the protection order rather than the contempt court’s findings below that were responsible for the anomalies created by his analysis of the assault and felony threats counts. Neither the parties, nor amicus curiae, advocated Scalia’s approach in the briefs or at argument. While the defendants had argued that Harris was relevant, see Brief for Respondent at 31, United States v. Dixon, 509 U.S. 688 (1993) (1992 WI. 511936) [hereinafter Brief for Respondent], their analysis led to all charges being barred.

339. More recently, Scalia again argued that “[l]ike many other guarantees in the Bill of Rights, the Double Jeopardy Clause makes sense only against the backdrop of traditional principles of Anglo-American criminal law.” Monge v. California, 118 S. Ct.
Harris exception, the tasks required to apply Scalia’s incorporation test are much more akin to a same conduct or collateral estoppel test. All that Harris requires is inspection of the indictment to determine which felony is being used to prove the felony-murder. While more than a review of statutory language, a Harris inquiry still presents none of the difficulties of a true conduct-based test. The Dixon test, in comparison, generally requires an in-depth review of the record of the contempt case. Although the depth of review may vary from case to case, the inquiry will virtually always go beyond the statutory elements or the face of the charging document. This was precisely Chief Justice Rehnquist’s complaint with Scalia’s analysis:

By focusing on the facts needed to show a violation of the specific court orders involved in this case, and not on the generic elements of contempt of court, Justice Scalia’s double jeopardy analysis bears a striking resemblance to that found in Grady—not what one would expect to find in an opinion that overrules Grady.

In addition, Dixon has a core analytic difficulty, the need to translate the language of civil court orders into elements of criminal offenses, that plagues Scalia’s entire approach to the elements of contempt. Unlike the Ashe v. Swenson collateral estoppel test, which at least compares a criminal trial with a criminal offense, Scalia’s test requires a comparison of a contempt proceeding, based upon a civil protection order, with the elements of a criminal offense. As civil decrees, protection orders are drafted in the language of civil, not criminal law. Thus, protection orders rarely, if ever, specifically state which criminal offenses are prohibited by the order. Moreover, a contempt proceeding is initiated by a show cause order, not by an indictment or information. While a show cause order must set forth the dates and factual predicates for a violation of the order, they do not specify the allegations in terms of criminal offenses, but rather use the terms of the original court order. Moreover, because this “civil applies” to “criminal

340. This simple, paper inquiry is another reason that the Harris exception can be seen as only a minor departure from the traditional elements test.
341. Alvin Dixon’s case was easy for Scalia because the release order stated on its face, much like a felony-murder indictment, which criminal offenses were incorporated (the entire criminal code). Dixon therefore did not present the civil “apples” to criminal “oranges” problem. Scalia used this feature of Dixon to his rhetorical advantage in the opinion. In justifying the need for an incorporation test in contempt cases, Scalia focuses exclusively on the Dixon facts. See Dixon, 509 U.S. at 697–700. He only attempted the difficult task of translating the language of Foster’s order into criminal elements after he established the incorporation test as the rule. See id. at 700. However, in double jeopardy claims that involve domestic violence contempt, Scalia’s opinion requires, as it did for Foster’s case, a review of the transcript of the contempt hearing.
342. Id. at 717 (Rehnquist, C.J., concurring in part and dissenting in part).
345. See, e.g., id. at § 92.
Comparing Dixon with the “clear rules” analysis of Scalia’s Grady opinion reveals additional methodological conflict. In his Grady dissent, Scalia gave a parade of horribles that would befall the criminal justice system if the ahistorical Grady rule was engrafted into double jeopardy doctrine. Scalia’s Dixon test, however, creates these very same kind of rule implementation problems. First, hardening back to In re Nielsen, Scalia’s Dixon test turned the doctrine of lesser-included offenses on its head. Under traditional doctrine, a lesser-included offense: (1) has fewer elements than the greater; (2) carries a less severe penalty than the greater; and (3) is necessarily included in the greater. Under Dixon, serious felony offenses are demoted to the status of lesser-included offenses of misdemeanor contempt, violating the rule that lesser offenses have lesser penalties. For example, Dixon’s felony cocaine charge, which had a maximum sentence of fifteen years, became a lesser-included of his six-month contempt conviction. Indeed, under Scalia’s analysis, even a murder committed on release would become a lesser offense of contempt. As Chief Justice Rehnquist pointed out, none of these substantive criminal offenses were lesser-

346. See supra Part II.B.
348. 131 U.S. 176 (1889).
349. Obviously, the two elements of generic contempt are fewer than many criminal offenses. This number of elements issue, however, is not really that significant as the proliferation of statutory offenses has created a variety of situations where related offenses with fewer elements carry a greater penalty than an offense with more elements. See James A. Shellenberger & James A. Strazzella, The Lesser-included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies, 79 Marq. L. Rev. 1, 7 n.10 (1995).
350. See Solem v. Helm, 463 U.S. 277, 293 (1983) (“Few would dispute that a lesser included offense should not be punished more severely than the greater offense.”); Simms v. State, 421 A.2d 957, 964 (Md. 1980) (“[W]hen the defendant is convicted only of the lesser included charge, he may not receive a sentence for that conviction which exceeds the maximum sentence which could have been imposed had he been convicted of the greater charge.”); Amar & Marcus, supra note 147, at 28 (“[T]he greater offence...typically carries a penalty that incorporates punishment for the lesser included offence...”). Shellenberger & Strazzella, supra note 349, at 7 n.10 (“Traditionally...lesser crimes were graded lower and carried lesser penalties...”). But see State v. Young, 289 S.E.2d 374, 376 (N.C. 1982) (“A crime of “less degree”...is not...exclusively one which carries a lesser sanction...”)(citations omitted).
352. See D.C. CODE ANN. § 33-541(a)(2)(A) (1998). The law has since been amended such that Dixon’s offense currently carries a maximum sentence of 30 years imprisonment.
353. For Foster, the same was true. His contempt conviction now barred the assault count punishable by a year in jail. Moreover, under a slightly different protection order (or a different interpretation of the same order), more serious offenses such as assault with intent to kill might have been barred. For example, if Scalia had interpreted the term “assault” in the order to mean all criminal assaults but not tortious assaults, his test would have barred the assault with intent to kill count.
included offenses of contempt, "either intuitively or logically."\textsuperscript{354} Scalia's analysis also violated the requirement that the lesser offense is necessarily included in the greater. As the Chief Justice also wrote, "[a] defendant who is guilty of [felony drug charges] or of assault has not necessarily satisfied any element of criminal contempt. Nor, for that matter, can it be said that a defendant who is held in criminal contempt has necessarily satisfied any statutory element of those substantive crimes."\textsuperscript{355}

Second, relegating substantive criminal offenses to the status of lesser-included offenses of contempt creates a host of practical trial practice problems akin to those that Scalia ridiculed in \textit{Grady}. Scalia claimed the \textit{Grady} rule would distort the traditional roles of counsel because defense attorneys might seek to trigger double jeopardy by introducing evidence themselves that proved elements of the prior charge.\textsuperscript{356} Prosecutors, on the other hand, might withhold evidence at the first trial to avoid proving an element necessary to a different offense.\textsuperscript{357} Similar role-bending scenarios are created under \textit{Dixon}.

Foster's assault with intent to kill count, which was not barred, furnishes a good example. At the trial, Foster would ordinarily be entitled to an instruction on the lesser-included offense of simple assault.\textsuperscript{358} However, a conviction for simple assault would be barred under \textit{Dixon} because Foster had been found guilty of contempt/assault for that incident. The trial court would then be faced with a dilemma. If the court gave the lesser-included instruction, a resulting conviction for simple assault would be barred by double jeopardy. This would encourage cagey defense counsel to encourage the jury to find Foster guilty of simple assault, or more generally, whichever charges could not stand under the \textit{Dixon} test. In addition to distorting the advocacy role, this procedure would also subvert the jury system because the jury would be voting on charges that had no legal consequences.\textsuperscript{359}


\textsuperscript{355.} \textit{Id.} at 718–19. The elements test was also endorsed by the Court as the proper interpretation of Federal Rule of Criminal Procedure 31(c) in \textit{Schmuck v. United States}. See \textit{Schmuck v. United States}, 489 U.S. 705 (1989). Scalia dissented in \textit{Schmuck}, but on a different issue. See \textit{id.}, at 722 (Scalia, J., dissenting).


\textsuperscript{357.} See \textit{id.}

\textsuperscript{358.} See \textit{Fed. R. Crim. P. 31 (c)}; \textit{D.C. R. Crim. P. 31(c)}.

\textsuperscript{359.} If the court refused to give the lesser-included instruction, a defendant would be deprived of a recognized trial right to an instruction for all lesser-included offenses that are reasonably within the evidence presented at trial. This route might also tempt prosecutors to bring contempt charges first in weak cases because, win or lose, the state could still charge the greater offense in a criminal case while preventing a compromise verdict on a lesser-included offense. Scalia's test also encourages alleged contemnors who may face later criminal charges to argue at the contempt proceeding that the court order incorporates criminal offenses because the maximum sentence for contempt remains the same no matter how the contempt is characterized. Correspondingly, a battered woman might be inclined to water down a contempt prosecution to avoid creating a double jeopardy bar. See infra note 526.
Lastly, Scalia’s analysis of the Foster counts in Dixon violates his clear rules principle because the test fails to ensure predictability and consistency in successive prosecution cases involving contempt. Under Scalia’s test, the consequences of a contempt prosecution upon a criminal prosecution rest upon a series of variable steps where a slight change along the way will alter the double jeopardy result. Initially, minor differences in the drafting of a protection order will determine whether criminal offenses are incorporated, and as importantly, whether non-criminal conduct is included in the same term.\(^{360}\) Then comes the contempt court’s gloss on the restraining order terms at the contempt hearing. Next is the criminal court’s interpretation of the contempt court’s record or its independent analysis of the court order.\(^{361}\) In addition, the interpretation of the court order and the contempt court record is neither straightforward nor simple. One need look no further than Justice White’s disagreement with Scalia over interpretation of the threats language in Foster’s order for an example.\(^{362}\) Thus, from a practical perspective, the convoluted analysis required by Scalia’s test creates multiple dilemmas for the courts that issue and enforce protection orders.\(^{363}\)

Scalia’s abandonment of his methodology in Dixon is brought into full focus in his debate in Dixon with Justice Blackmun over the contempt-is-exempt rule. Justice Blackmun argued for the contempt-is-exempt rule because “the interests served in vindicating the authority of the court are fundamentally different from those served by the prosecution of violations of the substantive criminal law.”\(^{364}\) Scalia was utterly dismissive of Blackmun’s “interests-based” analysis saying, “the distinction is of no moment for purposes of the Double Jeopardy Clause, the text of which looks to whether the offenses are the same, not the interests that the offenses violate.”\(^{365}\) However, Scalia’s claim that the text supports his analysis was pure defensive reflex. By refusing to require a literal interpretation of the Double Jeopardy Clause—that same means only exactly the

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\(^{360}\) See supra notes 319–330 and accompanying text.

\(^{361}\) Foster’s contempt case was transferred from the Family Division to a criminal judge for trial.

\(^{362}\) In contrast to Scalia’s abstract interpretation, Justice White relied on the contempt court’s reference to “legal threats” to conclude that the order prohibited only criminal threats. See United States v. Dixon, 509 U.S. 688, 702 n.7 (1993) (White, J., concurring in part and dissenting in part).

\(^{363}\) The state court decisions in years since Dixon prove that my critique is correct; similar cases are being resolved inconsistently and many opinions reflect a lack of understanding of the subtleties of Scalia’s analysis. See infra notes 502–518 and accompanying text. Moreover, the inherent ambiguities of comparing civil protection order “apples” with criminal offense element “oranges” also allows for the introduction of judicial discretion into the process. Theoretically, judges holding different values, from increasing judicial power, to cracking down on domestic violence, to protecting the rights of defendants could each be inclined to interpret protection orders in a result guided manner.

\(^{364}\) Dixon, 509 U.S. at 743 (Blackmun, J., dissenting).

\(^{365}\) Id. at 699. Justice White also argued that Scalia’s analysis was “abstracted from the purposes the constitutional provision is designed to promote.” Id. at 735. White referred to the principles of finality, embarrassment and expense, and government “fine-tuning.” Id. at 736.
same offense—Scalia long ago abandoned the safe haven of textualism, and as this Part demonstrated, the other components of his methodology as well. 366

V. JUSTICE SCALIA AND CONTEMPT: IDEOLOGY VERSUS METHODOLOGY

The evidence against Scalia’s reasoning in Dixon is damning. From across the ideological spectrum, each concurring and dissenting opinion made a convincing attack on some part of Scalia’s analysis. 367 Nor did anything in Scalia’s prior double jeopardy opinions foreshadow the peculiarities of his Dixon analysis. And, as demonstrated in Part IV, Scalia’s opinion is at odds with his methodology. The question that remains is, Why did Scalia choose this route when he had alternatives that were both consistent with his methodology and acceptable to other justices? 368

The key to unlocking Scalia’s manipulation of his methodology in Dixon can be found in Scalia’s judicial power opinions. These cases reveal that contempt power pushes two of Scalia’s hottest ideological buttons—his general distrust of expansive judicial powers and his belief in a strict separation of powers principle. 369 This Part shows that these ideological imperatives are responsible for the distortions of his methodology in the Dixon opinion. More importantly, throughout Scalia’s contempt jurisprudence, and particularly in Dixon, Scalia grossly misreads the history of common law contempt practices. Thus, in addition to motivating his constitutional methodology, Dixon shows that Scalia’s hostility to judicial power exerts an independent force on his substantive approach to double jeopardy doctrine.

A. Scalia’s Ideology, Inherent Judicial Powers, and the Modern Injunction

Early on, the Supreme Court endorsed the common law concept that courts were presumed to have certain inherent powers that “vested, by their very creation.” 370 These early decisions also adopted the common law view that contempt is an inherent power so fundamental as to be “necessary to the exercise of all [other powers].” 371 Unbridled common law inherent powers, however, sometimes gave rise to judicial excesses. 372 In response, the modern Court “has

366. Although Scalia claims to be a believer in strict translation of text like his professor father, Scalia’s Dixon opinion is, to paraphrase the Oldsmobile ad, “not his father’s textualism.”

367. See United States v. Dixon, 509 U.S. 688, 713 (1993) (Rehnquist, C.J., concurring in part and dissenting in part); Id. at 720 (White, J., concurring in part and dissenting in part); Id. at 741 (Blackmun, J., concurring in part and dissenting in part); Id. at 743 (Souter, J., concurring in part and dissenting in part).

368. See supra notes 251–279 and accompanying text.

369. See infra notes 378–388 and accompanying text.


372. See, e.g., Bloom v. Illinois, 391 U.S. 194,198–99 (1968); Ex parte Terry,
attempted to balance the competing concerns of necessity and potential arbitrariness.\textsuperscript{373} Sometimes, the Court has merely admonished that “[b]ecause of their very potency, inherent powers must be exercised with restraint and discretion.”\textsuperscript{374} In other instances, the Court has imposed substantive limitations.\textsuperscript{375} Consistent with the modern Court’s treatment of inherent powers in general, more recent decisions have permitted legislative restrictions on contempt power, although cautioning that its core function, the protection of judicial authority, may not be impaired.\textsuperscript{376} In keeping with the revolution in individual rights, the Court has extended most due process trial rights accorded to criminal defendants to contemnors.\textsuperscript{377}

Although by dint of history, Scalia has no choice but to recognize their existence, not surprisingly, his opinions and voting record reflect a greater suspicion of inherent powers.\textsuperscript{378} In part, his suspicion arises from a libertarian

128 U.S. 289, 313 (1888).

374. Chambers v. Nasco, 501 U.S. 32, 44 (1991). In many of these cases, the Court nevertheless affirmed the exercise of an inherent power by a lower court. See \textit{id.} (affirming lower court’s imposition of sanctions under inherent powers, holding that such power was not displaced by scheme of statutes and rules). See also Roadway Express, Inc. v. Piper, 447 U.S. 752, 764 (1980); Gompers v. Buck’s Store & Range Co., 221 U.S. 418, 450–51 (1911) (stating that contempt should be used “sparingly” and that the “very amplitude of the power is a warning to use it with discretion”); \textit{Ex parte Burr}, 22 U.S. (9 Wheat). 529, 531 (1824) (holding that the federal court has power to control admission to the bar and discipline attorneys but this power “ought to exercised with great caution”).
377. For “serious” contempt, contemnors are entitled to the classic trial rights of criminal defendants. See, e.g., \textit{In re Oliver}, 333 U.S. 257, 278 (1948) (right to public trial); Cooke v. United States, 267 U.S. 517, 537 (1925) (notice of charges, assistance of counsel, right to present a defense); \textit{Gompers}, 221 U.S. at 444 (presumption of innocence, proof beyond a reasonable doubt, guarantee against self-incrimination). The Court has not extended all the Bill of Rights guarantees such as the pretrial rights to an indictment and arraignment to contempt because it is the Due Process Clause that governs contempt issues. See \textit{Levine v. United States}, 362 U.S. 610, 616 (1960); United States v. Martinez, 686 F.2d 334, 340 (5th Cir. 1982); United States v. Bukowski, 435 F.2d 1094, 1099–1100 (7th Cir. 1970), \textit{cert. denied}, 401 U.S. 911 (1971).
378. \textit{See Carlisle v. United States}, 517 U.S. 416 (1996). Speaking for the majority, Scalia rejected a district court’s attempt to enter an untimely judgment of acquittal, stating, “Whatever the scope of this ‘inherent power’...it does not include the power to develop rules that circumvent or conflict with the Federal Rules of Criminal Procedure.” \textit{Id.} at 426. Justice Stevens, argued that Scalia’s opinion turned judges into no more than judicial referees. He asserted that courts have the inherent power to correct wrongs “done by virtue of its process.” \textit{Id.} at 437 (Stevens, J., dissenting) (quoting \textit{Arkadelphia Co. v. St. Louis S.W. Ry. Co.}, 249 U.S. 134, 146 (1919)). See also \textit{Kokkonen v. Guardian Life Insurance Co. of America}, 511 U.S. 375, 380 (1994) (rejecting claim of ancillary jurisdiction under inherent power to reopen dismissed lawsuit due to breach of agreement where settlement was not part of court’s dismissal order).
streak that abhors permitting any government entity free rein to define its own powers. More specifically, Scalia's constitutional ideology requires particular restraints on the judicial branch. In Scalia's view, an open-ended inherent powers doctrine too easily justifies judicial incursions into the domains of the elected branches.

Nowhere does the danger of judicial overreaching loom larger for Scalia than in the use of modern injunctions. Along with his conservative colleagues, Scalia views sweeping injunctions, particularly in the context of court supervision of public institutions, as dangerous judicial activism. Injunctions, of course, are enforced by civil and criminal contempt sanctions. Thus, part of Scalia's impetus to restrict inherent powers, including contempt, arises from his desire to curb the modern injunction—for if the enforcement mechanism is curtailed, the injunction becomes toothless. In fact, Scalia has gone so far as to suggest that if the scope of modern injunctions continues to grow, they might no longer warrant enforcement by contempt.

Of even more concern to Scalia is that expansion of judicial power often occurs at the expense of another branch's authority, raising separation of powers concerns. As Scalia himself has remarked, he is unaware of any modern figure who cares as much about the separation of powers principle as he does. Scalia

379. Scalia's cynicism runs deep here. He argues that for the Justices, like all government officials, the natural temptation is "towards systematically eliminating checks upon its own power." Planned Parenthood v. Casey, 505 U.S. 833, 981 (1992) (Scalia, J., concurring in part and dissenting in part).


381. See United Mine Workers v. Bagwell, 512 U.S. 821, 842 (1994) (Scalia, J., concurring) (noting with disapproval that contemporary courts "routinely issue complex decrees which involve them in extended disputes and place them in continuing supervisory roles over parties and institutions"); Lewis v. Casey, 518 U.S. 343, 362 (1996) (stating that "the injunction imposed by the District Court was inordinately—indeed, wildly—intrusive.... [It is the ne plus ultra of what our opinions have lamented as a court's "in the name of the Constitution, become[ng]...enmeshed in the minutiae of prison operations."]") (quoting Bell v. Wolfish, 441 U.S. 520, 562 (1979)); Madsen v. Women's Health Center, Inc., 512 U.S. 753, 815 (1994) (Scalia, J., concurring in part, dissenting in part) (describing "misguided trial-court injunction" permitted by the Court as a "powerful loaded weapon lying about").

382. See Bagwell, 512 U.S. at 844 (Scalia, J., concurring).

383. See id.

384. The separation of powers principle embodies several principles. It concerns the encroachment of one branch upon another but also deals with the dispersion of one branches' power to non-governmental entities. See generally Steel Co. v. Citizens For A Better Env't., 523 U.S. 83 (1998) (Stevens, J., concurring) (discussing separation of powers and qui tam actions); Joan Meier, The "Right" to a Disinterested Prosecution of Criminal Contempt: Unpacking Public and Private Interests, 70 Wash. U. L.Q. 85, 101-03 (1992) (reviewing the history of private prosecution).

385. Two scholars believe that, aside from his rejection of affirmative action, Scalia's dedication to the doctrine of separation of powers may be his strongest doctrinal commitment. See David A. Schultz & Christopher E. Smith, The Jurisprudential Vision of Antonin Scalia 84, 85 (1996).
views the separation of powers as a structural guarantee of liberty and endorses Madison's statement in the Federalist Papers that the doctrine is more "sacred than any other in the Constitution." Therefore, Scalia believes in a rigid and near absolute separation of powers principle. Any deviation from this strict approach is risky because it begins the process of allowing one branch to accumulate the power of the others. Thus, recent cases in which the Supreme Court has adopted a more pragmatic approach, permitting the creation of hybrid institutions such as the Independent Counsel and the United States Sentencing Commission, have sparked some of Scalia's most scathing dissents, which darkly warn that the Court "will live to regret" its recent flexibility toward the doctrine.

With such a rigid concept of the separation of powers principle, the very nature of the contempt power is problematic for Scalia. Thus, before and after Dixon, Scalia has argued that "the notion of judges"[sic] in effect making the laws, prosecuting their violation, and sitting in judgment of those prosecutions, summons forth...the prospect of 'the most tyrannical licentiousness'", and therefore, contempt is "out of accord with our usual notions of fairness and the separation of powers." Moreover, he has decried that broad contempt powers are "no less fundamental a threat to liberty than is deprivation of a jury trial."

386. The Federalist No. 47 (James Madison) ("The accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the definition of tyranny."). Scalia has also said that the "Bill of Rights is no more than ink on paper unless...it is addressed to a government which so constituted that no part of it can obtain excessive power." Shultz & Smith, supra note 385, at 89.

387. In his opinion, the first three Articles vest exclusive control of legislative, executive, and judicial power in their respective branches. For example, if a specific power is deemed "executive" in nature, the Constitution establishes a presumption, rebuttable only by the most conclusive textual or originalist evidence to the contrary, that only the President can exercise that power. See Morrison v. Olson, 487 U.S. 654, 705 (1988) (Scalia, J., dissenting). Scalia argues that his strict separation of powers approach is supported by Constitutional text, reading the phrase "executive power shall be vested in the President," to mean "all" executive power. Scalia supports his position with selective quotes from the The Federalist and a clear rules argument that separate must mean completely separate or else there is no principled basis on which the Court can draw lines. See id. However, neither historical scholars nor the Court's decisions uniformly support Scalia's approach. In fact, there is substantial historical evidence of the "pragmatic actions of government officials immediately after the Constitution was ratified [that] cast doubt on Scalia's view that the framers intended to implement a rigid, clear principle of separation of powers." Shultz & Smith, supra note 385, at 87. See also Elbert P. Tuttle & Dean W. Russell, Preserving Judicial Integrity: Some Comments on the Role of the Judiciary Under the 'Blending' of Powers, 37 Emory L.J. 587, 588 (1988) (arguing that the Framers' "much ballyhooed separation of powers was, in essence, a blending of powers").


391. Young, 481 U.S. at 824 (Scalia, J., concurring). In addition, Scalia's general
Scalia’s ability to act on his objections to the nature and modern uses of contempt power is hampered by his theoretical commitment to historical practices-based originalism. An unfettered contempt power had strong roots in the common law at the time of ratification. To escape from the historical practices governing contempt, Scalia’s *modus operandi* in contempt cases has been to drive a wedge between the modern contempt sanction and its common law antecedents. To his mind, if modern contempt shares no more than the same name as its historical counterpart, he is not bound by the historical rules for common law contempt. Scalia’s arguments, however, are so strained as to reveal their ideological underpinnings.

**B. Scalia’s Contempt Opinions**

In his two solo opinions in contempt cases, *Young v. United States ex. rel. Vuitton et Fils, S.A.* and *United Mine Workers v. Bagwell,* Scalia abandoned or distorted the applicable history and precedent which support a strong contempt power. He also uncharacteristically relied on Warren Court decisions and abstract principle arguments that are incompatible with his methodology. These unusual features are also found in *Dixon.*

1. *Young v. United States ex. rel. Vuitton et Fils, S.A.*

The best example of Scalia’s efforts to cut modern contempt from its roots is found in his *Young* concurrence. The underlying civil suit in *Young* was settled when the defendants agreed to a permanent injunction that forbade them from infringing on the plaintiffs’ trademark. Upon alleged violations of the injunction, the district court appointed the plaintiffs’ attorneys to prosecute the violations. The majority reversed on the grounds that it was improper to have the opposing party prosecute the contempt action.

The Court limited its decision in two important respects. First, the majority relied solely on its supervisory powers over the federal courts. Second, the majority held that aside from the interested prosecutor infirmity, it was mistrust of the judiciary adds fuel to his unwillingness to allow courts to wield the mixed powers of contempt. In *Madsen v. Women’s Health Clinic, Inc.*, Scalia warned that injunctions “are the product of individual judges rather than of legislatures—and often of judges who have been chagrined by prior disobedience of their orders.” *See* *Madsen v. Women’s Health Clinic, Inc.*, 512 U.S. 753, 793 (1994) (Scalia, J., concurring in part, dissenting in part). Thus, Scalia warned that “[t]he right to free speech should not lightly be placed within the control of a single man or woman.” *Id.*

392. *See supra* notes 370–372 and accompanying text.
393. *See infra* Part V.B.
394. *See infra* Part V.B.
397. *See Young,* 481 U.S. at 790.
398. *See id.* at 792.
399. *See id.* at 802.
400. In this capacity, the Court also instructed the lower courts to first request that the government prosecute the contempt before appointing a private prosecutor. *See id.*
otherwise constitutional for a federal court to appoint a private attorney to prosecute an out of court violation of a court order.\footnote{401}{Therefore, Young did not hold unconstitutional the widespread state practice of allowing private litigants, such as battered women, to litigate violations of restraining orders as criminal contempts.\footnote{402}}

Scalia concurred in the judgment but contended that only the executive branch can decide to prosecute a contempt.\footnote{403}{Therefore, courts lack the derivative power to appoint any private attorney as a prosecutor in a contempt action. Scalia began his analysis with the premise of an absolute separation of powers and asserted that the power to initiate criminal prosecutions rests entirely within the executive branch.\footnote{404}{However, Scalia had to concede that each branch has some power to "protect the functioning of its own processes, although those implicit powers may take a form that appears to be nonlegislative...nonjudicial...."\footnote{405}{For the judicial branch, of course, this means contempt power. Scalia argued that judicial power to initiate self-protective contempt actions is narrow, limited solely to contempts that interfere with "the orderly conduct of their business or disobey orders necessary to the conduct of that business (such as subpoenas)."\footnote{406}{Correspondingly, Scalia contended that federal courts have no power, inherent or under Article III, to prosecute out-of-court disobedience to their judgments and orders.\footnote{407}{Throughout the opinion, though, he struggled to find evidence consistent with his methodology for this position.}}}}}} First, Scalia ignored his usual originalist sources, which is not surprising because each contradicted his position. Blackstone wrote that courts had the power to punish contempt "in the face of the court" and those which "arise at a distance, of which the court cannot have so perfect a knowledge."\footnote{408}{Historians believe that the Framers were well aware of Blackstone's view on the reach of the common law principle of necessity. See id. (Scalia, J., concurring in the judgment).}

\footnote{401}{See id. at 793.}
\footnote{402}{See Joan Meier, The "Right" to a Disinterested Prosecutor of Criminal Contempt: Unpacking Public and Private Interests, 70 WASH. U. L.Q. 85, 103–07 (1992) (discussing and defending this widespread practice).}
\footnote{403}{See Young, 481 U.S. at 815 (Scalia, J., concurring in the judgment).}
\footnote{404}{Scalia tried to frame this as a textualist and originalist argument implicit in the text and structure of the Constitution. However, Scalia's rigid separation of powers argument falls prey to historical research which suggests a more flexible concept of the doctrine in the early period of the Republic. Daniel Reisman has explored Scalia's selective use of historical materials to demonstrate this point. See Daniel Reisman, Deconstructing Justice Scalia's Separation of Powers Jurisprudence: The Preeminent Executive, 53 ALB. L. REV. 49, 81–82 (1988).}
\footnote{405}{Young, 481 U.S. at 821 (Scalia, J., concurring in the judgment). Scalia recognized this power under the common law principle of necessity. See id. (Scalia, J., concurring in the judgment).}
\footnote{406}{Id. (Scalia, J., concurring in the judgment).}
\footnote{407}{See id. at 821 (Scalia, J., concurring in the judgment). Scalia argued that to allow the courts this power would grant the judicial branch greater powers of self-enforcement than the other two branches. In a typical Scalia-ism, he stated that any claim to greater self-enforcement power had no basis other than "self love." Id. at 821–22 (Scalia, J., concurring in the judgment).}
\footnote{408}{4 WILLIAM BLACKSTONE, COMMENTARIES *283.}
law contempt power and did not intend to change it in the Constitution." The Judiciary Act of 1789, passed by the First Congress, evinces a similar intent. That Act granted federal courts broad discretion to punish "all contempts of authority in any cause or hearing."\(^{410}\) Lastly, early Supreme Court decisions confirm that the Framers and the immediately succeeding generation understood the contempt power to reach disobedience to court orders outside the courtroom.\(^{411}\)

Unable to rest his position on historical practices or precedent, the true foundation for Scalia's position in *Young* was the Warren Court decision in *Bloom v. Illinois*.*\(^{412}\) *Bloom* established that serious criminal contempts were sufficiently like criminal offenses and required jury trials as a fundamental due process

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409. *See* Ronald L. Goldfarb, *The Contempt Power*, 17–18 (1963). *See also* Schick *v.* United States, 195 U.S. 65, 69 (1904) ("Blackstone's Commentaries are accepted as the most satisfactory exposition of the common law of England."). Historians now dispute Blackstone's assertion that an extensive common law contempt power was "as ancient as the laws themselves." *Bloom v. Illinois*, 391 U.S. 194, 198 n.2 (1968) (quoting 4 William Blackstone, *Commentaries* 286–87). They mark the rise of broad contempt powers only to the Star Chamber practices. However, none contest that by the 18th Century, both the English and American courts had adopted Blackstone's view. *See id.* (reviewing common law sources of the period).


411. *See* Ex Parte Robinson, 86 U.S. 505, 511 (1873) (interpreting the 1831 Judiciary Act to authorize contempt actions, *inter alia*, "where there has been disobedience or resistance by any officer, party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the courts. As thus seen the power of these courts in the punishments of contempts can only be exercised to...enforce obedience to their lawful orders, judgments, and processes."). *See also* Anderson *v.* Dunn, 19 U.S. (6 Wheat.) 204, 227 (1821) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates..." (emphasis added)). While the *Anderson* "submission to their lawful mandates" language had long been interpreted to mean the power to enforce all court orders, Scalia took the dubious position in *Young* that it meant no more than "orders necessary to the conduct of a trial, such as subpoenas." *Young*, 481 U.S. at 821 (Scalia, J., concurring in the judgment). Actually, Scalia himself appeared to recognize the implausibility of this interpretation, for immediately after making the argument, he retreated and merely contended that "in any event," this quote was dictum that did not "carefully consider[]...the outer limits of the federal court's inherent contempt powers." *Id.* (Scalia, J., concurring in the judgment). An even earlier case, *United States v. Hudson & Goodwin*, stated, "To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court...." United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812). Scalia also cited *Hudson* in *Young* but argued that the case did not refer to court judgments and was therefore ambiguous. *See Young*, 481 U.S. at 819 (Scalia, J., concurring in the judgment). As Daniel Reisman points out, more important than his dismissal of *Hudson*, Scalia utterly failed to discuss *Ex parte Robinson*, which explicitly endorsed the common law rule that the contempt power includes enforcing judgments. *See Reisman, supra* note 404, at 86.

412. 391 U.S. 194 (1968). *Bloom* overruled the infamous labor injunction case, *In re Debs*, 158 U.S. 564 (1895). *Debs* had affirmed the common law rule that criminal contempts could be tried summarily by the court as well as reaffirming the common law contempt is exempt rule. *See supra* notes 256–257 and accompanying text.
Typical of the balancing in modern inherent power cases, Bloom concluded that the passage of time had shown that the potential for abuse of summary procedures for serious contempts outweighed the principle of necessity that animates the common law rule. While speaking broadly at times, Bloom's holding was limited to the question presented—did the Constitution require jury trials for serious contempts?

Nevertheless, in Young, Scalia took the broadest phrases from Bloom and ran with them. He argued that Bloom overruled the cases holding that courts have inherent power to enforce their orders through self-initiated contempt actions. However, as Justice Brennan noted in the majority opinion, Bloom did "nothing to undermine" this well-established view. Scalia apparently realized the weakness of arguing that Bloom was controlling precedent for his position and uncharacteristically backed off. Instead, he alternatively argued that Bloom was at least "highly relevant" to the issue in Young. Bloom, he said, stood for the principle that arguments based on judicial necessity "must be restrained by the totality of the Constitution, lest it swallow up the carefully crafted guarantees of liberty." Applying this principle, Scalia then wrote, "it is inconceivable to me that [this principle] would not prevent so flagrant a violation of [the separation of powers] as permitting a judge to promulgate a rule of behavior, prosecute its violation, and adjudicate whether the violation took place."

Given Scalia's methodology, this was an amazing statement. Finding no text, historical practice, or precedent-based rule for his position, he rested his argument on the implicit principle of a Warren Court decision that overruled a common law practice over the dissent of that era's originalists. He then held that

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413. See Bloom, 391 U.S. at 201.
414. Bloom therefore fits neatly within the Court's modern inherent power cases that balance the principle of necessity with the threat of potential arbitrariness on an issue by issue basis. See supra note 373 and accompanying text.
415. "But Bloom repudiated more than Deb's holding. It specifically rejected Debs' rationale that courts must have self-contained power to punish disobedience of their judgments...." Young, 481 U.S. at 823 (Scalia, J., concurring in the judgment).
416. Id. at 796 n.8. The Debs Court had merely taken the hoary principle that courts could enforce their orders and judgments by contempt as a given and used it to support its more specific argument that the issuing judge, not another judge or a jury, must have the power to enforce the order. Therefore, the Court's decision in Bloom to overrule Debs' endorsement of summary proceedings did not imply the Court's disapproval of the more general common law rules for contempt.
417. Id. at 824 (Scalia, J., concurring in the judgment).
418. Id. (Scalia, J., concurring in the judgment).
419. Id. (Scalia, J., concurring in the judgment).
420. In Bloom, Justices Harlan and Stewart dissented and argued that the majority had substituted its conception of due process in place of historical practices and the original understanding of the Fourteenth Amendment. Harlan wrote that the "Court's actions here can only be put down to the vagaries of the times." Bloom v. Illinois, 391 U.S. 194, 215 (1968) (Harlan, J., dissenting). Indeed, the majority conceded that it was overruling a rule that was based on "weighty and ancient authority." However, sounding the theme of the evolving that Constitution Scalia opposes, the Court held that "the ultimate question is not whether the traditional doctrine is historically correct but whether the rule...is an acceptable construction of the Constitution." Id. at 199–200 n.2.
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due open-ended principle—that necessity arguments should be limited whenever possible—must govern this case because any other alternative was "inconceivable" to him. Thus, instead of any methodology-based arguments, Scalia’s position in Young boils down to precisely the kind of barely veiled statement of personal opinion that he derides as illegitimate. The operative value for Scalia in Young was his hostility to judicial power and, in particular, his separation of powers complaint about contempt. Thus, Young demonstrates that when contempt is at issue, Scalia’s ideology prevails over his methodology.

2. United Mine Workers v. Bagwell

In Young, Scalia mostly ignored the relevant historical sources. In Bagwell, he manipulated his originalist methodology and the historical evidence to advance his thesis that modern contempt and historical contempt are different animals.

Bagwell revisited the line between civil and criminal contempt in the context of a complex labor injunction. After a hearing, a state judge held a labor union in civil contempt and imposed a large fine. On appeal, the union argued the contempt proceedings were criminal, which entitled it to jury trial under Bloom. Writing for the majority, Justice Blackmun found the case difficult, but ultimately agreed with the union and reversed.

Justice Scalia agreed that the contempt sanctions in Bagwell were criminal but used his concurrence to lecture the Court on the historical practices relevant to the issue in the case. He contended that common law equity orders

421. See Young, 481 U.S. at 824 (Scalia, J., concurring in the judgment).
422. See supra notes 15–25 and accompanying text.
424. At one point in the litigation, the court set out a schedule of fines for future violations. After additional violations of the order, the court held hearings it denominated as "civil and coercive." The court permitted the parties to conduct discovery, introduce evidence, and call and examine witnesses as in a civil proceeding but required the contumacious acts to be proven beyond a reasonable doubt. However, the court did not afford the union a jury trial. After the labor dispute was settled, the parties moved to dismiss the resulting contempt fines but the court ordered some of the money paid to the counties and the state which had expanded resources to combat the illegal strike activities. The parties and local government withdrew from the litigation, so the court appointed a Special Commissioner to litigate and collect the fines. The Supreme Court of Virginia held that, as a matter of state law, the fines were civil and coercive and thus properly collected in a civil proceeding without a jury. See Bagwell, 512 U.S. 821, 824–26.
425. See id. at 826.
426. The majority opinion did little to clarify the distinction between civil and criminal contempt in ambiguous situations. The two main factors in the Court’s decision appeared to be: (1) that the extensive fact-finding required to determine if the union had complied with the order’s comprehensive code of conduct was best resolved by the rigor of a criminal proceeding; and (2) that the amount of the fines qualified this as a serious contempt. The majority refused to establish a definitive test and rejected the two advanced by the parties. See id. at 834–38.
427. In characteristic fashion, Scalia claimed that the existing tests for distinguishing criminal and civil contempt were irreconcilable and only historical practices
generally required affirmative acts because "[a] general prohibition for the future does not lend itself to enforcement through conditional incarceration..." In addition, he claimed that common law injunctions were limited to simple acts that either advanced the litigation, such as discovery, or terminated it, such as the conveyance of a deed. Although Scalia acknowledged that some common law equitable decrees were prohibitory rather than affirmative, he declared that early injunctions were still "much less sweeping than their modern counterparts" and did not involve "any ongoing supervision of the litigant's conduct, nor did its order continue to regulate his behavior." Therefore, according to Scalia, the modern injunction had "lost some of the distinctive features that made enforcement through civil process acceptable." In this way, Scalia distinguished common law injunctions from the complex prohibitory regulations in the Bagwell court order.

By framing the modern injunction as a historical departure from historical equity practices, Scalia saw significant ramifications for future contempt cases. Whereas the majority was content to evaluate each contempt proceeding on a case-by-case basis to determine whether it was civil or criminal, Scalia was inclined to announce a more drastic rule. He suggested that if "the modern judicial order is in its relevant essentials not the same device" as the historical injunction, the Court would at some point have to decide "whether modern injunctions sufficiently resemble their historical namesakes to warrant the same extraordinary means of enforcement." In other words, Scalia reached beyond the facts of the case to declare his readiness to rule that civil contempt sanctions should no longer be a permissible remedy for a violation of a modern injunction. Thus, as in Young, Scalia advanced arguments that would limit contempt power to the narrowest of circumstances.

The flaw in Scalia's Bagwell opinion is that he subtly altered his originalist methodology to reach this conclusion. Normally, Scalia holds that due

428. Id. at 841 (Scalia, J., concurring).
429. See id. (Scalia, J., concurring). More recently, in Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc., 119 S. Ct. 1961 (1999), Scalia, writing for a 5-4 majority, quoted A. Dobie, HANDBOOK OF FEDERAL JURISDICTION AND PROCEDURE 660 (1928), for the proposition that "the equity jurisdiction of the federal courts is the jurisdiction in equity exercised by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act, 1789 (1 Stat. 73)." Id. at 1968. Therefore, Scalia held that the district court had no power to issue the preliminary injunction in this case. Id. at 1974-75. But see id. at 1975-78 (Ginsberg, J., dissenting) (stressing the adaptable character of federal equity power, and that equity can evolve over time).
430. Bagwell, 512 U.S. at 842 (Scalia, J., concurring).
431. Id. at 843 (Scalia, J., concurring).
432. Scalia agreed with the majority that the level of fact finding required to determine compliance with a complex prohibitory order was better served by criminal procedures than civil process. However, the heart of his argument was that enforcement of this type of order by civil process would be a historical "novelty." Id. (Scalia, J., concurring).
433. Id. at 844 (Scalia, J., concurring) (emphasis added).
process is only that process (or a close historical analogue) which the Framers recognized as necessary. Scalia therefore faults other Justices when they frame due process issues as an abstract inquiry into fairness devoid of historical foundations. However, although Scalia claimed in Bagwell that the case could be resolved by resort to historical practices, Scalia’s analysis did not start with the historical practices governing civil contempt. Instead, as in Young, he began with the abstract, ahistorical premise that the very nature of contempt power presents a threat to due process and the separation of powers principle. Based on this a priori premise, Scalia argued that “only the clearest of historical practices” could justify the denial of jury trial for the union. Essentially, Scalia used a presumption of a due process violation to impose a heavier historical burden of proof on contempt practices than for other historical practices. In other words, Scalia stacked the rules of the game against contempt.

This higher burden of historical proof for contempt skewed Scalia’s analysis in Bagwell. Normally, when Scalia finds a historical analogue to the contested practice, his presumption is that due process is not offended, even if the practice has evolved into something quite different from its common law root. Given that civil contempt sanctions based upon prohibitory injunctions were at least a small part of historical equity practice, Scalia could have traced the continuous existence of civil contempt sanctions based on prohibitory orders from their simple beginnings through their evolution to the more complex creatures of today. Under his normal approach, he would therefore have held that modern civil contempt sanctions were the equivalent of common law’s civil contempt sanctions, regardless of the complexity of the underlying order. Instead, under this stricter version of originalism, Scalia used the difference in complexity between common law injunctions and the Bagwell injunction to declare that the “clearest of historical practices” standard was not met.

However, even Scalia’s assertion that the modern “sweeping injunction” is a clean break from historical equity practices is dubious. The “sweeping injunction” is not a Twentieth Century phenomenon that emerged from the Warren Court or even the New Deal. Rather, as early as the 1880s, federal district courts issued complex prohibitory orders during the strikes that accompanied the rise of organized labor, which in many instances were enforced by civil contempt sanctions. Moreover, the ease with which the tradition-bound Nineteenth

436. Bagwell, 512 U.S. at 840 (Scalia, J., concurring). Because this was a civil contempt case, Scalia added that it was even worse to allow a contempt proceeding without the “protection usually given in criminal trials.” Id. (Scalia, J., concurring).
437. Id. (Scalia, J., concurring).
438. Scalia accomplishes this by constructing a historical continuum that shows continuation and/or evolution of the past practice to the present time. See Michael H., 491 U.S. at 123–25.
439. See supra notes 51–62 and accompanying text.
440. The rise of unionism was resisted by the courts, which used “broad injunctions” to stymie organized labor. See William E. Forbath, Law and the Shaping of the American Labor Movement 62 (1991) (“Injunctions figured in virtually every
Century courts issued complex labor injunctions suggests that Scalia’s dichotomy between historical equity practice and the modern injunction is a fallacy.441 As one commentator similarly concluded, “[I]t is difficult to see the ‘sweeping’ decrees as an entirely new phenomenon....”442 Scalia even acknowledged the early labor cases in Bagwell, but apparently considered them the product of “contemporary courts.”443 For Scalia, the “modern era” in civil contempt appears to have begun around the 1880s (conspicuously when the courts began to issue the kinds of orders of which Scalia disapproves).444 However, because Scalia changed the rules of the originalism game, he required an exact match between the Bagwell injunction and historical practices. With this as the test, Scalia could easily seize on the expanded scope of modern injunctive relief as proof that modern injunctions should not be governed by the historical rules for civil contempt.445

railroad strike” and “in most strikes which industrial unionism...was an issue....” ) “Federal courts went so far as to deputize private police or seek state or federal troops to assist employers.” Id. See also Phillip A. Hostak, Note, International Union, United Mine Workers v. Bagwell: A Paradigm Shift in the Distinction Between Civil and Criminal Contempt, 81 CORNELL L. REV. 181, 191–92 (1995) (chronicling how federal district courts “regularly policed labor disputes by issuing injunctions and subsequently enforcing them via contempt proceedings”).

441. Prior to the 1880s, injunctions issued by American courts primarily involved nuisances and protecting public carriers. Both kinds of injunctions were justified under traditional equitable principles. See Edwin E. Witte, Early American Labor Cases, 35 YALE L.J. 825, 834 (1926). The courts that first issued the more complex labor injunctions of the 1880s relied on these earlier cases, as well as statutory provisions and other case law that broadly defined judicial power in equity. See id; Sherry v. Perkins, 147 Mass. 212, 214 (1898) (finding that injury to plaintiff’s business and property “was a nuisance such as a court of equity will grant relief against”); Worthington v. Waring, 157 Mass. 421, 428 (1892) (“Under pre-existing statutes, courts of equity have the right to issue ‘all general and special writs and processes required in proceedings in equity to courts of inferior jurisdiction, corporations, and persons, when necessary to secure justice and equity.’”) (citation omitted).

442. Hostak, supra note 440, at 221. Thus, while restrictions on the use of civil contempt sanctions in complex cases may be a good idea, originalism fails to provide the justification as Scalia contended in Bagwell.

443. Bagwell, 512 U.S. at 842.


445. Although Scalia contends that he looks to the most specific historical analogue to the challenged modern practice, the level of specificity of tradition is in the eye of the beholder. In Bagwell, the formulation of the most specific tradition could be either: (1) whether prohibitory civil injunctions were permissible at common law; or (2) whether complex prohibitory injunctions were permissible. Because complex injunctions were unknown at common law, Scalia’s decision to focus on complexity as the key issue resolves
C. Scalia and Contempt in the Dixon Opinion

In light of Scalia’s contempt jurisprudence, the structural and analytic peculiarities of his Dixon opinion make more sense. Specifically, the conflict between Scalia’s originalism and his hostility to contempt, played out in Young and Bagwell, is repeated in Dixon.

1. The Structure of Scalia’s Discussion of Contempt

In several ways, the very structure of the opinion reflects Scalia’s struggle between his methodology and his hostility to contempt. First, although the case was briefed and argued as a vehicle for the Court to reconsider the Grady double jeopardy test, Scalia began the analysis section of his opinion with a discussion of the history of contempt that had nothing to do with double jeopardy. The first sentence reads: “To place these cases in context, one must understand that they are the consequence of a historically anomalous use of the contempt power.” Curiously, however, he never explained why it was necessary to distinguish these contempt cases from their historical analogues to resolve the double jeopardy issue. Only within the context of Scalia’s constitutional methodology does his diversion into the history of contempt make sense. In Dixon, Scalia was once again faced with a historical practice favorable to contempt power—the contempt-is-exempt rule. Under his originalist methodology, he could not discard this historical rule without first showing that the contempt cases at issue were a significant departure from their historical analogues.

Scalia drew two distinctions between historical contempt and the Dixon contempt cases. Scalia first reiterated his argument from Young that common law “criminal contempt power was confined to sanctions for conduct that interfered with the orderly administration of judicial proceedings,” thereby excluding out-of-court violations of court orders and judgments. Scalia then moved quickly to a second, more specific contention about the contempt cases in Dixon. Scalia argued that the common law and early American courts could not have issued the Dixon and Foster injunctions because there was a “long common-law tradition against judicial orders prohibiting violation of the law.” To Scalia, it was “not surprising, therefore, that the double jeopardy issue presented here...did not occur at common law, or even quite recently in American cases.” Toward the end of

the case, Scalia’s methodology, however, provides no value neutral rule to guide this decision.

446. See Brief for Petitioner, supra note 266, at 33–46.
448. See id.
449. See supra note 51 and accompanying text.
450. Dixon, 509 U.S. at 694. While he cited some of the same sources, curiously, Scalia did not cite his Young concurrence as a reference.
451. Id. at 695. Scalia cited to Blackstone and to various English and American treatises and cases on equity law. See id. at 694.
452. Id. at 695. Scalia characterized the issue as “whether prosecution for criminal contempt based on violation of a criminal law incorporated into a court order bars a subsequent prosecution for the criminal offense.” Id. However, while that characterization
this second argument, Scalia acknowledged the existence of the common law and early American cases that permitted prosecution for criminal contempt and a subsequent criminal charge based on the same conduct.\textsuperscript{453} Nevertheless, Scalia concluded the existence of these cases did not undermine his argument that the Dixon contempts were historically anomalous because these early cases were allegedly examples of contempt “as originally understood” since they all involved the “disruption of judicial process.”\textsuperscript{454}

Scalia’s claims are difficult to analyze because he did not develop either argument in great detail and because he switched between the two arguments without clear demarcation. However, Scalia’s rhetorical maneuver at the end of his second historical argument is the first clue that his attempt to distinguish the Dixon contempts is flawed. Rather than end on a high note, Scalia had to try to explain away the common law contempt-is-exempt cases which appear to undercut his second assertion that the Foster and Dixon orders could not have been issued at common law. In doing so, however, Scalia actually abandoned this second argument—about the scope of historical injunctions—and switched back to his first and broader claim from Young—that common law contempt did not cover out-of-court violations of court orders and judgments (except for a narrow class relating to disruptions of judicial process).\textsuperscript{455} This shifting and blending of arguments suggests that neither of his historical points was strong enough to stand on its own and that his broader Young argument was actually the heart of his position in Dixon.

2. A Critique of Scalia’s Historical Claims About Contempt

Beyond being merely confusing, the evidence for both of Scalia’s historical claims with regard to Foster’s domestic violence injunction in Dixon is weak. Examination of his sources and additional historical evidence reveals that Scalia was either partially inaccurate or just plain wrong about several of his critical assertions.

While Scalia’s second argument that common law equity rules would have forbidden these court orders makes sense in the context of Alvin Dixon’s release order, the protection order in Foster’s case did not contradict the rules of common law equity, even as defined by Scalia. According to Scalia, common law prohibited injunctions that enjoined “violation of the civil or criminal law as such.”\textsuperscript{456} On the other hand, injunctions that forbade harmful acts that produced a “separate injury to private interest” and which incidentally were punishable under the criminal law, were allowed.\textsuperscript{457} In fact, if this had not been so, the contempt-is-exempt rule could never have arisen at common law. In applying this common law equity principle in the opinion, Scalia only analyzed the injunction in Dixon’s

\textsuperscript{453} See id.
\textsuperscript{454} Id.
\textsuperscript{455} See supra notes 406–411 and accompanying text.
\textsuperscript{456} See Dixon, 509 U.S. at 695 (emphasis added).
\textsuperscript{457} Id.
case. That order enjoined further criminal violations while on release in a criminal case. The defendant then violated this release order by committing a new offense. Here, Scalia is correct that no private party was implicated and thus no identifiable private interest was at stake; therefore his historical anomaly argument is reasonable.

The court order in Foster’s case is a profoundly different matter. Foster’s restraining order was issued at the request and for the benefit of a private party, Ana Foster. Moreover, she sought the court’s protection under a specific legislative provision directed at individuals in certain statutorily defined relationships. The District of Columbia Code therefore established a private legal interest, separate from that protected by the criminal law. The order itself reflected this distinction because it enjoined a range of conduct far beyond that which could violate the criminal law. Thus, while family court regulation of domestic violence did not exist at common law, the Foster restraining order still squarely fit within the common law equity rule that permitted injunctions which, although designed to protect private interests, might also result in violations that constituted criminal conduct. Scalia avoided this problem by focusing solely on the Dixon facts and omitting any discussion of the Foster order in this part of the opinion.

Turning back to his broader Young claim that common law contempt was not used to enforce judgments and most out-of-court violations of judicial orders, Scalia’s historical arguments in Dixon were no better those that he advanced in Young. In the first half of his bifurcated Young argument in Dixon, Scalia cited to Blackstone for the proposition that “the criminal contempt power was confined to sanctions for conduct that interfered with the orderly administration of judicial proceedings.” However, Scalia failed to identify the specific language in Blackstone that supports his claim nor did he quote the other passages from Blackstone which contradict his position.

458. See id. at 691.
459. Id.
460. See supra notes 305–306.
461. In fact, under Scalia’s analysis later in the opinion, he held that individual terms of the order, such as the “in any manner threaten,” precluded both criminal and non-criminal wrongs. See supra notes 327–330.
463. Scalia only cited to 4 William Blackstone, Commentaries *280–85, thus it is impossible to know which passages he believes support his claim. One possibility could be Blackstone’s statement that a court could punish disobedience by parties to “any rule or order, made in the progres[s] of a caufe.” Id. at 282. The language “progress of a cause” might be interpreted to refer to just judicial process. However, “any rule or order” suggests Blackstone believed in a broad contempt power. Additional language in Blackstone supports the latter, broader interpretation. Blackstone also wrote that all persons, including non-parties, could be punished for contempts that arise as at distance for “disobeying or treating without respect the king’s writ[s], or the rules or procefs of the court;... and by any thing in short that demonstrate a gross want of that regard and respect, which when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely loft among the people.” Id. at 282. Finally, my interpretation of Blackstone is more consistent with the cases from the times. See infra notes 470–477 and
Next, Scalia argued that this “limitation was closely followed in American courts.” As in Young, however, Scalia neglected to discuss Ex parte Robinson, which contains language that undermines his argument. Scalia also noted that Congress amended the Judiciary Act of 1789 in 1831 to “allow[] federal courts the summary contempt power to punish generally ‘disobedience or resistance’ to court orders.” Here, Scalia seemed to suggest that the 1831 Act expanded the federal courts’ statutory contempt power to include judgments and all other court orders and, by implication, that the First Judiciary Act had limited contempt to the narrow class that Scalia believed was all the common law had permitted. If this was his intended point, he appears to have gotten it backwards. The Judiciary Act of 1789 allowed the federal courts to punish “all contempts” of their “authority in any cause or hearing before the same.” Commentators agree that the plain language of the 1831 Judiciary Act and Congress’ clear intent in 1831 was to limit the common law contempt power that the 1789 Act had codified, not expand that power to new classes of court orders.

Scalia’s final claim here was that the common law cases that gave birth to the contempt-is-exempt rule were limited to contempt that “were for disruption of judicial process,” thereby excluding any contempts analogous to the Dixon and Foster scenarios. In support, Scalia cited to the 1739 English case, King v. Lord Ossulston. An examination of that case, however, proves the opposite to be true.

accompanying text.


465. See supra note 411 and accompanying text. Nor did Scalia advance his strained interpretation of the Anderson v. Dunn “lawful mandates” language as he had in Young. Instead, all Scalia could muster in Dixon was a ‘see’ citation to the 1812 case, United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32 (1812). See Dixon, 509 at 694. All that case decided was that the lower federal courts had no inherent jurisdiction over common law criminal offenses. Hudson & Goodwin, 11 U.S. (7 Cranch) at 34. Thus, in the absence of legislation federalizing an offense, the federal courts had no authority to entertain a criminal prosecution for a substantive offense. Moreover, the Court was quite careful to deny that it was imposing any restrictions on traditional inherent powers, specifically singling out contempt power as excepted from its holding. See id. at 33. (“Certain implied powers must necessarily result to our Courts of justice from the nature of their institution....To fine for contempt—imprison for contumacy—inforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others....”). Therefore, Hudson & Goodwin added nothing to Scalia’s claims about the limited scope of contempt power soon after ratification of the Fifth Amendment.


468. See Tuttle & Russell, supra note 387, at 594. Historians agree that the 1789 Act was understood to recognize the existing broad contempt power at common law rather than define a new power. See id. However, after the infamous Peck case, Congress decided to preclude judges from using summary contempt to punish persons for libelous statements about them outside the courtroom. See id.

469. Dixon, 509 U.S. at 695.

The defendants in *Ossulston* were Lord Ossulston, Pierson, and various servants who together had "contrived to get a young lady out of the custody of her guardian assigned in Chancery, and marry her."471 She apparently consented "and was carried into Sussex, and there married."472 Ossulston and his co-conspirators were held in contempt and committed for violating the guardianship order.473 There was also a criminal statute to punish those who married underage women with inheritances without the consent of their legal guardian (whether their natural father or a guardian appointed by the court).474 Subsequent to the contempt, Ossulston and his co-defendants were charged by information under this statute.475 On appeal, the King’s Bench refused to dismiss the information despite the earlier contempt proceeding, holding that there were different purposes served by contempt and the criminal law.476

With the facts laid out, Lord Ossulston’s contempt cannot be conceived as a “disruption of judicial process.” First, these nonparty contemnors clearly committed an out-of-court violation, not a classic in-court verbal or physical disruption of judicial proceedings. Nor did the *Ossulston* contempts relate to any out-of-court form of judicial process, such as a subpoena, as part of ongoing litigation in the guardianship proceeding. Rather, the guardianship decree was a standing order that governed the conduct of guardian, as well as any person who interacted with the ward in a way that implicated the terms of the order (such as marriage or her inheritance).477 By conspiring together and then spiriting away the

412 (K.B. 1738) (providing a fuller recitation of the facts than the Strange report to which Scalia cited in *Dixon*). Scalia also cited *State v. Yancy*, 4 N.C. 133 (1814), for support. *Yancy*, however, involved an in-court contempt for disrupting court proceedings which neither advances nor detracts from Scalia’s argument about the scope of out-of-court contempts at common law.

471. *Ossulston*, 93 Eng. Rep. at 1063. Lord Ossulston was the eldest son of the Earl of Tankerville. *Pierson*, 95 Eng. Rep. at 412. He is referred to as “Lord O.” in the *Pierson* version. See id. The groom was Pierson, the eldest son of one of the stewards of the Earl of Tankerville who was “in low circumstances.” Id. The female ward was “Mary Eads, an heiress, a little under sixteen years of age, and worth 10,000l. personal estate, and 900l. per. ann.” Id. Her guardian appointed by the Court was Mr. Brieron, her uncle on her mother’s side. Id. Guardians, of course, were appointed by Chancery only if the ward had an income via an inheritance. *See Marrying in Contempt of Court, THE IRISH LAW TIMES, April 13, 1889 at 194 [hereinafter Marrying in Contempt].


473. See id.

474. See 4 & 5 Phil. & M. c. 8. See also *Marrying In Contempt, supra* note 471, at 194 (noting that “Most people who read romances are well acquainted with the doctrine, that for an adventurous tuft-hunter to marry a female ward of Chancery in a clandestine manner, whether out of a boarding school or not, is a somewhat perilous proceeding”).


476. “As to the commitment by the Court of Chancery, that was for a contempt only; and therefore it is no reason against punishing the defendant’s for the satisfaction of publick justice, and by way of publick example.” *Pierson*, 95 Eng. Rep. at 413.

477. Furthermore, contrary to Scalia’s characterization of equity orders that were enforced by contempt, the guardianship decree did not require a simple, single act that either advanced or terminated the proceeding. This Chancery Court order had given a wide
ward, the contemnors violated the substance of the order—the court’s assignment of guardianship authority to the guardian. Therefore, *Ossulston*’s case actually refutes Scalia’s claim that common law out-of-court contempts were limited to a narrow class of acts that interfered with judicial process.

Why Scalia cited *Ossulston* remains a mystery. Additional historical records suggest several possible sources for Scalia’s misconceptions about common law contempt. It may be that Scalia (or his secondary sources) relied upon medieval notions of contempt that were long superseded by the mid-to late-Eighteenth Century—the critical period to which Scalia’s originalism turns to find the benchmark common law practices for constitutional analysis. Scalia’s misunderstanding may also be attributed to an overly literal interpretation of certain common law terms. For example, in medieval times, the term “in the presence of the court” actually included whole classes of out-of-court contempts. Similarly, the phrase, “hinder the administration of justice” appears to have long included much more than simply disrupting court proceedings or disobeying a limited class of out-of-court orders such as subpoenas. Thus, to the

range of powers to the guardian, including the power to approve the marriage of the ward as well as manage her finances. See id.

478. Medieval English courts treated the out-of-court disobedience of court orders as a civil rather than criminal contempt. Early common law criminal contempt was likely reserved for actions that “hinder[ed] the administration of justice, such as libeling a judge, or creating a disturbance while the court [was] sitting.” *Contempt of Court in Legal History, 173 The Law Times 286 (1932). In addition, the out-of-court criminal contempts that did exist and were committed by strangers (non-parties and non-officers) were accorded a regular trial by jury. By the late 16th Century, much of this had changed. The Star Chamber asserted power over most contempts of the common law courts and it proceeded by summary process, not trial. In addition, the Star Chamber penalty for most contempts, including violations of court orders which had been considered civil, was both a fine and imprisonment. By the mid-Eighteenth Century, most criminal contempts, be they in or out-of-court, or by parties and non-parties, were afforded only summary process by the King’s Bench (which had assumed the power of the Star Chamber in 1641). See id. This practice was cemented by the unpublished opinion in Almon’s case in 1765. While the historical assertions about summary contempt in Almon’s case were critiqued in 1908 by Sir John Fox, this could not change the fact that the Framers of the Constitution believed in a broad, summary contempt power that included violations of court orders. Therefore, to the extent there is historical support for Scalia, it is from the wrong time period.

479. Although medieval courts claimed to punish contempts as criminal only if they were committed “in the actual presence of the court,” officers of the court were always deemed “present” and therefore their out-of-court contempts were always deemed criminal. See *Contempt of Court in Legal History, supra* note 478, at 286.

480. One early American commentator explored the English history of contempt in the context of advocating against summary contempt proceedings for certain out-of-court contempts. See Kihahan Cornwallis, *The History of Constructive Contempt of Court, 35 Alb. L. Rev. 145 (1886). Cornwallis divided English contempts in two categories, direct contempts and constructive contempts. He defined constructive contempt as acts “committed beyond the view or hearing of a court having reference to its judges or proceedings, which may or may not be construed to have tendency to obstruct or retard the duties of the court.” *Id.* Direct contempts comprised any “act committed within the view of hearing of a court, or a hindrance or disobedience of its lawful process, where it is directly and intentionally retarded or obstructed in the discharge of the duties imposed upon it by
extent that these terms were used in cases or by commentators in the Eighteenth Century, it is likely the broad, not the literal, meaning of these terms was intended. Finally, there are a few historical statements that, when viewed in a vacuum might support Scalia’s position, but actually arose in the context of a much narrower debate over the use of contempt to punish out-of-court libels of judges, not out-of-court violations of substantive orders. In any event, regardless of the origin of Scalia’s historical misconceptions, the available historical evidence supports neither his Young argument about the scope of criminal contempt at common law nor his Dixon test for contempt and double jeopardy.

3. Scalia’s Bloom Argument in Dixon

After purporting to show that the Dixon contempts were historical anomalies, Scalia again invoked Bloom’s broad language that “contempt is a crime for the benefit of society.” Id. at 145 (emphasis added). Thus, unlike the modern view of direct contempt which now includes only acts in the courtroom, Cornwallis believed the common law considered both in-court disruptive behavior and virtually all out-of-court violations, other than out-of-court libels, to have been committed in the presence of the court, i.e., as a direct contempt, and therefore punishable by criminal sanction.

481. Several early commentators quote Chief Justice Anderson in 1599 who stated that “a man may be committed for a contempt done in court, but not for a contempt out of court, and therefore he ought not to have been committed for such a private abuse.” Cornwallis, supra note 480, at 146. While at face value this statement seems to support Scalia’s view (although more one hundred years too early), the context of the case strongly suggests the justice was referring only to the use of constructive contempts to punish unfavorable statements about judges made outside the courtroom. As Cornwallis reports, this case involved “one Dean, a merchant of London, who publically called one Garret, an alderman, a fool and a knave, whereupon the alderman being a magistrate, he was committed to Newgate for contempt, but on being brought before the Court of Common Pleas on a writ of habeas corpus, he was discharged.” Id. Even in their day, constructive contempts for libel were criticized, and many believed it unfair to punish them by summary criminal sanctions. See id. Thus, a modern writer seeing a common law critic argue that out-of-court contempts (i.e., constructive contempts) should not be punished criminally, might easily misunderstand this to mean contempts that violated court orders rather than just libel. However, as Osullivan’s case, Blackstone, and the early American cases show, this would be a mistaken interpretation because criminal contempts sanctions for out-of-court violations of substantive orders appeared to have been well-accepted. Therefore, even to the extent that there are common law sources that appear to support Scalia’s point, they appear to be directed at a different issue than the one he raised in Young and Dixon.

482. While challenged by Chief Justice Rehnquist, Scalia never really gives an originalist explanation for rejecting a straightforward application of the elements test. A tentative hypothesis for Scalia’s position would go like this: Because these contempts were an entirely “new context,” not only did Scalia feel released from the historical contempt is exempt rule, but in addition, he felt free of all doctrinal constraints—including his own prior double jeopardy jurisprudence (which included a strong preference for the traditional elements test). In other words, because he deemed injunctions that incorporated criminal laws to be modern anomalies, he was not required to rigidly apply the traditional elements tests which had been designed for substantive criminal offenses. Instead, he could create a rule that comported with his sense of the correct result. In doing so, I believe Scalia was influenced by his antipathy to contempt because the results generated by his test violate his clear principles.
in the ordinary sense’ to support his holding." He also relied on the Court’s prior decisions extending a broad variety of constitutional safeguards to contemnors. Based on these authorities, Scalia stated that “it was obvious” that the Double Jeopardy Clause should also apply to all out-of-court contempts.

While presented as a supporting argument, Scalia’s two sentence discussion of Bloom was the real foundation of his position on contempt and double jeopardy in Dixon. This can be shown in two ways. First, as demonstrated above, Scalia’s historical arguments that modern contempt is significantly different from the contempt doctrine of the Framers is without support. Thus, Warren Court precedent is the only authority in the opinion that actually supports his position that contempt should be covered by the Double Jeopardy Clause.

Second, Scalia’s ultimate conclusion, that all out-of-court contempts are covered by double jeopardy, is broader than even his flawed historical claims supports. Even assuming Scalia was correct that the Dixon contempts were historical anomalies, all that conclusion justifies is that double jeopardy should apply to those contempts. Even under Scalia’s version of history, there were a limited number of out-of-court contempts that fell under the disruption of judicial administration heading, and thus, were prosecutable at common law. A faithful application of Scalia’s originalist principles would have still held open the possibility that the contempt-is-exempt rule would be valid for those contempts. However, Scalia never discussed this possibility. The import of his failure to even discuss the issue signals that Bloom and the modern contempt cases, rather than historical practices, were sufficient and independent grounds to support his broad holding that the Double Jeopardy Clause applies to all out-of-court contempts.

484. See supra note 377 and accompanying text.
485. Dixon, 509 U.S. at 696. While not at issue, Scalia did note that what is now called summary contempts, an immediate finding of contempt for in-court disturbances, might warrant a different rule. Id. Summary contempts are the one area in which judges are still permitted to hold persons in contempt without a hearing or any other due process proceedings.
486. The problem with relying on Bloom, as noted earlier, is that it ultimately rests upon an evolutionary argument: The Framers did not understand contempt to fall under double jeopardy but the Court now does today. See id. Scalia’s originalism should have required him to either reject such an argument outright or subject it to a faint-hearted originalist analysis. With a more flexible approach to constitutional analysis, White’s Dixon dissent made a more thoughtful case for applying double jeopardy to contempt than Scalia.
487. Other than disobeying subpoena, Scalia was vague about what kinds of out-of-court contempts constituted “disruption of judicial process.” Dixon, 509 U.S. at 695.
488. Perhaps Scalia believed that he would never meet a modern out-of-court contempt sufficiently similar to a common law out-of-court criminal contempt to merit any discussion of the continued viability of the common law rule. There are, however, such possibilities such as a contempt based upon a violation of a guardianship order similar to the Osulston case. An additional example might be an out-of-court act by judicial officers such as a bailiff’s conduct with a jury that might constitute both criminal jury tampering and contempt, which at common law was treated as criminal contempt. See Scalia, supra note 23.
4. *Scalia and His "Feigned Originalism" in Dixon*

Scalia’s approach to contempt in *Dixon* was anti-originalist; however, his need to demonstrate allegiance to his methodology required him to outwardly maintain that historical practices support his position on contempt and double jeopardy. In other words, his position in *Dixon*, as well as in *Young* and *Bagwell*, can best be described, to coin a phrase, as “feigned originalism.” Still, Scalia claims that his originalism is practical because it contains a safety valve, the faint-hearted component which allows the Constitution to adapt to significant changes in society. \(^{489}\) Thus, the final issue to consider is whether Scalia’s decision to abandon the common law rule for contempt and double jeopardy can be justified under the mantle of faint-hearted originalism.

Scalia’s “faint-hearted” principle allows him to depart from a historical rule if it is clear that an “evolution in social attitudes has occurred.”\(^{490}\) This evolution must appear in extant sources, such as widespread legislation at the state level, and must evince an overwhelming trend.\(^{491}\) Thus, although “faint-heartedness” is a safety-valve in theory, its requirements usually lead to a strong preference for finding continuity between historical and current practices, despite significant societal or institutional changes.\(^{492}\) One need look no further for an example of this strong form of originalism than Scalia’s defense of the elements test in *Grady* and *Dixon*. In this context, Scalia was immune to the argument that the evolution of complex and overlapping modern criminal codes has created a situation in which the traditional elements test no longer implements the underlying principles of the Double Jeopardy Clause envisioned by the Framers.\(^{493}\)

Given how high Scalia has set his “faint-hearted” bar, it was therefore impossible for him to avail himself of this principle to justify abandonment of the common law contempt-is-exempt rule in *Dixon*. In fact, the best evidence under Scalia’s originalism for the faint-hearted exception—existing legislation—is against him in this area. The restraining order statute at issue in *Dixon* explicitly endorses the contempt-is-exempt rule.\(^{494}\) Moreover, at least twenty-four states

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489. *See supra* notes 68–70 and accompanying text.
491. Scalia’s reasoning is that to permit judges to make nuanced decisions about the level of societal change necessary to shrug off the constraints of history invites personal values back into the process. Thus, he prefers to err on the side of restraint—in his words, to be “librarian who talks too softly.” *Id.* at 864. *See* Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 39 (1991) (Scalia, J., concurring in judgment) (Scalia concurred on the grounds that “punitive damages assessed under common-law procedures are far from a fossil, or even an endangered species”).
493. In fact, Scalia ignores the evidence that the societal view of the fairness of the element’s test has changed significantly. *See* Scalia, *supra* note 23. Nor was Scalia open to a critical historical inquiry that the elements test was a 17th Century common law accident—nothing more than a judicially devised means to prevent a windfall to defendants under the technical rules of the common law pleading, rather than a true reflection of the common law concept of the double jeopardy guarantee.
legislatively mandate that successive prosecution of contempt and substantive offenses be permitted while only three forbid it.\textsuperscript{495}

As a result, Scalia had to resort to backdoor tactics in \textit{Dixon} because he was unable to prove that this "historically approved practice from our national life," i.e., the contempt-is-exempt rule "is no longer the law of the land."\textsuperscript{496} Therefore, one of the true ironies of \textit{Dixon} is that Scalia advertises the opinion as a paradigm of originalism; one which returned the common law elements test to its rightful place in double jeopardy doctrine.\textsuperscript{497} In reality, however, the opinion can be more accurately described as a "feigned originalist" decision about contempt in which Scalia engaged in the kind of ad hoc judicial lawmaking his methodology condemns.\textsuperscript{498} Not only is Scalia's \textit{Dixon} test a methodological disaster, but as will be discussed in the next Part, it is also bad public policy.

\section*{VI. JUSTICE SCALIA AND BATTERED WOMEN}

This Part documents the confusion created by Scalia's \textit{Dixon} test in domestic violence cases. This confusion has made it more difficult to use of the best tools for combating domestic violence—easily obtained civil protection orders enforced by swift criminal contempt actions.

\textsuperscript{495} \textit{See}, e.g., \textit{ALA. CODE \textsection 13A-5-2} (1975); \textit{ARIZ. REV. STAT. \textsection 1-253} (1997); \textit{CAL. PENAL CODE \textsection 658} (West 1997); \textit{COLO. REV. STAT. \textsection 18-9-111} (1997); \textit{HAW. REV. STAT. \textsection 710-1077} (1988); \textit{IND. CODE \textsection 24-2-2-4} (West 1997); \textit{KAN. STAT. ANN. \textsection 21-3835} (1996); \textit{KEN. REV. STAT. ANN. \textsection 403.760} (Banks-Baldwin 1984); \textit{ME. REV. STAT. ANN. tit. \textsection 19-A, \textsection 852} (West 1998); \textit{MICH. COMP. LAW Ch. 750.411h} (1997); \textit{MINN. STAT. \textsection 518B.01} (1997); \textit{MONT. CODE ANN. \textsection 37-3-326} (1996); \textit{NEV. REV. STAT. 193.300} (1997); \textit{N.H. STAT. \textsection 173-B:8} (1996); \textit{N.J. STAT. ANN. \textsection 2C:28-5.2} (West 1997); \textit{N.Y. PENAL LAW \textsection 215.54} (McKinney 1997); \textit{N.C. GEN. STAT. \textsection 14-226.1} (Michie 1997); \textit{OHIO REV. CODE ANN. \textsection 2943.04} (Anderson 1997); \textit{OKLA. STAT. tit. \textsection 21, \textsection 27} (1997); \textit{OR. REV. STAT. \textsection 33.045} (1996); \textit{18 PA. CONS. STAT. \textsection 4955} (West 1998); \textit{R.I. GEN. LAWS \textsection 8-8.1-3} (1956); \textit{VT. STAT. ANN. tit. \textsection 13, \textsection 1030} (1989); \textit{WASH. REV. CODE \textsection 9.92.040} (1997); \textit{WYO. R. CRIM. PRO. 42. But see ILL. COMP. STAT. 5/112A-23} (1998); \textit{S.C. CODE ANN. \textsection 16-9-380} (1998); \textit{WISC. STAT. 785.03 committee comment} (1981).


\textsuperscript{498} Scalia's focus on the changes in the scope of modern contempt versus extant legislation on the precise issue before the Court also appears to conflict with Scalia's somewhat vague definition of what evidence "counts" in a faint-hearted originalist inquiry. \textit{See} Scalia, \textit{supra} note 23, at 861-64. In addition, if general changes in a societal practice are sufficient to abandon a historical rule, than the massive expansion of criminal codes should be considered valid faint-hearted evidence on the viability of the elements test. \textit{See id.}
A. The Lower Courts Struggle to Apply Scalia’s Dixon Test

One of Scalia’s major criticisms of the Grady test was that the lower courts had trouble understanding and applying its confusing formula. Part IV showed that Scalia’s Dixon test is theoretically flawed because it requires the inherently problematic comparison of the terms of civil protection orders with the elements of criminal offenses. I also noted that the Dixon test was likely to produce inconsistent results because slight changes in the wording or interpretation of a protection order would lead to different outcomes in similar cases. In fact, the post-Dixon domestic violence cases involving contempt and double jeopardy cases demonstrate the unworkable nature of Dixon. The state reporters are replete with both reversals of trial court rulings and dissenting opinions as judges have struggled to apply Scalia’s test in domestic violence prosecutions that follow contempt hearings for violations of protection orders. As predicted, the outcome of many of these cases has turned on minor differences in the terms of the court order, or the gloss put on the order at the contempt hearing, or later, by the criminal trial court or appellate court. Like the counts in

499. Scalia claimed that Grady “has produced ‘confusion’” in the lower courts. See Dixon, 509 U.S. at 711 n.16 (citations omitted).

500. See supra notes 341–366 and accompanying text.

501. See id. Protection orders are drafted in simple language, to ensure fair notice to the respondent. They also strive to be responsiveness to the facts of the case, sometimes leading to highly particularized orders. A legislature drafting a criminal law need only write a general rule that can pass a vagueness or notice challenge. It is not surprising therefore that protection orders are rarely written with terms that can be easily matched up with the elements of criminal offenses in a logical and consistent manner.


503. See Decker, 664 A.2d at 1028–31. The order enjoined defendant from “physically abusing” or “from placing them in fear of abuse.” Id. at 1028–29. The simple assault count was barred because rather than compare the term “physically abusing” with the elements of simple assault, the court looked to the protection order statute for the definition of abuse. That definition mirrored the elements of simple assault and, therefore, as in Foster, the assault was a lesser included offense of contempt. See id. at 1031. See also People v. Allen, 868 P.2d 379, 385 (Colo. 1994) (stating that criminal trespass prosecution was not barred because court order contained only stay away and no contact provisions); People v. Benson, 627 N.E.2d 1207, 1208–11 (Ill. Ct. App. 1994) (rejecting defendant’s argument where the order barred “striking, harassing, or interfering” with personal liberty of his ex-wife, and defendant argued that home invasion charge was barred because
Foster's indictment in *Dixon*, Scalia's test has also led to split results within a single case, with some charges barred and others permitted to go forward.\(^{504}\)

A few courts have taken Scalia's hair-splitting distinctions between the Foster protection order and the District of Columbia threats statute as a license to use the subtlest distinctions to distinguish protection orders from subsequently charged criminal offenses. For example, one court distinguished between the mental states of "willfully" and "maliciously" to hold two crimes distinct.\(^{505}\) Several courts have also used the difference between a single act requirement in a court order versus a multiple act element in a statute to avoid a double jeopardy finding, even though multiple acts were introduced in both proceedings.\(^{506}\)

Another area of discord created by Scalia's *Dixon* opinion is the proper level of scrutiny of the contempt hearing that precedes the criminal case. Some courts look only at the face of the protection order to determine if there is overlap with the criminal charge.\(^{507}\) Others recognize that Scalia's opinion appears to require an inquiry into the interpretation of the protection order terms by the

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breaking into her home and attacking her included harassing and interfering with liberty); State v. Kraklio, 560 N.W.2d 16, 20 (Iowa 1997) (stating that the narrowly drawn restraining order narrowly did not overlap with elements of criminal offense); Busby, 921 S.W.2d at 393 ("[T]he contempt order contains findings which encompass [only three of five elements] of the indictment. Moreover, by necessary implication, the contempt order must encompass [the remaining two elements].").

504. See Busby, 921 S.W.2d at 392–93 (misapplication of fiduciary property not barred; aggravated perjury barred).

505. See Johnson, 676 So. 2d at 411 (court held that stalking was not a lesser included offense of contempt because it required maliciousness whereas contempt only required willfulness).

506. In *State v. Miranda*, the contempt was based upon an order not to "harass" the victim. State v. Miranda, 644 So. 2d at 343 n.3 (Fla. Ct. App. 1994). The criminal charge was aggravated stalking defined as "knowingly, willfully, maliciously and repeatedly follows or harasses another person [after the imposition of a protective order]." FLA. STAT. ANN. § 784.048 (West 1993). Although the state proceeded on a theory of stalking by harassment, the court distinguished "harass" in the statute from "harass" in the order. Harass was defined in the stalking statute as a "course of conduct." Although the protection order statute did not define "harass," because a plain meaning of "harass" in the protection order could be a single incident, the court held that the elements were different although each offense used the word "harass." See Miranda, 644 So. 2d at 345. See also State v. Jones, No. CA94-11-094, 1995 WL 367197, at *3 (Ohio Ct. App. June 19, 1995) (contempt and criminal non-support not barred. Contempt of support order supported by single act and willful disobedience. Criminal nonsupport has distinct element of showing inadequacy of support over given period); Gonzalez, 940 P.2d at 189 (stalking (multiple acts of harassment) versus contempt (single act of harassment)). For a case in which such hairsplitting was rejected, see *Fierro v. State*, 653 So. 2d 447, 448–49 (Fla. Dist. Ct. App. 1995) (contempt conviction barred charge of removing a child contrary to a court order. The state unsuccessfully argued that contempt required taking the child without consent outside the court's jurisdiction whereas the removal offense required concealment within the court's jurisdiction or removal from the state).

contempt court. Unfortunatel[y, this deeper inquiry has sometimes been frustrated where contempt courts have failed to specify the basis for the finding of contempt, particularly when the court order contained multiple proscriptions. Even more troubling are cases affirming convictions despite the unavailability of the necessary transcripts from nonrecord family court proceedings. Finally, a few unclassifiable decisions just seem plainly in conflict with Scalia’s analysis in Dixon.

Another group of post-Dixon courts never even reaches Scalia’s Dixon test. A few opinions purport to follow Scalia’s analysis but actually apply the generic elements of contempt, either ignoring or misunderstanding that a review of the court order and the contempt hearing is required. Other cases explicitly

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509. See People v. Stenson, 902 P.2d 389, 391–92 (Colo. Ct. App. 1994) (reversing dismissal of burglary charges, the court interpreted the findings of the contempt court to have rested solely on violation of the contact order and not the criminal code violations even though the contact came via the alleged burglary); Gonzalez, 940 P.2d at 188–89 (rejecting appeal because although the judge below failed to “indicate the basis for the finding of contempt,” the protection order contained numerous prohibitions upon which sufficient evidence of violations had been presented); Commonwealth v. Yerby, 679 A.2d 217, 222–31 (Pa. 1996) (dismissing double jeopardy claim rather than remanding to clarify the record even though contempt hearing transcript did not reveal “the precise basis for the trial court’s finding of contempt.”)

510. See Vice, 519 N.W.2d at 568. For example in Vice, the protection order enjoined threats, assaults, molestation, attacks or entering the premises of the complainant. See id. at 565. The criminal charge was that of terrorist threats. The appellate court could not determine from the record which of specific proscription from the protection order was found to have been violated. Rather than remand, the court rejected Vice’s appeal holding simply that it “cannot determine the elements of the conduct underlying Vice’s conviction.” Id. at 568. Similarly, in People v. Benson, 627 N.E.2d 1207, 1208-09 (Ill. Ct. App. 1994), no transcript of the contempt hearing was available and the written contempt order was illegible. Nevertheless, the defendant’s double jeopardy claim was rejected on the grounds that the defendant bore the burden of production.

511. In Hernandez v. State, while barring prosecutions for battery and violation of an injunction, the court failed to analyze the terms of the protection order as required by Dixon. 624 So. 2d 782, 783 (Fla. Dist. Ct. App. 1993). Instead, the opinion simply stated that, “subsequent prosecution for criminal contempt, the basis of which is substantive offense for which a conviction has been obtained, violates the Double Jeopardy Clause.” Id. Under the meager facts provided, however, the underlying facts included a threat as well as a battery. Thus, depending on the breadth of the initial order and the finding of contempt, the prosecutor might have been able to avoid a bar under Scalia’s test if properly applied. See also Ivey v. State, 698 So. 2d 179, 184 (Ala. Crim. App. 1996) (appearing not to understand that under Dixon, contempt is the greater offense and the charge the lesser)

512. See Commonwealth v. Burge, 947 S.W.2d 805, 812 (Ky. 1996). While citing Dixon as controlling, the court used the generic elements of contempt. The opinion did not cite the language of the protection order, which makes it impossible to perform Scalia’s analysis. See also Ivey, 698 So. 2d at 183–85 (citing Dixon but using the generic elements of contempt to hold that aggravated stalking—which includes as elements, violation of court order, harassment and threats to injure—is distinct from contempt based on order that barred harassment and threats); People v. Kelley, 60 Cal. Rptr. 2d 653, 658–59 (Cal. Ct.
disavow Scalia’s approach and adopt either Rehnquist’s generic elements test,\footnote{K. Clark v. State, 580 S.W.2d 351, 353 (Tex. Crim. App. 1978) (rejects Dixon and acknowledges that “courts, relying on Dixon for guidance, may face difficulty in properly applying the standard to subsequent prosecution cases.”). See also State v. Allen, 868 P.2d 379, 384 (Colo. 1994) (discusses Dixon but notes that “fact specific application of Harris that fragmented the Dixon majority” was not applicable to the case).}

Blackmun’s “contempt is exempt” approach,\footnote{Blackmun v. Ritter, 405 U.S. 139 (1972) (holding that prosecution of telephone harassment was not barred by contempt where analysis employed only generic elements of contempt).} or reject the elements test for a same-transaction test under state constitutional law.\footnote{App. 1997 (fails to analyze court order to determine if it incorporated crime of stalking); Village of Bentleyville v. Pisani, No. 69063-69066, 1996 WL 476434, at *2 (Ohio Ct. App. Aug. 22, 1996) (holding that prosecution of telephone harassment was not barred by contempt where analysis employed only generic elements of contempt). At the other extreme, the court in Flores v. State erred in the opposite direction, believing that Justice Scalia appeared “to have focused on the underlying conduct of the offense.” 906 S.W.2d 133, 137 (Tex. Ct. App. 1995).


See Ex parte Jackson, 911 S.W.2d 230, 232–33 (Tex. Ct. App. 1995). The court analogized contempt sought by a private party to dual prosecutions by distinct sovereigns. Thus, when contempt was sought by a private party, there is no double jeopardy bar when the state seeks to press criminal charges for the same event. This was so even in this case where the state Attorney General’s office prosecuted the contempt on behalf of the former wife. See also Ex parte Ivey, 698 So. 2d 187, 189 (Ala. 1997) (contempt statute allowing a maximum of five days in jail was a “violation,” not a criminal offense and thus not subject to double jeopardy review).

See State v. Lessary, 865 P.2d 150, 156 (Haw. 1994) (rejects Dixon and acknowledges that state constitution provides greater protection to criminal defendants than U.S. Constitution and adopts Grady test under state version of Fifth Amendment).

See Flores v. State, 906 S.W.2d at 137 (“Courts, relying on Dixon for guidance, may face difficulty in properly applying the standard to subsequent prosecution cases.”). See also Parrish v. State, 869 S.W.2d 352, 354 (Tex. Crim. App. 1994) (“Indeed, the core meaning of Blackburger is now evidently more in dispute than ever before.”); People v. Allen, 868 P.2d 379, 384 (Colo. 1994) (discusses Dixon but notes that “fact specific application of Harris that fragmented the Dixon majority” was not applicable to the case).

One case that demonstrates a variety of these issues is State v. Winningham. 1996 No. 01C01-9504-CC-00109, WL 310370 (Tenn. Crim. App. June 11, 1996). The defendant was held in contempt for multiple violations of a protection order, including setting fire to his ex-wife’s home. The order had enjoined him from “abusing, threatening to abuse...or committing any acts of violence” against his ex-wife. Id. at *1. In a split decision, the appellate court upheld the dismissal of a subsequent criminal indictment for arson. The majority held that the phrase “any acts of violence” incorporated any punishable act of violence into the order and therefore barred the arson charge. Id. at *5. While the majority claimed to apply Scalia’s lesser-included analysis, they did not really seem to understand it. For example, the court said that the “elements of arson were implicitly included in the contempt proceeding,” without really explaining what this “implicitly” meant. Id. Neither the state nor the dissent argued under Dixon that the “any acts of violence” term in the court order included non-criminal acts of violence such as tortious assaults. The dissent instead said that the arson charge contained elements relating to property damage, the contempt to attacks on the wife. See id. at *12. Unlike the majority,
SCALIA’S CONTEMPT METHODOLOGY

D. The Dixon Test and Civil Protection Orders

The persistence of batterers and the battering relationship lies at the heart of the domestic violence problem. Available in every state, the civil protection order is considered the centerpiece of legislative reform designed to address this issue. Protection orders are viewed as a middle ground between inaction and directing all domestic violence incidents into the criminal justice system. By focusing prospectively, protection orders seek to step between the batterer and the victim to break the cycle of violence. They provide additional remedies, such as stay-away provisions and support and custody terms, that improve the likelihood that the primary goal of ending the violence will be achieved. Furthermore, by providing simplified court procedures, protection orders are relatively easy to obtain, regardless of the economic status of the victim. Depending on the state, a

...the dissent tried to understand how the contempt court had defined the terms of the order but aptly pointed out that to perform Scalia’s analysis correctly, they were required to become “mired in the minutia of an expedited contempt hearing.” Id. at *16. Even without going into all nuances that were or could have been argued in this case, Winningen demonstrates that the Dixon test is miserably failing as a clear rule.

518. The inconsistencies are both of results and analysis. Compare Gov’t of the Virgin Islands v. Crossley, No. F475/1995, 1997 WL 88020, at *3 (V.I. Jan. 21, 1997) (holding that aggravated stalking prosecution was barred by contempt conviction for violation of protection order), with State v. Johnson, 676 So.2d 408, 411 (Fla. 1996) (holding that aggravated stalking prosecution was not barred by contempt conviction). For contradictory analysis of CPO language, compare State v. Miranda, 644 So.2d 342, 345 (Fla. Ct. App. 1994) (holding that the term “harass” has different meanings in CPO and in stalking statutes), with Commonwealth v. Decker, 664 A.2d 1028, 1031 (Pa. Sup. Ct. 1995) (holding that different words in CPO and statute have same meaning).

519. The substantial research on this issue focuses on the psychological dynamic of the battering relationship and social and cultural attitudes that condone or ignore domestic violence. Economic factors also play a role in some cases. See generally BEVERLY BALOS & MARY L. FELLows, LAW & VIOLENCE AGAINST WOMEN: CASES AND MATERIALS ON SYSTEMS OF OPPRESSION (1994); FAMILY VIOLENCE, AN INTERNATIONAL AND INTERDISCIPLINARY STUDY (John M. Eekelaar & Sanford N. Katz eds., 1978); ROGER LANGLEY & RICHARD C. LEVY, WIFE BEATING: THE SILENT CRISIS (1977); LEGAL RESPONSES TO WIFE ASSAULT: CURRENT TRENDS AND EVALUATIONS (N. Zoe Hilton ed., 1993); TREATMENT OF FAMILY VIOLENCE: A SOURCE BOOK (Robert T. Ammermann & Michel Hersen eds., 1990).


523. See Topliffe, supra note 522, at 1064 (reviewing the remedies available to courts via civil protection order).

524. Civil protection order forms have been simplified so that the majority of victims can successfully obtain an order pro se. See Barry, supra note 521, at 350 & n.38.
violation of a protection order can be punished as a contempt, as a separate misdemeanor offense, or by either sanction.525

Unfortunately, the confusion spawned by Scalia’s Dixon test has undermined the effectiveness of the contempt remedy, which often provides the swiftest relief. Because the double jeopardy consequences of a contempt motion can no longer be easily predicted, some victims’ advocates and prosecutors have altered their strategy, either watering down contempt motions,526 or hesitating to

525. See David M. Zlotnick, Empowering the Battered Woman: The Use of Criminal Contempt Sanctions to Enforce Civil Protection Orders, 56 Ohio St. L.J. 1153, 1194–95 & nn.185–87 (1995). A few jurisdiction make protection order violations grounds for civil rather than criminal contempt sanctions. See Mary E. Collins, Comment, Mahoney v. Commonwealth: A Response to Domestic Violence, 29 New Eng. L. Rev. 981, 982 (1995). See also Mary C. Cheh, Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Distinction, 42 Hastings L.J. 1325, 1405 (1991). A majority of jurisdictions—approximately thirty-four—specifically authorize contempt sanctions. See Zlotnick supra at 1195 & n.186. Even where there are no explicit statutory provisions, judges retain their inherent power to punish violations of court orders. See, e.g., Walker v. Bentley, 678 So. 2d 1265, 1266 (Fla. 1996) (“[C]ontempt is an inherent [power] that exists independent of any statutory grant of authority....”). Contempt is therefore available in most jurisdictions to enforce protection orders. While both the criminalization and contempt mechanisms have their proponents and critics, there are substantial arguments that the contempt route offers significant practical and theoretical advantages. In fact, some commentators, including myself, have argued that contempt sanctions should be preferred initial remedy for protection order violations. See Zlotnick, at 1214. See also Kin Kinports & Karla Fischer, Orders of Protection in Domestic Violence Cases: An Empirical Assessment of the Impact of the Reform Statutes, 2 Tex. J. Women & L. 163, 199–200 (1993); Topliffe, supra note 398, at 1047–48.

526. See telephone interview with Jo Sterner, Pennsylvania Coalition Against Domestic Violence (July 30, 1998) (stating that the public interest group is training police officers to do exactly that when charging domestic violence assaults that also violate protective orders); telephone interview with Catherine F. Klein, Associate Professor of Law, Columbus School of Law, Catholic University (July 29, 1999) (stating that she advises domestic violence attorneys to carefully draft contempt motions when there might be a subsequent criminal prosecution but agreeing that such an approach can result in a “watered down” contempt motion); id. (stating that junior prosecutors in Washington, D.C. sometimes do not understand when a contempt proceeding might jeopardize a criminal prosecution); telephone interview with Lore Rogers, Domestic Violence Project, Ann Arbor, Mich. (Aug. 18, 1999) (stating that in rare cases where contempt goes forward before decision on criminal charges is made, advocates purposely introduce evidence only of violation of stay-away order and do not put in evidence of later criminal conduct in same incident, but that many prosecutors are still unaware of the double jeopardy concerns in this area); telephone interview with Kim Susser, New York Legal Assistance Group (July 30, 1999) [hereinafter Susser Interview] (noting routine lack of communication between domestic violence workers and prosecutors on same case which would be a problem if more women were encouraged to file contempt motions, because both family court and criminal court have concurrent jurisdiction over contempts arising out of violations of protection orders). See also POLICE RESPONSE TO DOMESTIC VIOLENCE: PENNSYLVANIA LAW AND PRACTICE 69 (1997) (published by the Pennsylvania Coalition Against Domestic Violence).

Even the chief deputy of a domestic violence unit of a prosecutor’s office in New York was unaware of both the Dixon case, and a reported post-Dixon case from his city, that explicitly discussed the confusing double jeopardy issues in domestic violence
seek the swift but relatively light sentences provided by contempt, for fear of barring more serious criminal punishment, particularly for protection order violations involving violent conduct.\

Nor are these double jeopardy concerns unfounded. While post-*Dixon* decisions in which serious criminal charges have been barred are rare, *Dixon* does jeopardize the most commonly charged offense in domestic violence cases—simple assault. Many, if not most protection orders contain a term prohibiting "assaults." At the same time, the majority of domestic violence incidents that result in criminal prosecution includes the charge of simple assault. Following cases. See *Susser Interview*. See also *People v. Arnold*, 664 N.Y.S.2d 1008, 1013–15 (Kings Cty. Sup. Ct. 1997) (applying Rehnquist's elements test to subsequent prosecution but noting that Scalia might resolve case differently).

527. *See* telephone interview with Leslie Orloff, AYUDA, Washington, D.C. (June 1993); telephone interview with Lore Rogers, Domestic Violence Project, Ann Arbor, Mich. (Aug. 18, 1999) (stating that in that jurisdiction, criminal contempt violations are joined by prosecutors in a criminal case, although the court issuing the order has the option to enforce it separately); telephone interview with Lisa Jordan, Chief of Litigation at House of Ruth, Baltimore, Md. (Aug. 16, 1999) (stating that advocates for battered women are very careful to include purge conditions in contempt proceedings to ensure that contempt is treated as civil, not criminal sanctions, to avoid double jeopardy problem; but noting that holding batters in civil contempt is often ineffective); telephone interview with Laura Kniaz, Managing Attorney, House of Ruth, Baltimore, Md. (Aug. 16, 1999) (stating that because of double jeopardy concerns, advocates often drop contempt when criminal charges are filed on the same incident; even though most judges treat contempt motions as seeking civil sanctions, an "acquittal" in the contempt can constitute collateral estoppel in the criminal case); telephone interview with Rod Underhill, Senior Deputy District Attorney, Moultnomah County, Or. (Aug. 12, 1999) [hereinafter *Underhill Interview*] (stating that protection order violations are only enforceable via contempt proceedings in family court, and are brought almost exclusively by special unit in D.A.'s office); telephone interview with Larry Busching, Deputy Bureau Chief, Family Violence & Child Abuse Unit, Manhattan District Attorney's Office, (Aug. 11, 1999) (stating he would encourage victims not to testify in family court criminal contempt proceeding if his unit was contemplating a criminal action on the same incident because of double jeopardy concerns; but notes rarity of pro se contempt motions by victims in this jurisdiction). Pro se victims are rarely even aware of the double jeopardy consequences of a protection order, let alone understand how the specific terms of relief may limit their ability to enforce the order or the state's ability to file criminal charges.

According to Senior Deputy District Attorney Underhill, the special unit in Moultnomah County District Attorney's Office never brings both contempt and separate criminal case because it would be “too risky,” given the double jeopardy issue. See *Underhill Interview*. This is true despite case law which should theoretically alleviate such risk. See *State v. Delker*, 858 P.2d 1345 (Or. Ct. App. 1993) (holding that under an interpretation of Oregon double jeopardy statute, criminal contempt action brought by battered woman did not bar later criminal charges). While noting that contempt hearings are resolved faster than criminal cases, Mr. Underhill felt comfortable that bail and release conditions ensure victim's safety while criminal case was pending. See *Underhill Interview*.


529. Many prosecutors still undercharge domestic violence, relying on simple assault where aggravated charges are possible under the state code. See Johanna R. Shargel,
Scalia's analysis of the "assault" term in Dixon, the lower courts are likewise holding that a simple assault prosecution that follows a contempt proceeding for the same incident is barred. Thus, while the appellate case law does not contain many reversals of criminal charges, at the practitioner's level, Dixon acts as a deterrent to contempt actions in the typical case.

As a result, the double jeopardy dilemma created by Scalia's Dixon opinion has also affected the larger debate over how to best enforce protection orders. First, the fractured results under Dixon harm efforts to promote the use of contempt as the primary or equal partner with criminal sanctions. Successful domestic violence reform programs are well publicized and copied in other states. Because of the different approaches being taken by state supreme courts and the uncertainty of result in individual cases, one jurisdiction's success with contempt is not easily transferrable to another. Second, the double jeopardy problems


530. See supra notes 503, 511 and accompanying text.

531. Effective enforcement of protection orders remains a significant problem. See Barry, supra note 521, at 348. Some argue for a pure criminalization approach to make a "statement about the seriousness of the orders and the situations they reflect." Id. at 356. See also Natalie L. Clark, Crime Begins At Home: Let's Stop Punishing Victims and Perpetuating Violence, 28 WM. & MARY L. REV. 263, 281 (1987). Unfortunately, this strategy relies on the very criminal justice system that has so often failed to protect victims of domestic violence in the past. In this context, many police, prosecutors, and juries are resistant to criminalizing conduct which would not otherwise constitute an offense absent the protection order. See Richard Barbieri, Saving Money on Misdemeanors; Faced with a Statewide Budget Crisis, a Few Prosecutors Are Rethinking Their Opposition to ADR and Other Cost-Saving Alternatives to Prosecution, RECORDER, June 1, 1993, at 1; Daniel D. Polsby, Suppressing Domestic Violence with Law Reforms, 83 J. CRIM. L. & CRIMINOLOGY 250, 251 (1992). Contempt sanctions, on the other hand, are often a better fit with institutional attitudes towards the entire range of conduct that can constitute a protection order violation. I have argued that "contempt language" is uniquely suited to enforcing protection orders because of its dual nature as a powerful legal sanction and as a label that shifts the focus away from why women stay in destructive relationships and onto the batterers as bullies who also disregard judicial orders. Anecdotal evidence suggests that judges are more likely to incarcerate a batterer for a clearly willful violation of court order than if the same conduct is presented as a criminal offense. See Zlotnick, supra note 525, at 1203 n.222. See also Martha Minow, Surviving Victim Talk, 40 UCLA L. REV. 1411 (1993); Martha Minow, Words and the Door to the Land of Change: Law, Language and Family Violence, 43 VAND. L. REV. 1665 (1990). Finally, I have argued that contempt actions for violations can be an empowering experience for the victim, place the victim at the center of the decision-making process, and avoid reliance on the police and prosecutors. See Zlotnick, supra note 525, at 1197–99.

532. The confusion in the post-Dixon case law about when contempt sanctions may bar a successive criminal prosecution are pushing policymakers away from contempt. See John Brunetti, The Judiciary Law's Criminal Contempt Statute: Rip For Reform, 69 N.Y. St. B.J. 47, 48–49 (1997) (claiming state statute that permits contempt and criminal charges for the same conduct is invalid under Dixon, and arguing that "[t]hese statutes should be repealed as they are misleading").
created by Dixon are also used by criminalization proponents as secondary support for their position.\textsuperscript{533}

These are unfortunate results for several reasons. The advantages the contempt route offers is lost over concern about a narrow class of cases; those involving violent conduct in which the state seeks criminal penalties after a contempt proceeding has already occurred. While this latter group contains some significant cases, the double jeopardy concerns for one class of cases should not be driving the entire policy debate. In addition, there are cases for which the dual pursuit of contempt by the victim and criminal charges by the state is exactly the right strategy.\textsuperscript{534} For persistent and violent batterers like Michael Foster, an immediate contempt sanction and a later severe criminal penalty may be necessary to protect the victim's immediate safety needs and fully punish the offender for his conduct.\textsuperscript{535} While there are other possible options, such as revising pretrial detention rules in domestic violence cases, the mechanisms for contempt plus criminal prosecution are already in place. But for confusion over Dixon, this strategy could be immediately and aggressively pursued. Nor are the problems created by Dixon easy to countermand in any practical way. While education about the limits of Scalia's opinion and how to craft a double-jeopardy-proof order can be helpful\textsuperscript{536} in the end these limited measures are unlikely to stem the tide away from contempt and toward criminalization. In domestic violence reform, uniformity and predictability are critical and Dixon simply makes this impossible.\textsuperscript{537} True relief would consist only in a definitive Supreme Court ruling that Scalia's incorporation approach to contempt is not the majority rule. In its place, the Court could either adopt the generic elements test that Dixon requires for substantive offense to contempt or reaffirm the common law contempt-is-exempt rule.\textsuperscript{538}

\textsuperscript{533} For example, in 1995, the Florida Legislature passed a bill drafted by the Governor's Task Force on Domestic Violence which eliminated provisions for criminal contempt in domestic cases and mandated that all protection order violations be prosecuted as criminal offenses. See Fla. Stat. Ann. § 741.2901(2) (West. Supp. 1995). After an outcry over the constitutionality of this change, see In re Report of the Comm'n on Family Courts, 646 So. 2d 178, 180 & n.1 (Fla. 1994), the legislature reinstated the contempt power the next year. Originally, the bill's sponsors focused solely on the perceived advantages of criminalization. However, in the course of this debate, the double jeopardy problem created by Dixon was invoked by judicial supporters of criminalization to defend the first bill. See Walker v. Bentley, 660 So. 2d 313, 325 (Fla. Dist. Ct. App. 1995) (Altenbernd, J., dissenting) ("The restrictions in [the bill eliminating contempt] prevent problems of double jeopardy.").

\textsuperscript{534} See Zlotnick, supra note 525 at 1215.

\textsuperscript{535} See id.

\textsuperscript{536} See supra note 526.

\textsuperscript{537} See supra note 502 and accompanying text.

\textsuperscript{538} Given the change on the Court, the generic elements approach might now command a majority without Scalia. Justices Blackmun and White, who dissented in Dixon, have been replaced by Breyer and Ginsburg, whose votes on criminal issues are frequently more conservative. Because Justice Blackmun was the sole vote for the contempt-is-exempt approach, realistically that view is unlikely to prevail if the issue were revisited now.
VII. CONCLUSION

The initial optimism with which some in the domestic violence community greeted the Dixon decision proved unwarranted. While superficially, the result in Foster’s case appeared to represent a victory, in reality, the decision has frustrated efforts to use contempt sanctions to enforce civil protection orders. Nor, in light of Scalia’s driving ideology should this result be a surprise, for Scalia’s contempt opinions reveal a consistent effort to limit the use of contempt sanctions to enforce judicial orders. In fact, based upon Scalia’s Young concurrence, domestic violence contemnors have begun to argue that the current practice in many states which permits battered women to litigate contempt motions on their own behalf violates due process.539 Thus, Scalia’s contempt jurisprudence will likely continue to be a hindrance to those in the domestic violence legal community and in law enforcement who believe that contempt sanctions should play an important role in combating this serious societal problem.540

This Article also confirms one of the most important accusations against Justice Scalia’s jurisprudence—that when his strongest ideological values are at stake, he manipulates his vaunted constitutional methodology to reach his preferred outcome.541 Throughout the Dixon opinion, I have shown that Scalia abandoned or distorted key tenets of his methodology. No component of Scalia’s methodology was immune from tampering. In interpreting the Fifth Amendment, Scalia never considered what textualist supremacy seems to require; that the plain meaning of “same offence” is exactly the same offense and nothing more. Nor did he ever explain why he could ignore a textualist reading of the “same offence” clause without violating the principle of methodological hierarchy. Most significantly, my research reveals that Scalia committed aggravated historical malpractice in Dixon.542 To justify his rejection of the still vibrant contempt-is-exempt rule, Scalia painted a picture of common law contempt practices that is demonstrably wrong. Most egregiously, Scalia cited Lord Ossulston as an example of how the common law limited contempt to in-court disturbances and interference with court process, when, in fact, Lord Ossulston proves quite the opposite. In this 1739 Chancery Court decision, nonparties were held in contempt for violating the substance of an injunctive decree—the very thing Scalia claims the common law did not permit.543 Elsewhere in Dixon, Scalia ignored or mischaracterized key historical sources such as Blackstone’s Commentaries, the actions of the First Congress, and the early Supreme Court cases.544 Having abandoned text and

539. Some commentators have noted this danger and argued that contrary to Scalia’s claim, contemnors are not entitled to a “disinterested prosecutor” in this context. See Cheh, supra note 525, at 1408–11; Meier, supra note 384. See also Green v. Green, 642 A.2d 1275, 1278 (D.C. Ct. App. 1994) (rejecting Young argument that contemnor was denied fundamental right because his wife participated in intra family court contempt hearing for violation of a civil protection order).

540. See Zlotnick, supra note 525, at 1214.

541. See David M. Zlotnick, Justice Scalia & His Critics: An Exploration of Scalia’s Fidelity to His Constitutional Methodology, 51 EMORY L. J. (forthcoming 1999).

542. See supra notes 456–477 and accompanying text.

543. See supra notes 476–477 and accompanying text.

544. See supra notes 462–468 and accompanying text.
distorted history, Scalia's convoluted Dixon test for successive prosecutions involving contempt was his final blow to any pretense of methodological fidelity in these doctrines. Stripped of its metaphoric content and contradictory assertions, Scalia's incorporation approach to the elements of contempt simply has no basis in the common law or Supreme Court precedent. Worse yet, Scalia's ersatz test requires the same kind of fact-intensive, unpredictable analysis that Scalia criticized in Grady v. Corbin, the case Dixon overruled. Thus, in a variety of ways, Scalia's Dixon opinion embodies the kind of judicial lawmaking that stands in opposition to his vision of a constitutional law of clear and inviolable rules.

The Article also directly links his methodological lapses in these cases to his hostility to contempt power and his absolutist vision of the separation of powers principle. In fact, all of Scalia's contempt opinions abandon his originalist commitment to historical practices. Instead, each begins with a presumption that virtually any exercise of modern contempt power violates the separation of powers principle. Thus, instead of his usual preference for finding historical continuity, Scalia seizes upon minor differences between historical and modern contempt as proof of a clean break with tradition. Because his historical proof is lacking, he is forced to embrace Warren Court era cases such as Bloom v. Illinois, with which he would ordinarily find fault.

The proven failure of Scalia's methodology in Dixon rebuts Scalia's assertion that his system is superior at cabining judicial discretion. Moreover, because Scalia personally identifies the motivating principle for his methodology as his fear of an unrestrained judiciary let loose in a constitutional democracy, it makes sense to continue to test whether the methodology succeeds first and foremost in restraining him in judicial power cases. However, Scalia's opinions and public speeches are rife with references to other strongly held political and ideological positions. It is critical to test his opinions on these subjects for methodological purity as well, for if he does not successfully implement his methodology in the arena where he feels the strongest pull of personal preferences, then he cannot justify the central reason for its existence.

545. See supra notes 194–206 and accompanying text.
546. See supra notes 15–25, 45–47 and accompanying text.
547. See Zlotnick, supra note 541.
The Buddha's Parable and Legal Rhetoric

David M. Zlotnick

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  School, J.D. 1986. The author wishes to thank Colleen Murphy for encouraging him to pursue
  this topic as well as Susan Ayres, Diana Hassel, Peter Margulies, Pierre Schlag, and Michael
  Yelnosky for their comments on earlier drafts. Appreciation is also due to Bill Nelson of New
  York University School of Law for leading a series of round table discussions about scholarship
  that contributed to the development of this Article and to the faculty of the Boyd School of Law,
  University of Nevada-Las Vegas for their suggestions at a faculty colloquium. Finally, this Arti-
  cle could not have been completed without the dedicated research assistance of Helena Pacheco,
  Danielle Jenkins, Lucy Holmes, and Christy Hetherington.
I. Introduction

This Article is about rhetoric, truth, and legal scholarship. More specifically, it explores how legal scholars use rhetorical devices to illustrate their beliefs about the relationship between scholarship and truth. The vehicle for this discussion is a specific rhetorical device—the parable—and more particularly, an ancient Eastern parable that has found its way into our children’s storybooks and into literally hundreds of law review articles and judicial opinions. Ultimately, this Article urges legal scholars in all fields of inquiry to consider more carefully both their epistemic assumptions and their rhetorical choices—for the sake of each scholarly project and to improve the quality of the debate over legal scholarship in the post-modern era.

But first, the parable. It is a story many of us know from childhood. A group of blind men encounter an elephant. Each blind man touches a different part of the elephant’s body and then incorrectly proclaims that the entire elephant resembles his section. The blind man who felt the leg believes that an elephant is like a tree; the tusk-toucher compares the elephant to a spear; and so on. The trunk is like a snake, the body a house, the ears a fan, the tail a rope, until every blind man has spoken.\(^1\) Disagreement then ensues. Nevertheless, the Westernized versions found in children’s books, reporters, and law reviews in American libraries usually arrive at a happy ending. Eventually, the blind men are able to figure out that an elephant actually has all these qualities, either because of the intervention of an outsider,\(^2\) because the wisest of the blind men has an insight,\(^3\) or because the blind men finally listen to one another and piece it together as a group.\(^4\) Thus, the moral of the modern

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1. The source of the parable for many modern writers is the verse version that appears in *The Poetical Works of John Giffrey Saxe*, *The Blind Men and the Elephant: A Hindoo Fable* 111 (1859). Saxe’s poem has itself been the subject of American litigation. See Mozert v. Hawkins County Pub. Sch., 582 F. Supp. 201, 202 (E.D. Tenn. 1984) (rejecting parent’s claim that parable should be banned from school book because it was hostile to religion).


4. See Al Gore, *Address at Rio Earth Summit*, 59 TENN. L. REV. 645, 646 (1992) (“Only after enough time had passed and enough communication had taken place was there a realization that they each had a separate part of the same beast.”). The various English language versions are generally similar to this version with other minor variations, such as the number...
version, whether implicit or stated outright, is obvious: "To find out the whole truth, [one] must put all the parts together."5

Lawyers, law professors and jurists have invoked this simple parable in a startling quantity and array of contexts.6 From former Vice President Al Gore to Judge Harold Kozinski to Professors Amar, Kramer, and Koh,7 legal scholars and jurists by the dozens invoke the blind men and the elephant parable to dramatize their points or to enliven their prose.8 However, because

of blind men or the parts of the body touched. See Maria Leach, Noodles, Nitwits, and Number Skulls 54 (1961) (discussing how four blind men touch leg, tail, ear, and body); Young, supra note 3 (discussing seven blind mice touching leg, trunk, tusk, head, ear, tail, and entire elephant); Quigley, supra note 2 (discussing six blind men feeling side, trunk, tusk, leg, ear, tail, and side).

5. Quigley, supra note 2, at 24; see also Glenn v. State, 511 A.2d 1110, 1121 (Md. Ct. Spec. App. 1986) (using parable to say that one should not assume that whole resembles part with which one is familiar); Young, supra note 3, at 34 ("The Mouse Mole: Knowing in part may make a fine tale, but wisdom comes from seeing the whole."). Occasionally, the story is told with the moral implicit in the parable's structure, see Leach, supra note 4, at 24 (ending one page version simply with challenging question, "Would anyone answer 'Elephant'?").

6. A Westlaw search yields more than one hundred and fifty law review articles and judicial opinions that cite the parable (results available on file with author). Some subjects, such as the O.J. Simpson murder trial and the Internet are repeatedly compared to the parable. See C. Keith Wingate, The O.J. Simpson Trial: Seeing the Elephant, 6 Hastings Women's L.J. 121, 122 (1995) (comparing different views toward O.J. Simpson trial to blind men viewing elephant); see also Symposium, Internet Entrepreneurs, New Traffic Patterns, and Policy Issues, 3 B.U. J. Sci. & Tech. L. 1, 9 (1997), at http://www.bu.edu/law/scitech ("When we look at the Internet, one of the things that concerns me is that it is a term that we use without any consensus as to what it means. I talk to people in virtually every industry and I get completely different images. It is like the three blind men and the elephant."). For a similar discussion, see Lofthe E. Becker, Jr., Children's Rights vs. Adult Free Speech: Can They Be Reconciled?, 29 Conn. L. Rev. 893, 894 (1997).


8. See, e.g., Application of Lustig, 368 F.2d 1019, 1022 (C.C.P.A. 1966) (Smith, J., dissenting) (stating that persons not looking at entire design are blind men); Application of Rainer, 347 F.2d 574, 575 (C.C.P.A. 1965) (Smith, J., dissenting) (stating that two parties find-
the vast majority have no inkling that the simple tale they have appropriated has ancient roots in Eastern religion, they rarely recognize its epistemic implications or that their applications of the modern version turn the ancient parable’s moral on its head.

Part II, therefore, begins by briefly tracing the origins of the blind men and the elephant parable to ancient South Asia and perhaps back to the Buddha himself. In the South Asian religions in which the parable arose, the story’s moral endorsed perspectivism and proclaimed the ungraspable nature of truth. Agreeing that a search for ultimate answers to theoretical questions is futile, Buddha advocated a "middle way" to personal enlightenment: a spiritual journey that requires letting go of all attachments, including self-aggrandizing intellectual views. Part II then contrasts this world view with the implicit model held by the many modern legal scholars who employ the parable unselfconsciously: in their minds, the parable serves merely as a rhetorical flourish. In these modern contexts, the parable’s meaning now reflects not the Eastern attitude toward truth but rather Western philosophical beliefs about the ultimate triumph of logic and dialectic analysis. Part II goes on to explore why the meaning of the parable has changed and suggests why unconsciously adopted epistemic beliefs are detrimental to scholarly endeavors.

Part III explores the small group of legal theorists who have consciously invoked the parable because of its epistemic content. Interestingly, the parable’s moral changes here too, chameleon-like, depending on each writer’s now explicit epistemological arguments. Although this group includes scholars who have tried to integrate the original Eastern moral into Western legal contexts, Part III does not put forth one "correct" use of the parable. Instead, it merely explores how one’s epistemic beliefs generally impact legal scholarship, whether it be a nihilist’s tendency to "trash" other work or a pragmatist’s effort to balance perspectivism with a continued search for a grounding of moral values. Second, Part III observes how well this parable acts as a mirror of each writer’s epistemic beliefs.

This last observation leads to Part IV, which explores the blind men and the elephant parable more broadly as a rhetorical device. Rather than seeing parables, metaphors, and other tropes as mere rhetorical flourishes, Part IV

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(Additional text not transcribed)
contends that legal scholars should recognize that their work is as much about persuasion as about elucidation. Thus, examining a scholar’s rhetorical choices can be a tool for deconstructing that scholar’s implicit beliefs and, more broadly, for understanding the underlying rhetorical structure of legal discourse. Part IV also uses the blind men and the elephant parable’s ubiquitous appearance across a wide range of legal writing as an entry into the debate provoked by the perspectivism of outsider scholarship and post-modern skepticism to the previously self-enclosed world of law and legal scholarship. Here, the Article suggests that rhetorical theory might provide a more rational basis for evaluating legal scholarship in the post-modern era.

The Conclusion turns more forcefully to advocacy. First, recognizing that the rhetorical structure of legal scholarship actively discourages an investigation of epistemic premises, the Conclusion urges legal writers to consider more carefully the epistemic implications of their arguments, even when their subject matter seems far afield from heady philosophical concerns. Second, the Conclusion suggests that writers also carefully examine their rhetoric because unexamined metaphors and parables may in fact reveal more about their agenda than they realize and because of the unique ability of rhetorical tropes to spur greater creative thinking. In this way, the Conclusion argues that legal writers will be better able to find their true epistemic voice: a voice that honestly appraises their claims about the relation of their work to truth without sounding arrogant, overly hopeful, or, at the other extreme, uncharacteristically insecure. In other words, the Conclusion urges that regardless of one’s epistemic or political beliefs, the Buddha’s advice – to seek a middle way between intellectual arrogance and the despair of nihilism – still has relevance for the enterprise of legal scholars today.

II. The Parable as Epistemic Mirror

A. The Original Parable and the Eastern View of Truth

The blind men and the elephant parable originated in South Asia at least two thousand years ago. Given its ancient lineage, slightly different versions are preserved in different locales and religious traditions. My personal favorite is in Edmund Berkeley’s *Ride the East Wind: Parables of Yesterday and Today*, entitled "The Six Blind Men of Nepal." According to this tale,

9. If the parable’s origin is in Buddhism, it dates back to Buddha’s lifetime of approximately 563-483 B.C. See KENNETH K.S. CH’EN, BUDDHISM THE LIGHT OF ASIA 14 (1968) (estimating dates of Buddha’s life). If Jainism is the source, the parable may go back to as early as 2500 B.C. See David K. Chavkin, *Fuzzy Thinking: A Borrowed Paradigm for Crisper Lawyering*, 4 CLINICAL L. REV. 163, 194 n.8 (1997) (estimating origin of parable to be in Jainism).

in the Nepalese highlands "there lived six blind men who had heard many conflicting stories about a great beast called the elephant. And this led to many heated arguments among them." To resolve their disputes, they went down to the lowlands and engaged "the help of a rather casual and careless guide who could see." A sleeping elephant was found and each blind man touched the elephant for a minute or two "until the elephant waked up and trumpeted, whereupon they all fled." Back home, their journey provoked even more disagreements, as their individual observations led to the familiar misconceptions. However, unlike the ending of the Western versions, the Nepalese blind men never come to a full understanding of the beast. Instead, they resolve their dispute by agreeing that while an animal could perhaps have some of these qualities, the men "could not possibly conceive of an animal that had all these qualities." Thus, they concluded that the elephant was a legend like a unicorn and the noise they heard was a mere "jungle illusion." Moreover, they agreed to "forbid all discussion of the elephant – to avoid the arguments, the friction, and the waste of time."

Although Berkeley's version appears to have been adapted from the texts of the ancient South Asian religion of Jainism, he appears to have misunderstood a central tenet of this religion. The guiding principle of Jainism is anékanta, which holds that reality should be "looked at from various points of view." To assert one's own point of view as the truth is ekanta or dogmatism. Thus, intellectual and social tolerance is "the spirit of anékanta." Jains use the parable of the blind men and the elephant to humbly remind us of our perceptual limitations. Jains believe that with regard to theoretical or

11. Id. at 116.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
18. Id. at 117. Clearly, even a cursory review of any recent volume of the major law reviews reveals that legal scholars have not chosen the solution favored by the blind men of Nepal.
19. See T.G. KALGHATGI, JADALOGIC 15 (1981) (discussing Jain's view that different viewpoints are needed to attain fuller knowledge). Berkeley's misconception is the typical Western confusion with the Eastern idea that members of a group each can see the truth differently but feel no collective need either to ignore these differences or to resolve them.
20. Id. at xi.
21. Id.
22. Id.
23. Id.
metaphysical truths, we are all blind, and Jainism makes no promise that such truths are discoverable through analytic reasoning. In fact, dogmatism is seen to arise precisely from "discursive thought" and "intellectual discrimination." Jainism, however, is not against intellectual inquiry. Rather, the goal of Jainist practice is to adopt a rational and objective point of view that "looks at other view points with understanding and sympathy" and to see that "conflicting and diverse theories of realities [deserve] equal respect." This is not to say that Jains would, like the blind men in Berkeley’s tale, simply throw their hands up when confronted with divergent points of view. Rather, synthesis is clearly a worthy Jainist goal so long as the impossibility of one observer making an absolute statement is recognized.

Although the parable probably originated in Jainism, the similar Buddhist version has achieved much more widespread acceptance, in part because its telling is attributed to the Buddha himself. In this version, various monks and priests of different sects fell to quarreling about spiritual matters such as the afterlife and the existence of the soul. Their controversy was presented to Buddha, whose response was to tell the parable as follows: A king has all the persons in his kingdom, blind from birth, gathered together. Each one is directed to feel a different part of the elephant and then give a description. Disagreeing, the blind men began to fight. Witnessing this, the king is said to be delighted. Buddha then pronounces that like the blind men in the parable, the disputing monks "don't know what is beneficial and what is harmful [nor do they know] what is the Dhamma [[truth]] or what is [not.]." However, rather than resolve which monks were correct, Buddha's insight is to proclaim that "[s]ome of these so-called priests & contemplatives are attached. They quarrel & fight -- people seeing only one side."

24. Id. at 17.
25. Id. at 13.
26. Id. at 14.
27. Id. at 68. Jaina texts suggest that one should first study each point of view (Nayavada) and then attempt a synthesis "designed to harmonize the different view-points arrived at by Nayavada." Id. at 15. Jaina scholars have compared their philosophy as akin to Bertrand Russell's "doctrine of perspectives" and A.N. Whitehead's theory of "coherence." See id. at 66-67.
28. See Eugene Watson Burlingame, Buddhist Parables 75-77 (1922). The Udana is the third book of the Khuddaka Nikaya, a collection of short stories (suttas), each of which is followed by a short verse attributed to Buddha. The blind men and the elephant parable is found at Tittha Sutta (Ud. VI.4) and titled Various Sectarians. The Udana is part of a larger collection of texts in the Pali language, called the Pali Canon ("Tipitaka"), which is the foundation for Theravada Buddhism. See, e.g., http://www.accesstoinsight.org/canon/index.html (last visited March 10, 2001).
30. Id.
Thus, like Jains, Buddhists do not believe there are answers to ultimate questions about religion, metaphysics, or reality. Such a quest is pointless because no theory can be clearly established and each metaphysician’s point of view "inevitably reflects his variable passions and egoistic demands." In fact, Buddhism has no semantic equivalent for the word "reality." To Buddha, the more important issue is the harm done by the monks’ attachment to their individual views, which produces their desire to fight and dispute one another. In response to schisms and disagreement, Buddha advocated instead "a willingness to prefer the ends of loving understanding." Buddha did not purport that such an approach would lead a group to the correct answer, only to spiritual peace and harmony. Thus, Buddhism focuses not on philosophical problems in the abstract, but rather on the dangers of attachment to each person’s well-being. Attachment is defined broadly and includes material things like possessions and "dristi," literally translated as "views," "but interpreted to mean opinions, speculations, beliefs, including all sorts of philosophical and religious opinions." Buddhism offers a way of life, a practical guide for letting go of these attachments and thereby attaining the psychological and spiritual well-being known in Buddhism as enlightenment. This path, which Buddha called "the middle way," requires, among other things, the process of "humble self-searching."

Buddhism differs from traditional Western epistemology because of its "ontological nondualism." This means that while Buddhism denies the existence of a permanent self or reality (like post-modernism), at the same time, it posits "an existence before and beyond concepts." This "unconditioned emptiness," however, is neither a concept nor a tangible thing. Therefore, "emptiness" cannot be grasped by the language narrative because it is not part of the conceptual world. This does not mean that emptiness is beyond consciousness, but only that it is beyond conceptual consciousness. Buddhists believe that emptiness can "be experienced directly through the practice of ‘mindfulness,’ which is the ability to sustain a calm, intense, and steady focus when one intends to do so. . . . Mindfulness involves accessing a state

32. SANGHARAKSHITA, A GUIDE TO THE BUDDHIST PATH 177 (2d ed. 1996).
33. Id. at 84.
34. Id.
36. Id. at 1506.
37. Id. at 1507.
38. Id.
39. Id.
of consciousness that is beyond and ungoverned by experience and context. Thus, much of the Buddhist practice of sitting is directed towards gaining access to the place that is empty of concepts.  

The immediate questions for a traditional Western philosopher about this "place" of unconditioned emptiness are: What is its nature? Is it unchanging like the Platonic ideal or unique and transitory for each individual? Unfortunately, even these questions brings one "back in the realm of conceptual duality and not in the 'unpatterned' space that is free of concepts." The co-existing beliefs that (a) no definitive truths can be drawn from our transitory perceptions of the world, along with (b) a belief in a pre-existing, a-conceptual unity, are what also distinguishes Buddhist thought from post-modern perspectivism. While post-modern theory embraces Buddhism's anti-essentialist language with regard to the self and perception, no Western theory, pre- or post-modern, has at the same time asserted the seemingly contradictory essentialist concept of a unitary awareness that all persons can learn to experience temporarily.

With the Eastern understanding of the parable clearly set forth, the next section returns to legal scholarship to explore why so many Western legal academics are, to use a Buddhist term, so "attached" to a very different moral for the blind men and the elephant parable.

B. The Parable and the Implicit Essentialism of Legal Scholarship

1. The Parable in Doctrinal Scholarship and Judicial Opinions

Whether one writes about the tax code or the Constitution, every piece of scholarship has an epistemic component; that is, the author has an opinion about the relationship of his work to truth. An author may believe his conclusions reflect the "objective truth," or reflect a personal and partial "truth," or merely posit a tentative hypothesis to be tested by others. In legal scholarship, however, the author's position on this fundamental issue is usually implicit and must be teased out of his rhetoric. In this section, I explore how the blind men and the elephant parable serves as a mechanism for conveying legal scholars' implicit epistemic beliefs.

To be sure, some of the hundreds of references to the blind men and the elephant parable in legal literature are either decorative or passing efforts to

40. Id. at 1507 (citing KLEIN, supra note 35, at 11).
41. Id.
42. See id. (describing Western conceptions of self).
43. See In re Garza, 981 S.W.2d 438, 442 (Tex. App. 1998) (Rickhoff, J., concurring) (quoting prediction that revised code would end practice of different judges "passing on some facet of a child's welfare . . . [like] a blind man touching and describing an elephant;" but concluding that this case's history belied that prediction (quoting Eugene L. Smith, Texas Family
be humorous.\textsuperscript{44} Significantly often, however, the parable is referenced in an article’s title,\textsuperscript{45} used as the organizing paradigm for its introduction or conclusion,\textsuperscript{46} or used to anchor an important argument.\textsuperscript{47} Despite the staggering spectrum of subject matters in these articles, the vast majority of these authors use the parable to convey just two basic epistemological frameworks—what I shall call the “arrogant doctrinalist/judicial” model and the “interdisciplinary/optimist” model.\textsuperscript{48}

In doctrinal scholarship and judicial opinions, the parable is typically invoked to differentiate and elevate the author’s perspective. In its strongest


44. \textit{See} Muirhead v. Zucker, 726 F. Supp. 613, 614, 618 (W.D. Pa. 1989) (stating that court "stands here like the proverbial blind man holding the tail of an elephant . . . [and] holding only the tail, it is difficult for us to divine what shape the rest of this beast takes. Nevertheless we endeavor to hold up our end, so to speak.").


47. Upon closer examination, a surprising number of parable references suggest the parable’s moral is not a good fit with the author's point. \textit{See}, e.g., Sharp v. Dept' of Revenue, 945 P.2d 38, 46 (Mont. 1997) (Nelson, J., dissenting) (arguing that majority’s focus on contacts with state rather than clear statutory criteria on what constitutes taxable intangible income “makes as much sense as the blind man trying to describe the elephant’s trunk by reference to a tree”). The dissent’s essential complaint is that entirely irrelevant criteria were used, not that parts were mistaken for the whole. \textit{Id.; see also} United States v. Mallah, 503 F.2d 971, 987 (2d Cir. 1974) (stating that defining scope of narcotics conspiracy is akin to describing elephant from touch); \textit{In re} Special Investigation No. 228, 458 A.2d 820, 834 n.26 (Md. Ct. Spec. App. 1983) (stating that appellate courts should not look at part in context and assume part applies to whole); State v. Martin, 470 N.W.2d 900, 907 n.13 (Wis. 1991) (confusing parable with forest/trees metaphor). While parable “misuse” is distinct from the epistemic concerns discussed in much of this Article, these examples are relevant to Part IV which advocates a more self-conscious use of rhetorical devices.

48. \textit{See infra} Part III.
form, the author asserts that others who have examined a particular subject suffer from total or partial "blindness" and, therefore, have failed to properly see the elephant. The author then dresses his claim to greater vision in the evocative language of the parable and provides what he purports is a more accurate model or analysis of his subject than either a particular individual or a broader array of commentators have provided.

Doctrinal scholars use the parable to criticize others in their field or to illustrate that practitioners, legislators, or judges lack the perspective to comprehend the full complexity of an issue. Harold Koh's 1997 Yale Law Journal review of two books on international law provides a typical example of the former. Koh first praises the authors, Abram Chayes of Harvard, Antonia Chayes, President of the Consensus Building Institute, and Thomas Franck of New York University, agreeing that their models of international law have some descriptive power. However, he then declaims, "Yet both books, instructive as they are, give shape to only parts of the blind men's


51. See, e.g., Bobby Jindal, Justification of Justice: Intuitionism, 59 La. L. Rev. 891, 892 (1999) ("Particular societies vary in their distance from the ideal."); Robert M. Lawless et al., A Glimpse at Professional Fees and Other Direct Costs in Small Firm Bankruptcies, 1994 U. Ill. L. Rev. 847, 848-49 (1994) ("Thus, like the parable of the blind persons and the elephant, our perception of the bankruptcy system is partly right but ultimately wrong."); Robert H. Froehner, The Forest for the Trees: Judicial Activism in the Tort Marketplace, 78 Mich. B.J. 706, 709 (1999) (comparing critics of contingency fees to blind men). In some cases, the parable is inverted. The author argues that he sees multiple entities rather than the single entity disparately described by others. See, e.g., Nancy L. Simmons, Memories and Miracles — Housing the Rural Poor Along the United States-Mexico Border: A Comparative Discussion of Colonia Formation and Remediation in El Paso County, Texas, and Doña Ana County, New Mexico, 27 N.M. L. Rev. 33, 34 (1997) (stating that each "colonía" has its own characteristics). This is how this author originally used the parable in another article. See David M. Zlotnick, Justice Scalia and His Critics: An Exploration of Scalia's Fidelity to His Constitutional Methodology, 48 Emory L.J. 1377, 1381 (1999) (citing divergence of legal scholars' analysis of Scalia); see also infra note 286 (discussing genesis of Article).

52. See, e.g., Joe B. Brown, The Sentencing Guidelines Are Reducing Disparity, 79 Am. Crim. L. Rev. 875, 878 (1992) ("The use of statistics that are cut on such an artificial and arbitrary line produces a result that can be compared to three blind men feeling different parts of an elephant . . . none of them has a true picture of what the elephant looks like yet each believes himself to be accurate within his narrow frame of reference."); Benjamin B. Quiones, Redevelopment Redefined: Revitalizing the Central City with Resident Control, 27 U. Mich. J.L. Reform 689, 700 (1994) (stating that analysis have different perspectives on Housing Act).

53. See Koh III, supra note 7, at 2602 (stating that both books give shape to only part of blind men's elephant).

54. Id.
elephant" because both authors "omit . . . a thoroughgoing account of the transnational legal process." In Koh's view, "this overlooked process . . . is pivotal to understanding why nations "obey" international law, rather than merely conform their behavior to it when convenient." The remainder of the book review explains and justifies Koh's thesis. Thus, while polite and praising of these authors' efforts, the parable's real purpose is to emphasize that only Koh with his superior insight, rather than the authors of the reviewed books, can articulate a theory that actually explains "why nations obey international law." Koh's tone, as is common in most law reviews of this stature, is genteel, and his appraisal of his fellow scholars does not sound abrasive. Nevertheless, his conclusion that the Chayes and Franck models fail to include the "pivotal" concept suggests they are hardly useful models at all. In part, it is the cuteness and familiarity of the parable itself that serves to balm his harsh assessment. Thus, the parable serves not only to illustrate the superiority of the author's contribution but to soften the hubris of the assertion.

Judicial opinions that cite the parable generally follow the same paradigm, although their assessments of the blind are frequently more cutting. Judges employ the parable to denigrate the "blindness" of the parties, their experts, and their attorneys, who are alleged to have missed some critical
aspect of the case, often arguing that it is advocacy itself which causes the disability. Some judges even turn the parable against their colleagues, especially when battling over the interpretation of precedent. For example,

734, 737-38 (Iowa 1954) (discussing how three experts used widely different methods of property valuation).


64. See Heather S. v. Wisconsin, 937 F. Supp. 824, 832 (E.D. Wis. 1996) (decrying amount of testing of child with multiple disabilities and stating "that the parents, the educators, the psychologists, and all the other experts acted at times like the blind man and the elephant"); S. Cal. Edison Co. v. United States, 91 F. Supp. 757, 759 (Ct. Cl. 1950) (resolving financial claims of parties in wartime just compensation case and finding that although parties claims are very different, each is partially correct); Anglim v. Mo. Pac. R.R., 1991 WL 113978, at *13 (Mo. Ct. App. June 28, 1991) (Smith, P.J., dissenting) (arguing that doctrinal analysis of forum non conveniens cases often resembles parable); Menzer v. Village of Elkhart Lake, 186 N.W.2d 290, 292 (Wis. 1971) (stating parties' definitions of statutory term is like parable).

65. See United States v. Patriarca, 807 F. Supp. 165, 201 (D. Mass. 1992) (claiming that government failed to provide its expert witness with important information and expert's opinions were flawed like "the proverbial blind man who believed that an elephant resembled a snake because he had only felt its tail"); Fleming v. County of Kane, 686 F. Supp. 1264, 1266 (N.D. Ill. 1988) (stating that parties' versions of facts were so one-sided that court deferred to jury's verdict); United Parcel Serv., Inc. v. U.S. Postal Serv., 455 F. Supp. 857, 875 (E.D. Pa. 1978) (decrying parties' "uncritical" and selective approach to precedent and refusing to be placed in position of blind man examining elephant); Crawford-Gray v. Nelson, 485 N.W.2d 840, 1992 WL 126819, at *4 (Wis. Ct. App. Mar. 6, 1992) (Sundby, J., dissenting) (deciding that hearing was required because parties' affidavits were biased and that relying on them would be like parable); see also Tandy Corp. v. United States, 626 F.2d 1186, 1190 (5th Cir. 1980) (stating that interpreting debenture indenture requires looking at whole elephant); Application of Rainer, 347 F.2d 574, 575 (C.C.P.A. 1965) (comparing attorneys who did not clearly define what an invention is to blind men in parable); Transairco, Inc. v. United States, 366 F. Supp. 602, 604 (S.D. Ohio 1973) (comparing plaintiffs and defendant to blind men when analysis of mechanical device led to radically different conclusions).

66. In this context, the parable shows up in split decisions, with the parable users claiming that the dissent or majority has erred in some specific regard. See Davies v. Comm'r of Internal Revenue, 715 F.2d 435, 439 (9th Cir. 1983) (Honan, J., dissenting) (stating that majority fails to pay attention to critical parts of trial record); McAuley v. Wills, 303 S.E.2d 258, 261 (Ga. 1983) (Welton, J., dissenting) (arguing concepts of proximate cause, contributory negligence, negligence, last clear chance, etc. are all "but differing aspects of the same inquiry — causation — so that their expositors seem uncomfortably akin to the fabled blind men describing in varying terms the same elephant"); see also Gulver v. United States, 314 F.2d 506, 509 (Ct. Cl. 1963) (stating that different interpretations of contract were result of blind men (parties and lower courts) looking at part of elephant (contract)); Moore v. Lillebo, 722 S.W.2d 683, 691 (Tex. 1987) (Spears, J., dissenting) (criticizing majority's instruction on damages for mental anguish because instruction allows jury to award different damages for same injury).

67. See Wilson v. County Ct., 148 S.E.2d 353, 362 (W. Va. 1966) (Browning, J., dissenting) (using parable to highlight majority's failure to "look to any other applicable statutory or constitutional provision"); see also Bhd. of Maint. of Way Employees v. Atchison, Topeka & Santa Fe Ry., 138 F.3d 635, 645 (7th Cir. 1997) (Wood, J., dissenting) (noting that case calls
in a dissent later vindicated by the Supreme Court. Judge Kozinski wrote, "We are told that the blind man, when handed the elephant's tail, concluded that the creature looked like a rope. So does the panel err in building a whole theory of qualified immunity law on a paragraph dangling at the end of [a prior decision]."  

Clearly, time and cultural transplantation have dramatically changed the epistemic import of the original version. First, among doctrinal scholars and judges, there is now an implicit assumption that the "elephant" (i.e., the truth about an area of law or a case) is out there, waiting to be deduced through proper analysis. Second, blindness is now a metaphor for the intellectual shortsightedness that afflicts others, rather than an element of the human condition. Third, Eastern perspectivism is rejected, and "things" can only have a single meaning, not multiple ones. Thus, what started out as a reminder of the limits of the human condition has now become, no matter how gently or humorously put, a tool for the intellectually arrogant to express their superiority. The question is why this meaning, rather than the original moral, has such appeal to legal scholars and judges? Perhaps for judges, it is something inherent in their position. While a debated point in academic circles, a court's public function is to discover "the truth" in each case. Moreover, because live cases deal more with facts than for all interested parties to be joined in one action where there is jurisdictional dispute over work assignments, thus avoiding approaching case like the blind men in the parable); TEC & Commercial Union Ins. Co. v. Falkner, 827 S.W.2d 661, 663 (Ark. Ct. App. 1992) (Mayfield, J., dissenting) (stating that different interpretations of what qualifies as appealable order in workers' compensation cases resembles blind men and elephant parable).

68. Elder v. Holloway, 984 F.2d 991, 994 (9th Cir. 1993) (Kozinski, J., dissenting); see Elder v. Holloway, 510 U.S. 510, 516 (1994) (reversing panel's decision); see also NLRB v. Creative Food Design Ltd., 852 F.2d 1295, 1299 (D.C. Cir. 1988) (stating that "[l]ike the blind man with the elephant, our [dissenting] colleagues lays hand on a few isolated quotes and pronouncements about the importance of turnover, yet each of these addresses situations radically different from the one this case presents"); Skinner v. Mahomet Seymour Sch. Dist. No. 3, 413 N.E.2d 507, 510 (Ill. App. Ct. 1980) (using parable to describe dissent's selective use of quotes and claiming that dissent has created "a whole new creature").


with theory, judicial judgment about the truth of one party's testimony and
evidence versus another's seems more palatable than assertions about the
accuracy of doctrinal models. Regardless of the theoretical critique of the
truth-finding function of judicial proceedings, judges at the trial and appel-
late levels are required by institutional culture to justify their real-life deci-
sions and at least cloak their decisions in apolitical reason. This functional
difference, combined with the aura of invincibility of those cloaked in black
robes, is probably sufficient to explain the allure of this version of the parable
for judicial writers.

For scholarly writers, the answer seems more complicated and more
interesting. Unlike judicial proceedings, there is no requirement that one
theoretical model be correct and the others wrong. Certainly, one vein of the
scholarly ideal is exactly the opposite – one of open-minded rationality rather
than partisanship. Perhaps for legal academics it is our adversarial training
that lends itself to choosing metaphors that negate the position of our oppo-
nents, whether in court or in the pages of law journals. Others have suggested
that the competitiveness and grandiosity of much of legal scholarship is a
function of either the article selection process or tenure and promotion stan-
dards. For example, Daniel Farber argues that law journal selection process
is biased in "favor of brilliant, "paradigm-shifting" work" to the detriment of
mere thoughtfulness. He also believes this leads to adverse selection, with
startling and novel ideas driving out the true but trite.

Kenneth Lasson concurs that legal scholarship has seen an unwarranted
proliferation of claims of theoretical breakthroughs. However, he blames not
the inexperience of law review editors but the standards for promotion and
tenure set forth in most law faculty handbooks. For purposes of promotion
and tenure, most faculties require that scholarship must be "analytical,"

Fulminante decision are examining same case but express radically different opinions of its
outcome.

parable to frame the debate about truth seeking function of trials); see also Myrna S. Raeder,
The Better Way: The Role of Batters' Profiles and Expert "Social Framework" Back-
ground in Cases Implicating Domestic Violence, 68 U. COLO. L. REV. 147, 174 (1997) (recog-
nizing that trial is only partly an objective search for truth and using parable to describe
batterer's profiles).

73. On the other hand, some argue that legal scholarship's predominant mode is to mimic
the argumentation style of a legal brief or judicial opinion. More specifically, the body of
the article is a more elaborate and somewhat detached judicial opinion in waiting and the conclu-
sion is the lawyer's prayer for relief. See Edward L. Rubin, The Practice and Discourse of
Legal Scholarship, 86 MICH. L. REV. 1835, 1847-50 (1988) (stating that legal scholarship gives
opinion as to how judges should decide cases); infra notes 254-61 and accompanying text.


75. Farber, supra note 59, at 308.
'learned,' 'significant,' 'well written,' and 'disinterested.' Given these open ended criteria, Lasson contends that scholars feel pressure to write lengthy, arcane, heavily footnoted articles, most of which are mediocre. With the pressure to construct models that re-conceptualize well-trodden areas of law in order to establish their uniqueness and expertise to the tenure and promotion committee, the blind men and the elephant parable becomes a perfect rhetorical trope to emphasize the alleged importance of an author's contribution to the field. Nor, given the increase in the number and size of law schools over the past twenty-five years (and hence the number of faculty writing articles), should it come as a surprise that the percentage of articles that attempt grand theoretical or doctrinal synthesis has increased. On the other hand, it may be that legal scholars are participating, no more and no less, in a decidedly Western approach to intellectual inquiry. Certainly, other Western academic disciplines also use the parable in a similar manner. In both modern legal and rhetorical theory, critics contend that, dating back to Plato and Aristotle, Western thinkers have presumed that there is "one true reality that can be discovered and defined through dialectical argumentation." This epistemology, known as essentialism or foundationalism, goes hand in hand with another defining aspect of Western thinking -- "omnipresent dualisms," such as right/left, faith/reason, religious/secular, etc. Essentialism's legal equivalent, Langdellian formalism, shares this core
"faith that legal concepts are tied to nature and logic in a way that can produce uncontroversial right answers to legal questions" and its concomitant dualisms, such as guilty/not guilty, law/morality, and of course, true/false. Just as importantly, critics argue that legal academics generally adopt an essentialist outlook by default. Thus, scholarship is written within "a rhetorical hierarchy that channels inquiry away from the ontological to the epistemic, away from the epistemic to the normative, and away from the normative to the technical." With the exception of the few who write in the rarified air of legal theory, this hierarchy allows the majority of legal scholars who toil in policy and doctrinal debates (i.e., the normative and technical domains) never to have to consider the epistemic assumptions that underlie their work. Thus, it is not surprising that many Western legal scholars write as if they believe they have discovered the truth and that those with whom they disagree are wrong in some absolute sense.

However, the important insight here is not that legal academics tend to share in Western essentialist assumptions. Rather, this Article is concerned with the cost to legal scholarship of adopting epistemological beliefs by default rather than by choice. First, an unreflective essentialism may add to legal

TIBET (1995). Both McPhail and Charles Paine have suggested that many radical critics commit the same error by conceptualizing ultimate goals and adopting rigid political positions. Therefore, they "participate in the same essentialist discourse that they attempt to overthrow; without recognizing — or acknowledging — that they, in fact, are simply 'changing the currency.'" McPHAIL, supra note 81, at 36; see Winter, supra note 69, at 652 (claiming that Stanley Fish's argument would fail without apparatus of objectivist rationality).

83. Eric Blumenson, Mapping the Limits of Skepticism in Law and Morals, 74 Tex. L. Rev. 523, 525 (1996). The modern defenders of a more sophisticated kind of neo-formalism still insist that purpose of scholarship "is to discover and communicate the truth." Daniel A. Farber & Suzanna Sherry, The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth, 46 Stan. L. Rev. 647, 650 (1994) (insisting that it is duty of scholars to discover and communicate truth). Exactly what the neo-formalists mean by truth, however, is less clear than the purist Legalists. See Daniel Farber, Missing the "Play of Intelligence," 36 WM. & MARY L. Rev. 147, 170 (1994) (arguing that scholar's client is truth "with a small 't,'" though [Farber] cheerfully admits [his] inability to define that term").


85. See infra Part III and accompanying notes 109-214. One can still find isolated examples of self-conscious yet traditional essentialism. In his article, Speaking the Truth, Judge Eric Bruggink strikes out against post-modern academia's assault on truth, and he attributes many of our culture's ills to a "crisis of truth." Eric Bruggink, Speaking the Truth, 34(3) Procurement Law. 1 (1999). Bruggink asserts that while discovering the truth may often be difficult, this does not mean that "there is not, in fact, an objective truth to be discovered." Id. at 28. Although he correctly notes that the moral of the story of the "five blind Hindu fakirs and the elephant" is that "the truth is subjective," he argues this is demonstrably incorrect — "[s]omeone with two good eyes could give a very accurate description of the elephant." Id. His essentialism is traditional because he goes on to assert that there are moral truths as well as factual ones. Id. at 29. However, Bruggink's proposed solution is personal rather than systemic. He asks lawyers to try to tell the truth in their lives and in their practice for the next month as a method for
scholarship's tendency toward obfuscation and jargon. According to modern rhetoricians, the essentialist presumption that reality can be discovered through reason privileges true knowledge for an academic and philosophical elite because only they have the time and intelligence to engage in the necessary prolonged study. However, the more refined the analysis, the further it moves away from the language and understanding of even the well-educated lay person. As a review of pages of many law review volumes reveals, the refined reason of legal elites has produced discourses so theoretical, complex, and filled with jargon that it is now beyond the comprehension of most lawyers and even other law faculty. In other words, irrespective of their essentialist claims to an accurate representation of reality, their expressions of those findings have become virtually incomprehensible and therefore of little use to those who live and work in the practice of law.

Moreover, the presumption that a single reality exists and can be discovered creates a battle within the elites among their competing models and theories—a battle of course that no one ever really wins because absolute proof of a theoretical model, like the disputing monks' religious debates, is forever beyond proof. This is what Paul de Man ironically calls the "rhetoric of blindness." Because participants fail to "see the assumptions of the opposition preserving and revitalizing our culture and legal system. Id. at 30. While admirable as a goal, this article leads to a philosophical dead end, because Bruggink offers no methodology for when two lawyers' honestly held truths differ. Given the lack of a pure essentialist response to the post-modern assault on "truth," this one example of self-conscious essentialism has been relegated to a footnote rather than included in Part III, which deals with more serious efforts to confront the perspectivist dilemma. Some might also argue that Justice Scalia's constitutional formalism comes close to asserting essentialist principles about law. However, upon close analysis, Scalia's justification for his methodological formalism is not epistemic but pragmatic. He argues that his methodology is better not because it is "true" in an absolute sense but because it comes the closest to fulfilling the Constitution's requirement that the judicial branch base its decisions on an apolitical methodology. See Zoltanick, supra note 51, at 1382 (discussing Scalia's view that judicial branch should respect political judgments of executive and legislative branches). While Justice Scalia and many others may actually believe that there are fundamental values that are morally true, a democracy based on a written constitution surely does not require the courts to implement natural law rather only the written text, however problematic that may be.

86. See McPhail, supra note 81, at 44 (discussing search for truth in academic world); John S. Nelson et al., Rhetoric of Inquiry, in THE RHETORIC OF HUMAN SCIENCES: LANGUAGE AND ARGUMENT IN SCHOLARSHIP AND PUBLIC AFFAIRS 3, 6 (John S. Nelson et al. eds., 1987) [hereinafter THE RHETORIC OF HUMAN SCIENCES] (discussing evolution of attitudes toward rhetoric).

87. Of course, much of post-modern scholarship is also guilty of creating a new and impenetrable language. Modern rhetoricians, however, suggest that as much as some postmodernists have tried to escape from Western epistemology, by defining themselves as in opposition to the formalists, they have unconsciously fallen back into a dualistic mode of thinking. McPhail, among others, has argued for a rhetoric of coherence and transformation to move beyond this conundrum. See McPhail, supra note 81; see also Ayer, supra note 50, at 2162 (citing need to strengthen law school teaching relevant to practicing law).
inherent in [their] own positions," there is actually a tacit "agreement to disagree" and "to take positions that are assumed to be mutually exclusive and essentially at odds with one another" so long of course as all participants remain committed to the underlying foundationalist outlook. Thus, by silent invocation of essentialist assumptions, all too often doctrinal scholarship becomes enmeshed in the creation and advocacy of endlessly competing models that all purport to describe the whole truth. What may thereby be lost in the process is the opportunity to highlight each author's partial insights and greater efforts to synthesize or harmonize conflicting theories. This is unfortunate because with some reflection (and off the record), many legal scholars might admit that their actual ontological claims are actually quite moderate, along the lines of: "Here is a helpful, edifying insight/model, which in fact, I, the writer, believe does capture an important part of the truth. However, I am not asserting that my model has a monopoly on the truth or that the other models are without their own merit." But, because of our epistemic heritage, scholars too often unreflectively choose the most arrogant epistemic rhetoric, such as the strong essentialist version of the blind men and the elephant parable.

2. The Blind Men Parable as Seen by Interdisciplinary Scholars and Other Optimists

While the arrogance of doctrinal use of the parable is a clear throwback to Langdellian formalism, the other dominant rhetorical use of the blind men and the elephant parable in legal writing appears at first glance to be much more modest. Chastened by the post-modern critique, this second group of writers generally begins by noting the difficulty in understanding their particu-
lar elephant: this is often because of the complexity or novelty of the subject matter. In addition, they more generously credit those with divergent views on the subject with access to partial truth. However, in a variety of ways, these writers hold unexamined epistemic assumptions that are still traditionally Western.

In the first instance, some of this apparent modesty is compromised by the author's assertion that his contribution is critical to the creation of a unifying theory that will deliver the whole truth in the not too distant future. For example, Samuel Donnelly argues that in rejecting formalism, Ronald Dworkin, the post-modernists, Judge Posner, and the other participants in the modern jurisprudential debates all have contributed to the beginning of a "recovery of the person" in the law. Donnelly's thesis is that with a fully developed "personalist" jurisprudential theory, of which he is, not surprisingly, a proponent, "we will gradually be able to discern the outline of the elephant as we explore various portions of the body." Other authors believe that their unique contribution is the very recognition that seemingly contradic-


94. Id. at 571; see also Owen D. Jones, Law and Biology: Toward an Integrated Model of Human Behavior, 8 J. CONTEMP. LEGAL ISSUES 167, 167 (1997) (noting that integrated model of human behavior that taps numerous disciplines would benefit legal system in many ways).
tory or limited positions are ultimately reconcilable parts of a whole, even if they are not able to propose a unifying definition. For example, Paul Wangerin uses the parable as the organizing metaphor in his article, *Damages for Reliance Across the Spectrum of Law: Of Blind Men and Legal Elephants.* He first demonstrates that five substantive areas of the law—contracts, agency, torts, insurance, and constructive trusts—each have different methods for dealing with the problem of relying promises. Wangerin then calls upon scholars in these fields to construct a unified theory to achieve consistency in this type of case. In his conclusion, Wangerin refers back to the parable, claiming that while the traditional story ends with "confusion rampant," another less well-known version does not conclude until "someone standing nearby shouts out to them, 'But you're all describing the same thing.'" The blind men gather and talk and "[g]radually they piece together a picture encompassing all their ideas." Similarly, Wangerin urges scholars to break down the barriers between substantive areas of law and to abandon seeing only "what they wish to see." If this is done, Wangerin is confident that a unified theory of damages will emerge.

What differentiates the second paradigm is its choice of epistemic optimism in the face of perspectivism. Although these writers admit to some vision problems, they see blindness as curable, a condition created by circumstances or by specialization that will be overcome with time or by a concerted effort by a dedicated group to remove their intellectual blinders. This conception of blindness as a temporary rather than a permanent disability is espe-

95. *See* Eric T. Freyfogle, *A Sand County Almanac at 50: Leopold in the New Century,* 30 Env'tl. L. Rep. 10058, 10058-59 (2000) (noting that two views of nature are not antagonistic but simply parts of greater whole); Makua wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties,* 35 Va. J. Int’l L. 339, 346 (1995) (noting that Western view of human rights is perceived to be in conflict with traditions that emphasize group over individual, but that "all the accounts paint a complete picture"). Some authors begin by acknowledging the difficulty of knowing the elephant but then use the parable to point out that someone else’s model is nevertheless a poor tool. In a sense, these writers are simply saying someone else is even more poor sighted than the rest. *See* Adam M. Finkel, *A Second Opinion on an Environmental Misdiagnosis: The Risky Prescriptions of Breaking the Vicious Circle,* 3 N.Y.U. Envtl. L.J. 295, 362 (1994) (using parable to attack Stephen Breyer’s book on risk management reform).


97. *See id.* at 48 (describing different reactions to hypothetical fact pattern).

98. *Id.* at 99.

99. *Id.*

100. *Id.* at 99.

101. *Id.*

102. *Id.*
cially typical of interdisciplinary scholars who advocate that legal problems can only be understood by tapping other disciplines, such as economics, psychology, and sociology.\textsuperscript{103} Rather than simply conclude that legal issues, texts, or theories are not susceptible to a complete understanding, these writers exhort all to a greater effort and cooperation, expressing a mixture of hope and conviction that their elephant eventually will be comprehended fully if we just look at enough perspectives.\textsuperscript{104}

Even in this more humble fashion, the epistemic meaning of this version of the parable is still critically different from that of its Eastern origins. To the interdisciplinarians and other optimists, although we can be partially blinded by new problems or our specialties, truth is still attainable. This implicit epistemic system is really just foundationalism that has been bitten but not overcome by the post-modern critique of modernist epistemology. While these scholars have abandoned the effort to create a closed Langdellian system limited to legal texts, they still hope for ontological deliverance – this time by a community of disciplines rather than just reliance on the law. A belief that participation in a religious, political, or intellectual movement will ultimately yield essentialist truth is still, at its core, a Western ontological system. Although more commonly recognized in Western religious traditions, such as Judeo-Christian theology, or as a political ideology, such as Marxism, these "isms" assert that the ultimate truth, knowing God, or the structuring of a perfect society, can be achieved if one accepts a specific program or approach. Thus, although dressed in intellectual tolerance, the desire for salvation from the perspectivist dilemma bends the original parable from an accept ance of the multi-variability of truth to a denial that it must always be so. Arguing that the elephant can be understood if we just incorporate enough perspectives reassures us that the elephant’s contours are knowable. In other

\textsuperscript{103} For example, Cheryl Hanna argues that in the domestic violence arena, feminists and social scientists are like the blind men in the parable: "Each discipline not only feels something different, but also claims to possess what it touches." Cheryl Hanna, The Paradox of Hope: The Crime and Punishment of Domestic Violence, 39 WM. & MARY L. REV. 1505, 1512 (1998). But, she believes that "[a] discussion of punishment in domestic violence criminal cases presents an opportunity for feminists, social scientists and researchers from other fields to develop inter-disciplinary insights into the phenomenon of battering. To do so, however, we each have to relinquish ownership of the problem." Id. at 1513; see also Herbert Kritzer & Frances Kahn Zemans, The Shadow of Punitives: An Unsuccessful Effort to Bring It Into View, 1998 WIS. L. REV. 157, 168 (noting need for information from business leaders, social scientists and lawyers to understand impact of punitive damages on business).

\textsuperscript{104} See Finkel, supra note 95, at 362 (noting that specialists provide different perspectives); George A. Martinez, The New Wittgensteinians and the End of Jurisprudence, 29 LOY. L.A. L. REV. 545, 547, 569 (1996) (providing new approach to jurisprudence); see also Wegener v. Anna, 296 N.E.2d 589, 591 (5th Dist. App. Ct. Ill. 1973) (reversing summary judgment for defendant because plaintiff’s exercise of care involves many factors which needed full trial to properly develop, and court felt like blind man and elephant without trial record).
words, the interdisciplinarian version of blind men and the elephant still
refies its subject matter even as these authors concede that no one currently
can see it as it truly is. Pierre Schlag argues that this use of the blind men
and the elephant parable is indicative of the "weak perspectivist gambit" that, in
his view, pervades American legal scholarship.105

Weak perspectivism provides a rhetorical escape hatch from the self-
inflicted conundrum of positing that a legal problem has an answer but failing
to provide it. In psychological terms, weak perspectivist scholarship can take
the form of compensation. As scholars try to fill their legal elephants with
input from various disciplines, so many contradictory meanings are included
that it becomes a "super-full object" that "one would expect to burst."106
Although many of these efforts seem confident, one critic argues that they are
really not more than "desperate . . . performance[s] of the gesture — of the
ascription of legal meaning" prompted by the "ontological vacancy of the
[object]."107

Having examined the two dominant implicit epistemic models of parable
users and the impact of these systems on their rhetoric, the next section turns
to legal scholarship that deals directly with epistemic questions. Reacting to
the challenge of critical legal studies and other post-modern theoreticians,
American legal scholars have been addressing fundamental questions about
the nature of law.108 Quite naturally, some of these writers have more self-
consciously employed the blind men and the elephant parable. Interestingly,

105. See Schlag, supra note 84, at 1693. He also agrees that there is little epistemic difference
between foundationalists and these weak perspectivists. In both cases, the "entire enterprise of
what is called 'legal theory' is generally aimed at a reductionist, integrative essentialization
of the law." Id. at 1695.

106. Id. at 1704-05.

107. Id. at 1705. What is also interesting is that despite the conciliatory nature of their rhet-
oric, some weak perspectivists show a surprising lack of graciousness toward outsider scholars
whose attraction to narrative is founded in part, on a more radical perspectivism. Perhaps,
staying in the Freudian vein, in denial that their quest may be in vain, their sublimated fears that
there is no elephant is projected into their attack on outsider scholarship. See Farber & Sherry,
supra note 83; Tushnet, supra note 60.

108. See ROBERTO M.ÜNGER, LAW IN MODERN SOCIETY (1976) (discussing varying development
of law in different times and places); Duncan Kennedy, The Structure of Blackstone's
Commentaries, 28 BUFF. L. REV. 205 (1979) (discussing development of law in middle ages);
Joseph William Singer, The Player and the Cards: Nihilism and Legal Theory, 94 YALE L.J.
1, 4 (1984) (discussing legal implications of nihilism, specifically epistemic and moral compo-
nents of nihilistic claims that "it is impossible to say anything true about the world" and that
"there is no meaningful way to decide how to live a good life"); see also MORTON HORWITZ,
THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977) (discussing change of legal rules
over time to subsidize economic development and promote class interests); CATHERINE A.
MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979) (arguing that legal system has
both created and helped to enforce subordination of women in workplace).
however, the next Part shows that each invokes the parable in a manner that reflects his now explicit views.

III. The Parable and Self-Conscious Scholarship

A. The Nihilist Version of the Parable

The mother of all self-aware articles that invoke the blind men and the elephant parable is Pierre Schlag's *Hiding the Ball*. This article is a wonderful exposition of the post-modern attack on foundationalism.109 To help those confused by the jargon of many articles in this vein, Schlag starts at the beginning, which for lawyers is law school. He draws his title from the typical law student reaction to the Socratic method. Because traditional law professors never provide definitive answers to their questions, students come to believe the professor is hiding something -- the "ball." The ball is any authoritative meaning of the law, whether it be common law doctrine, a particular case or statute, or especially, the Constitution. Schlag believes that the "hiding the ball" metaphor "seduces the law student into comforting ontological and epistemic presumptions."110 Rather than question whether there is a ball, the student accepts that there is one and focuses on the serious, meaningful, and even contradictory things being said about it by lawyers, professors, and judges. Schlag says this process, begun in law school, "is a pattern that is repeated over and over in American law and ultimately in legal scholarship as well."111

As an example, Schlag explores the various and conflicting meanings ascribed to the Constitution. Schlag argues that because the Constitution cannot possibly be all these things at once,112 scholars routinely turn to the blind men and elephant parable as part of the weak perspectivist gambit to alleviate either their angst that the Constitution might be made to mean "just about anything" or "the fear that the Constitution doesn't mean anything at

109. See Schlag, supra note 84.
110. Id. at 1684.
111. Id. at 1685.
112. Schlag cites scholars who assert that the Constitution is a "text" versus a structural "charter," that its meaning is dependent on history versus political theory, that it is static or dynamic, a current dialogue, or a "prophecy for the future." Id. at 1689-92 (citing generally CHARLES L. BLACK, JR., STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW (1969); PHILIP BOBBITT, CONSTITUTIONAL INTERPRETATION (1991); RONALD DWORKIN, LAW'S EMPIRE (1986); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); PAUL W. KAHN, LEGITIMACY AND HISTORY: SELF-GOVERNMENT IN AMERICAN CONSTITUTIONAL THEORY (1992); Akhil Reed Amar & Neal K. Katyal, Executive Privileges and Immunities: The Nixon and Clinton Cases, 108 HARV. L. REV. 701 (1995); Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1 (1971); Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 1 (1959)).
all. Schlag believes that although the parable is a cautionary tale, "it is nonetheless a soothing one: Even though the perception of each of the blind men is partial, each still has something to contribute to the understanding of elephants. We, as spectators, know this because we can see the elephant for ourselves." Thus, rather than worry that all the conflicting accounts are "attributable to a defect in the master referent," the parable reassures legal actors that the Constitution really does exist.

Despite my admiration for Schlag's essay, I believe there are limitations to his analysis of the blind men and the elephant parable in legal scholarship. First, he fails to note the pure essentialist use of the parable in doctrinal scholarship and judicial opinions. Thus, Schlag misses the fact that, even more than the weak perspectivists, doctrinal scholars rely on the parable as a rhetorical device to reinforce their epistemic assumptions. Nor does it appear that Schlag was aware of the Jainist and Buddhist roots of the parable and its original epistemic meaning.

More fundamentally, Schlag fails either to distinguish or to reconcile his epistemic view (which verges on but does not entirely embrace nihilism) with the non-dualism of the Eastern philosophy. I say that Schlag's essay verges on nihilism because he concludes with the claim that there is a "fundamental ontological emptiness, not in the penumbra, but at the very core (or cores) of American law." In other words, because constitutional scholars cannot agree on a singular definition of the Constitutional elephant, he concludes there can never be one. This position can be understood to mean that there is no such "thing" as the Constitution, at least in the sense that the Constitution cannot be compared to a physical object.

Schlag nevertheless contends that his argument does not mean that the Constitution does not exist or that there is nothing there. Still, he cannot specify exactly what this thing is except to describe it as a "super-filled object." He argues that he "does not want to say that there is nothing there at all." Thus, although he maintains there is a fundamental emptiness at the

113. Schlag, supra note 84, at 1692.
114. Id. at 1693.
115. Id. at 1696. Schlag continues: "The story of the six blind men and the elephant is a kind of H.L.A. Hart for post-moderns . . . . 'There must be a core settled meaning, but there will be, as well, a penumbra of debatable cases in which words are neither obviously applicable nor obviously ruled out.'" Id. (quoting H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 607 (1958)).
116. These oversights are not surprising given that Schlag never discusses a single actual use of the parable in legal scholarship (apparently, this is how you can write a law review essay when you are brilliant, tenured, and famous).
117. Schlag, supra note 84, at 1717-18.
118. Private correspondence with Pierre Schlag (on file with author).
119. Id.
core, it is "not just emptiness." In a sense, Schlag’s attempt to describe something that has content but cannot be compared to a physical object seems akin to the Buddhist paradox: the existence of an emptiness that is somehow full and which tolerates a radical perspectivism without losing its unitary integrity. Ultimately, however, Schlag cannot find words, other than metaphors like "super-full object," to describe his object/Constitution which meaningfully distinguishes his object from the corporeal ones with which we are more familiar (like elephants). Thus, although Schlag recognizes how the weak perspectivists use the parable to reify the unseen elephant, his ultimate conclusion (however he might fight it with metaphors) is really that something approaching nihilism is the only honest choice for Western legal theorists.

Nihilism is a distinctly Western response to the radical perspectivism shared by both Western post-modernism and Eastern philosophy. However, because nihilism has been ascribed multiple meanings, many pejorative, let me first outline which definition(s) I am using before continuing. Mark Tushnet defines legal nihilism as the belief that there are no consistent principles that unify legal reasoning or the formulation and application of legal rules. Thus, nihilism takes radical perspectivism to its logical conclusion. Joe Singer argues that nihilism has both an epistemological and a moral component. Singer describes the moral component as follows:

As a theory of morality, nihilism claims that there is no meaningful way to decide how to live a good life. Any action may be described as right or wrong, good or bad. Just as there is no objective way to describe any action, there is no objective way to decide how to act . . . . Since we cannot know what to do, it does not matter what we do.

The critics of nihilism abhor this moral relativism and contend that nihilism provides no basis for opposing the major evils of history. Because

120. Id.
121. Philip Soper’s use of the parable in his review of LAW’S EMPIRE has a nihilistic bent as well. He writes that disagreements among legal theorists are not the result of looking at different parts of the phenomenon like the blind men and elephant because “both sides are already looking at the same thing. Legal theorists disagree, not about the possible ‘points of view,’ but about which one, if any, can be said to be the most important in elucidating the concept of law.” Soper I, supra note 8, at 1172.
123. Singer, supra note 108, at 4. Like Tushnet, Singer agrees that, “[a]s a theory of knowledge, nihilism claims that it is impossible to say anything true about the world . . . . If one takes nihilism seriously, it is impossible, or in any event fruitless, to describe the world; all possible descriptions are equally invalid because we cannot be sure that any description is reliable.” Id.
124. Id.
125. Often, these discussions reference the Nazi flirtation with Nietzschean nihilistic thought and argue that nihilism provides no basis for opposing the Holocaust. See, e.g. Laurence Doug-
of these implications, most theorists who embrace the radical perspectivist assertions of nihilism seek to distance themselves from its moral implications, or in the alternative, try to define the term to avoid these implications. Thus, even the most extreme nihilist leaning scholars have been accused of retreating from its precepts and acting "contrary to the radical consequences of their position." 126

Nevertheless, the embrace of the epistemic, if not the moral implications of nihilism, has a profound impact on one's rhetoric. Taken at face value, in fact, the correct response to nihilism for a legal scholar might be to give up or at least to think twice before setting pen to paper. According to Kelman, a leading proponent of legal nihilism, "Most of the arguments that law professors make are not only nonsensical according to some obscure and unreachable criteria of Universal Validity but they are also patently unstable babbles. But of course, neither Kelman nor any other nihilistically inclined post-modernists have stopped writing. The legal system continues to operate, and nihilist scholars continue to write articles. 128

Nihilist based scholarship, therefore, must take one of two approaches. At its most effective level, it is essentially "gotcha" scholarship that seeks to expose the contradictions and essentialist premises of legal scholarship and doctrinal development. 129 Even within the nihilist leaning community, scholar

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126 See Chow, supra note 81, at 223-24 n.4 (recognizing that nihilism is difficult position to maintain due to its "extreme skepticism").


128 Some of Schlag's other works come closer to embracing a pragmatist position. See, e.g., Pierre Schlag, Authorizing Interpretation, 30 CONN. L. REV. 1065, 1089-90 (1998) (stating that "there is never any answer to a question of constitutional interpretation other than to do the right thing"); Pierre Schlag, Law as the Continuation of God by Other Means, 85 CAL. L. REV. 427, 440 (1997) (stating that confusion and conflation between epistemic and ontological is crucial to American idea of rule of law because it enables faith in belief that social institutions and practices respond to reason).

129 See, e.g., Clare Dalton, An Essay in the Deconstruction of Contract Doctrine, 94 YALE L.J. 997 (1985); Peter Gabel & Duncan Kennedy, Roll Over Beethoven, 36 STAN. L. REV. 1 (1984); Kennedy, supra note 108; Duncan Kennedy, Form and Substance in Private Law
are ever vigilant with each other, seeking to rout out any reintroduction of essentialist thought. The problem, of course, is that an honest nihilist has no new program to offer which might reconstruct the legal system to something other than the naked exercise of power. Thus, the only constructive contribution of an honest nihilist-leaning scholar, such as Schlag, is to offer an awareness or understanding that encourages people to give up on seeking certainty in the law. What comes after that is left blank. In fact, the entire conclusion of Schlag’s Hiding the Ball essay consists of but three words — "There is none." While honest for sure, the nihilist nevertheless runs out of gas when there is nothing left to deconstruct.

Therefore, much of the rest of nihilist influenced scholarship seems in some way to be running from its own implications. In seeking to defend themselves from the charge of moral relativism, nihilist leaning scholars try to find some way back to basic notions of morality. Rather than succeeding, they seem only to provide further opportunities for other nihilists to produce more "gotcha" critiques. Thus, the radical perspectivism of nihilism leads in some ways exactly back to the self-referential, jargon-filled scholarship of essentialism. This is not surprising to modern rhetoricians, however, because to a large extent the post-moderns have defined themselves by oppositional rhetoric. By defining themselves by what they oppose, they are still trapped by dualistic thinking and, therefore, remain within an inherently Western ontological frame of reference.

Thus, even in its most radically skeptical and self-conscious form, the nihilist use of the blind men and the elephant parable still reflects a Western epistemology, albeit a post-modern Western one, rather than the non-dualistic Eastern view. However, an even smaller group of scholars has tried to integrate the broader lessons of the parable’s non-dualistic Eastern roots with


130. While I agree with Schlag that attempting to convince legal scholars to abandon the quest for certainty is a constructive act, he acknowledges that this is very unsatisfying for almost every other legal thinker. However, he argues that this has more to do "with their expectations and desires for law" which he again asserts are unattainable. Schlag, supra note 118, at 2.

131. Schlag, supra note 84, at 1718.


133. See McPhail, supra note 81, at 111-12 (indicating what postmodernism is not).

134. Once again, I draw this comparison not to privilege the Eastern version of the parable but simply to use contrast to reveal the various modes in which Western epistemic thinking manifests itself.
Western legal concepts or systems. These efforts are discussed in the next section.

**B. The Parable and Eastern Concepts of Truth in Legal Scholarship**

In the context of scholarly endeavors, the Eastern version of the parable has been used to gently remind other scholars of the need for humility in all "endeavors of inquiry" and that "[p]retensions to knowledge are as unscientific as ignorance, and more dangerous." Others have used the parable as an antidote to specific essentialist assertions about a subject and note the value of using multiple perspectives rather than privileging one. More significantly, although our legal system is based on an essentialist epistemology and the absolute dualisms that come with it, a number of scholars have recently tried to integrate the Eastern view of truth into Anglo-American legal concepts and practice.

David Chavkin's article, *Fuzzy Thinking: A Borrowed Paradigm for Crisper Lawyering*, is an excellent example of this effort. Chavkin contends that multivariant thinking will improve clinical teaching. Chavkin uses the concept of "fuzzy sets" to challenge the essentialist Aristotelean notion that something is either part of a set or not. For example, the question of whether a person is tall is a question of degree rather than of tall or not tall. He

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135. See Nancy Levit, *Listening to Tribal Legends: An Essay on Law and the Scientific Method*, 58 FORDHAM L. REV. 263, 273 n.51 (1989) (exploring application of scientific method to jurisprudence and suggesting that "attention to the principles of scientific inquiry is one method of improving the rationality of legal decisions and theories").

136. See Cynthia Price Cohen, *Introduction, Symposium: Implementation of the United Nations Convention on the Rights of the Child*, 6 TRANSNAT'L L. & CONTEMP. PROBS. 2 (1996) (using parable to describe symposium articles); Grant Gilmore, *Some Reflections on Oliver Wendell Holmes, Jr.*, 2 GREEN BAG 2D 379, 392-94 (1999) (describing Holmes jurisprudence as deeply contradictory and noting how various legal movements have all claimed Holmes as their own; suggesting that "[w]e deal with Holmes in our successive generations as the blind men dealt with the elephant" and claiming "we shall never know" real Holmes); supra note 103. A smaller group of authors use the parable to suggest the multi-variability and inaccessibility of truth without necessarily noting the Eastern origin of the story. See Abner Mikva, *Foreword, Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167, 176-77 (1988) (suggesting that public choice analysis makes claims of accuracy despite lack of data and also suggesting that no model can capture complexity of political decision makers in political system).

137. Chavkin, supra note 9; see also John W. Teeter, Jr., *The Daishonin's Path: Applying Nichiren's Buddhist Principles to American Legal Education*, 30 McGEORGE L. REV. 271, 273 (1999) (arguing that attention to Buddhist principles of "compassion, critique, courage, and wisdom are essential for law students and teachers alike").

138. Chavkin, supra note 9, at 167.

139. Id. at 168 (suggesting that six-foot person may be "tall" under graded membership of .9 whereas person 5' 10" might only receive value of .7). In addition, Chavkin's evaluation of "tallness" is contextual because it depends both on the height of the observer and the group within which the person is being judged.
realizes that the legal system must ultimately express itself in a bivalent result, guilt or innocence, liable or not liable, but argues the importance of fuzzy thinking in interviewing, theory development, counseling, and devising a strategy to persuade the fact-finder to lean in the direction that helps the client.140 One example Chavkin uses is the problem of "gap filling" in client interviewing.141 Gap filling occurs when an interviewer fills in facts about the client’s story based upon assumptions from the attorney’s pre-existing schema.142 Chavkin argues that such schema are an unhelpful product of bivalent thinking.143 For example, in the typical fuzzy fact pattern, a criminal defense client may relay six facts that correlate with guilt and not mention two additional facts that might be indicative of innocence.144 Instead of filling the story with more guilty facts from the schema, a good interviewer searches for and develops the two non-conforming, "fuzzy" facts.145 From these non-conforming facts, an attorney can build a theory of the case in the face of adverse evidence.146 Although the term "fuzzy thinking" was coined by an electrical engineer, Chavkin readily acknowledges its roots in Eastern philosophy, and he cites the Jainist version of the parable.147

Other theorists have used the Eastern version of the parable to shed light on areas where an essentialist vision of truth retards understanding and the possibility of reform. For example, Kim Scheppele uses the parable in reviewing Susan Estrich’s book, Real Rape: How the Legal System Victimizes Women Who Say No.148 Scheppele argues that in acquaintance rapes, men and women frequently perceive the same events differently.149 Therefore, "the version of facts that courts find to be true in particular cases is [not] the right or best or only truth. The idea of truth is not that simple . . . . Many different

140. Id. at 194.
141. Id. at 177.
142. Id. at 178-79.
143. Id. at 181-82.
144. Id. at 182.
145. Id.
146. Id. at 183. In Chavkin’s words, fuzzy thinking is a way for getting students "to utilize the client story rather that feeling trapped by it." Id.
147. Id. at 166-67. Chavkin also briefly comments on the potential of fuzzy thinking to "fundamentally alter our perception of the nature of law." Id. at 173 n.34. In a fuzzy legal system, he speculates, defendants would not be either guilty or not guilty, either negligent or not negligent, but rather "the degrees of guilt and negligence would become the focus for issues of punishment and liability." Id. The trend toward sentencing guidelines and comparative negligence suggests such a move is underway in some areas of the law.
149. Id. at 1104-05.
versions of a story all may correspond with reality, just with different parts of it, rather like the blind men with the elephant.150 Facing a choice between two equally valid yet incomplete versions of the truth, however, presents a serious problem for a judicial system premised on separating truth from falsehood. Moreover, because judges and juries make decisions in a cultural context, women’s disparate view of what constitutes a threat, resistance, force, or consent becomes buried or subjugated by the societal "objective" perspective which still favors the male perspective. Scheppelle uses this perspectivist insight to support Estrich’s attempt to "re-vision" rape law in a way that "see[s] differently... how men and women communicate and interact."151 According to Scheppelle, Estrich’s proposal "attempts to restructure social practice through restructuring the kinds of facts that courts notice," and she hopes that "making women’s perceptions visible in the law" will lower the incidence of acquaintance rapes.152 Here, Scheppelle employs the Eastern view as a frame shifting tool in the otherwise polarized debate over acquaintance rape and provides a neutral rationale for what otherwise might be perceived as too radical a solution.153

At its best, scholarship based upon Eastern epistemology offers a refreshing way to value different perspectives without privileging one over another. Writers such as Chavkin and Scheppelle challenge the Anglo-American legal system to soften its strict essentialist view of the truth and to offer interesting opportunities to improve legal practice and to spur reform. Moreover, they develop depth and credibility by drawing on a 2000-year-old, fully developed philosophical system. Another Western scholar, Rebecca Redwood French, makes this exact point. She states that her study of the Tibetan legal system enabled her to "think more deeply about our own unacknowledged assumptions and the possibly contingent nature of what we assume to be essential in our cosmology of law."154

Another discrete group of articles has explored whether Eastern conceptions of truth might be used to effect a more radical transformation of Western legal culture. These articles are more problematic and ultimately betray a deep uncertainty about the potential for success. Much like critical legal

150. Id. at 1095.
151. Id. at 1114.
152. Id. at 1115.
153. See also Sompong Sucharitkul, A Multi-Dimensional Concept of Human Rights in International Law, 62 Notre Dame L. Rev. 305, 306 (1987) (invoking Buddhist version of parable to argue that although concept of international human rights originated in West, it should be broadened to "tolerate the plurality of concepts of human rights" and different understandings of role of individual in society).
studies, transformative articles based on Eastern concepts can be wonderful critique pieces but struggle to find a way to change a legal system that is born of Western philosophic beliefs. One example is John Powell's article, The Multiple Self: Exploring Between and Beyond Modernity and Postmodernity. In this article, Powell argues that Western ideas about the essentialist self are "used to destructively frame the way we talk about the self and race."\(^{155}\) By contrasting the unitary, stable, and transparent Western self with a construct of an anti-essentialist, intersectional self, modern theorists have "made great strides in pushing the dialogue on identity and the subject beyond those traditional concepts...that have functioned to marginalize and subjugate oppressed groups."\(^{156}\) However, when one rejects the Western self, fundamental tenets of our legal system predicated on the individual, autonomous self are also called into question.\(^{157}\) For example, notions of agency and choice, central to the individual responsibility and accountability for one's actions, "would clearly be altered by moving away from the unitary self."\(^{158}\)

Powell looks for assistance from Freudian theory and Buddhism because each of these systems rejects the essentialist Western self. With insights from these disparate theories, he draws hope that the legal view of the individual could be constructed and fractured, without also having to believe that all else is constructed, leaving nothing essential or unconditioned on which to base a system of legal morality.\(^{159}\) Nevertheless, Powell acknowledges the difficulty of this project. For example, in the context of racism, Powell recognizes that current discrimination law is based on a unitary concept of self.\(^{160}\) Thus, when a racialized self is harmed, the legal systems sees its job as correcting the transaction so the racialized self is returned "to its original and rightful position."\(^{161}\) However, "[b]ecause the postmodern self is intersubjective, and thus dependent upon others for definition, oppression is a relational function:...you cannot get rid of subordination without eliminating the privilege as well."\(^{162}\) In other words, contrary to existing doctrine, "there is no

\(^{155}\) Powell, supra note 35, at 1482.

\(^{156}\) Id. at 1482.

\(^{157}\) Id.

\(^{158}\) Id. at 1513.

\(^{159}\) With regard to Buddhism, while not advocating its explicit acceptance, Powell notes that it has "positive implications for personal and interpersonal interaction" because its model of "self-engagement [does] not denigrate or otherwise oppress." Id. at 1508-09 (quoting Anne Carolyn Klein, Meeting the Great Bliss Queen: Buddhists, Feminists and the Art of the Self 80 (1995)).

\(^{160}\) Id. at 1514-15.

\(^{161}\) Id. at 1515.

\(^{162}\) Id. at 1516 (quoting Trina Grillo, Antinessentialism and Intersectionality: Tools to Dismantle the Master's House, 10 Berkeley Women's L.J. 16, 18-19 (1995)).
original position to which we can return the racialized self.\textsuperscript{163} Powell concedes that "[w]hat this may require in the form of jurisprudence is uncertain" and that while providing insights into the problem, neither Buddhism nor Freudian theory provides the key to solving the "discursive void that is left by rejection of the modern unitary self."\textsuperscript{164} Thus, while a fascinating rumination, this attempt to find actual solutions to the post-modern dilemma remains for Powell an ongoing discourse, "with no fixed resolution on the horizon.\textsuperscript{165}

The challenge to truly melding Eastern philosophy into Western legal theory ultimately lies in the perhaps unbridgeable differences in the fundamental starting principles and their practical implications. According to Rebecca French, in Buddhism "faith and reason, logic and compassion are all integrated." Thus, the Pali Buddhist scriptures use the "same word for truth and keeping one's promises. Morality and epistemology are therefore inextricably mingled.\textsuperscript{166} One dramatic consequence of these beliefs is that under the Tibetan legal system, most civil, and even much of the criminal process depends on the defendant's consent, rather than imposition of positive law on the individual.\textsuperscript{167}

Nevertheless, current legal theorists see similarities between Buddhist thinking and the postmodern approach because both positions start with an anti-foundationalist position with regard to truth.\textsuperscript{168} More importantly, both struggle with answering the charge of moral relativism. Except for the most committed nihilists, Eastern theorists and post-modernists seem to assert that ethical implications can be teased out of current events and history, however tentative those conclusions may be. In this way, "the post-modern position is entirely consistent with the view of the Buddha, the Boshu, and Zeno.\textsuperscript{169}"

\textsuperscript{163}  Id.
\textsuperscript{164}  Id. at 1517-19.
\textsuperscript{165}  Id. at 1520.
\textsuperscript{166}  Huxley, supra note 82, at 1897.
\textsuperscript{167}  Id.
\textsuperscript{168}  Andrew Huxley's review of two recent books on Tibetan and Chinese legal history compares and contrasts Eastern and modern Western legal epistemologies. He believes Tibetans worked out a "unique compromise between anarchism and law" whereas Western legal thought has been much more "statist" and has "pushed anarchism into the background." See id. at 1949-50. He agrees that postmodern legal theory and Eastern philosophy share a hostility to the "[o]mnipresent dualisms . . . [that] permeate the investigation, modeling, and presentation of Western material on legal systems." Id. at 1949 (citing REBECCA REDWOOD FRENCH, THE GOLDEN YOKE: THE LEGAL COSMOLOGY OF BUDDHIST TIBET 343 (1995)). However, Huxley poses the difficult question, can Westerners "think of law, history, education, and moral behavior as aspects of the same big phenomenon?" Id. at 1949. As noted above, this is where attempts to integrate Eastern thinking into a Western institution that is inherently dualistic are likely to founder.
\textsuperscript{169}  Id. at 1948.
difference between the post-modern position and Buddhism, however, is that the latter "regarded the data acquired by introspective emptying-of-the-mind as a suitable foundation for justifying truth claims. Seen from this angle, postmodernism is early natural law minus meditation."\textsuperscript{170} In other words, unlike the Buddhist who has "emptiness," postmodern theorists are still looking for some principled foundation upon which to base a system of values in an otherwise anti-foundationalist universe. Because of this fundamental difference between Eastern and Western ontology, neither the post-moderns nor any other Western scholars have successfully translated the Eastern grand narrative into Western legal thought.

C. Pragmatism, the Parable, and Legal Scholarship

The ontological divide discussed in the preceding section dissuades most legal scholars from looking for answers to the post-modern assault on essentialism in Eastern philosophy. Instead, more have turned to a distinctively American philosophical tradition — pragmatism — in search of a legal philosophy that provides a grounding for values in a perspectivist universe. Not surprisingly, some of these legal writers also turn to the blind men and the elephant parable to explain their epistemic positions.

Before turning to these examples, it would help to understand pragmatism and its epistemology. As it turns out, this task is not easy. Like nihilism, a definition of pragmatism is elusive. But, quite contrary to nihilism, the problem with pragmatism is that too many, rather than too few, seek to claim its mantle. Thus, while pragmatism is generally distinguished by its "orientation toward an American philosophical tradition tracing back to William James and John Dewey,"\textsuperscript{171} today, pragmatism "accommodates a variety of views ranging from Judge Richard Posner to philosopher Richard Rorty."\textsuperscript{172}

\begin{itemize}
  \item \textsuperscript{170} \textit{Id.}
  \item \textsuperscript{172} \textit{Id.} As Farber notes, Jack Balkin has provided "wry tribute" to the diversity of views that pragmatism accommodates in his "top ten reasons to be a legal pragmatist":
    \begin{itemize}
      \item It works.
      \item Being a legal pragmatist means never having to say you have a theory.
      \item Buy American.
      \item If you’re left-wing, you can finally find something to agree with Richard Posner about.
      \item You can read all your philosophical sources in the original.
      \item If you’re right-wing, you can finally find something to agree with Frank Michelman about.
      \item You can avoid seeing the world in terms of rigid philosophical dichotomies (or not).
      \item Because you’re socially constructed, it really isn’t your fault that you became one.
    \end{itemize}
  
\end{itemize}
Legal pragmatism, although narrower than philosophic pragmatism, is still no
more than "a loosely connected collection of anti-foundationalist views" that
incorporates a wide range of divergent practices.\textsuperscript{173} This diversity exists
because legal pragmatism seeks to include rather than exclude consideration
of anything that might be helpful in resolving a hard case.\textsuperscript{174}

Given its diversity of method and ideology, legal pragmatism's episte-
mology is therefore best understood by how it distinguishes itself from the
essentialist thinking it opposes.\textsuperscript{175} Unlike foundationalism, which requires
"unimpeachable connections between the foundation and the edifice,"\textsuperscript{176}
pragmatists prefer to speak of a web of beliefs and thus have a greater degree
of tolerance for open-ended and tentative solutions.\textsuperscript{177} Some have, therefore,
concluded that pragmatists equate "truth" with whatever "works."\textsuperscript{178} Daniel
Farber counters, contending that pragmatism should not be considered a
reductionist theory of truth

but rather a reminder that the only available standards to apply in a given
venture are the standards we actually already have. When those standards
prove problematic, we must contend with the difficulty as best we can in
each instance, without hoping for rescue from some acontextual theory of
truth.\textsuperscript{179}

\begin{itemize}
\item \textsuperscript{2} You can also be (a) a civic republican, (b) a feminist, (c) a deconstructionist,
(d) a case-cruncher, (e) a crit, (f) a law-and-economics type, or (g) anything
else.
\item \textsuperscript{1} No one has yet discovered John Dewey's anti-semitic writings for Le Soir.
Id. (quoting Jack M. Balkin, The Top Ten Reasons To Be a Legal Pragmatist, 8 CONST.
COMMENT. 351, 351 (1991)).
\item \textsuperscript{173} \textit{Id.} at 168; see J.M. Balkin, Nested Oppositions, 99 YALE L.J. 1669 (1990); William
N. Eskridge, Jr., Gadamer/Statutory Interpretation, 90 COLUM. L. REV. 609 (1990); William
N. Eskridge, Jr. & Philip P. Frickey, Statutory Interpretation as Practical Reasoning, 42 STAN.
L. REV. 321 (1990); Anthony T. Kronman, Alexander Bickel's Philosophy of Prudence, 94
YALE L.J. 1567 (1985) (two followers of "Aristotelian practical reasoning"); Martha Minow &
Elizabeth V. Spelman, In Context, in PRAGMATISM IN LAW AND SOCIETY 247 (Michael Brit &
William Weaver eds., 1991); Margaret J. Radin, The Pragmatist and the Feminist, in PRAGMA-
TISM IN LAW AND SOCIETY 127 (Michael Brit & William Weaver eds., 1991) (three feminist
theorists).
\item \textsuperscript{174} Ideally, most factors would suggest the same outcome, but when there is conflict, "the
only recourse is to make the best decision possible under the circumstances." Farber, supra note
171, at 169. While this seems open-ended, pragmatists assert that in "concrete cases it is often
possible to identify the most reasonable resolution." \textit{Id.}
\item \textsuperscript{175} \textit{See id.} at 167 (stating that legal pragmatism is not easy to define).
\item \textsuperscript{176} \textit{Id.} at 169.
\item \textsuperscript{177} \textit{See id.} at 169.
\item \textsuperscript{178} \textit{Id.} at 168; see also HANNAH ARENDT, THE HUMAN CONDITION 306 (1958) (comparing
pragmatism with idea that "man is the measure of all things").
\item \textsuperscript{179} Farber, supra note 171, at 168-69.
\end{itemize}
Similarly, when Oliver Wendell Holmes, a jurist sometimes associated with the early pragmatist movement, 180 considered the question of truth, he said, "When I say that a thing is true, I mean that I cannot help believing it . . . . But as there are many things that I cannot help doing that the universe can, I do not venture to assume that my inability in the way of thought are inabilities of the universe. I therefore define truth as the system of my limitations . . . ." 181 One scholar, in an article about Holmes, uses the parable to make this point about the nature of truth:

A pragmatic legal theorist will embed questions about law in a context and address them for a purpose, and so may reach different and apparently inconsistent answers as context and purpose vary. The point of view of the judge, the legal commentator, the counselor, and the legal historian or anthropologist might produce analyses of the concept of law that seem mutually inconsistent. There is no reason to assume in advance that these alternative accounts, directed as they are to different purposes, are, like the different perceptions the blind men had of the elephant, to be reconciled in some all-comprehending meta-account, though a wise pragmatist will also accept as legitimate the 'philosophical' human need to generate such unifying accounts. 182

Ian Hacking makes a further distinction with regard to pragmatists and truth. He identifies two veins of thought. 183 One group "identifies truth within discourse with what the consensus will be in the long run; another group

180. While Holmes was socially acquainted with James and other luminaries of the pragmatist movement and his writings have a decidedly pragmatist bent at times, he personally disavowed the label, calling James's pragmatism "an amusing humbug." Catharine Pierce Wells, Old Fashioned Postmodernism and the Legal Theories of Oliver Wendell Holmes, Jr., 63 Brook. L. Rev. 59, 63-64 (1997) (quoting Holmes-Pollock Letters 139 (Mark DeWolfe Howe ed., 1953)). Nevertheless, several recent articles suggest that Holmes's opinions and writings demonstrate a much closer correspondence with current pragmatism than his own direct statements might suggest. See id.; see also Thomas C. Grey, Holmes and Legal Pragmatism, 41 Stan. L. Rev. 787 (1989). Thomas Grey suggests that Holmes rejected James's pragmatism both for personal reasons and because of his antipathy towards James's willingness to make room for religious belief in his writings. Id. at 865-68.

181. Wells, supra note 180, at 71 (quoting Oliver Wendell Holmes, Ideas and Doubts, in Collected Legal Papers 303, 304-05 (1920)).

182. Grey, supra note 180, at 805. Interestingly, Grey posits the essentialist version of the parable — that a sighted man could provide a "meta-narrative" of the elephant — but then disagrees that this is possible, thus arriving back at the Eastern understanding.

183. See John Searle, Can Nihilism Be Pragmatic?, 100 Harv. L. Rev. 332, 341 n.27 (1986) (citing Ian Hacking, Representing and Intervening 58-63 (1983)). To Charles Pierce, who along with John Dewey is most identified as the founder of pragmatism, cognition does not give us direct knowledge of an external world. Rather, we use cognition to hypothesize about reality based on our prior cognitions. Thus, "the test of truth becomes a matter of internal logic and coherence rather than a matter of correspondence to a preexisting noumenal world." Wells, supra note 180, at 66.
identifies truth with the current consensus. Nevertheless, these distinctions are not troubling to pragmatists because defining "truth," at least in its absolute sense, is not necessary to their project. In this way, pragmatism is not so much a philosophy as a methodology for the pursuit of knowledge. Here, pragmatism is decidedly optimistic. While pragmatists share with post-modernists a recognition that "even natural scientific inquiry [has] unavoidably interpretive and culturally conditioned aspects; at the same time they believe that humanistic and explicitly evaluative inquiry can be pursued rationally and with the reasonable hope of progress." Thus, for pragmatists, the socially contingent nature of reality is a functional rather than philosophic insight. Acknowledging the uniqueness of each person's viewpoint forces one to consider that each person is truly different, "not just at different stages on a unitary path to truth." A pragmatist must engage in the "good faith practice of listening as a precondition for knowledge." Thus, a perspectivist epistemology leads to an emphasis on dialogue and community rather than the isolation or despair of nihilism. This viewpoint also encourages non-judgmentalism even towards those with whom one actively disagrees. Thus, for example, Thomas Grey applies this inclusive, non-judgmental view even to theorists who create essentialist, meta-narratives, even though he personally believes such projects are unattainable.

With its focus on the impact of philosophy on the individual's actual life in the world and its benign perspectivism, pragmatism shares some similarities

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184. Stick, supra note 183, at 341 n.27. Hilary Putnam, identified with the first strand, suggests that not only is truth best judged by "a long term convergence of beliefs" but also suggests there is a "long term convergence of beliefs concerning the proper methods of rationality." Id.

185. See Wells, supra note 180, at 82 (suggesting that Holmes's pragmatism is one way to understand Holmes).

186. Grey, supra note 180, at 790-91.

187. Wells, supra note 180, at 83.

188. Id.

189. Grey, supra note 180. There are a few additional examples of articles which appear to use the pragmatist version of the parable although without explicit reference. Ruth Gavison compares two books, one on natural law and the other on positivism. Her review stresses where these authors agree rather than disagree, contending that too much in the history of legal thought has been lost by granting primacy to debates and polemics . . . . Like the six blind men, we try again and again to describe an elephant, forever finding that we fail by emphasizing just one aspect, by illuminating one element while obscuring others. Maybe we can never do better than that.

Gavison, supra note 89, at 1285. But Gavison goes on to suggest that the authors under review have done a good job of benefiting from the insights of the other by refining from "battling caricatures." Id.
with Buddhism’s middle path.\textsuperscript{190} In both, absolute truth is neither asserted nor stated as a goal. To the contrary, as in the Eastern parable, pragmatism suggests that the pursuit of absolute truth or even studying a subject from just one perspective is counterproductive.\textsuperscript{191} Both are skeptical of essentialism’s dualisms, such as the division of subject and object.\textsuperscript{192} Finally, like Buddhism, pragmatism uses these insights as a guide for each individual’s search for knowledge rather than as a particular path to a particular truth. There is, however, a critical difference between them. Unlike Buddhism, which suggests seeking individual enlightenment in the first instance by turning inward,\textsuperscript{193} pragmatism’s orientation is toward engagement and dialogue with others. It is this decidedly outward focus that distinguishes pragmatism from Buddhism’s middle path and that also marks the distinctly pragmatic usage of the blind men and the elephant parable.

Catherine Pierce Wells’s article, \textit{Old-Fashioned Postmodernism and the Legal Theories of Oliver Wendell Holmes, Jr.}, illustrates the dialogic and optimistic elements of modern pragmatism’s use of the parable.\textsuperscript{194} In this article, Wells addresses the critics of Holmes and argues that despite his limitations and "bad man" image, a salutary pragmatism lies at the root of his jurisprudence.\textsuperscript{195} Wells first uses the parable to explain pragmatism’s communitarian approach to knowledge.\textsuperscript{196} She notes that if she sees an elephant that "no one else seems to notice," she might believe the elephant is a figment of

\textsuperscript{190} I am not the first to suggest that pragmatism offers a "middle way" for American legal theory. \textit{See} Peter F. Lake, \textit{Posner’s Pragmatist Jurisprudence}, 73 Neb. L. Rev. 545, 556 (1994) (noting Posner’s claim that pragmatism is "middle way" between formalism and legal realism).

\textsuperscript{191} \textit{See} Wells, \textit{supra} note 180, at 63-68. Wells quotes Charles Peirce, one of the founders of pragmatism, who describes the essential nature of the movement as "a method of philosophy based upon a simple maxim: ‘Consider what effects, that might conceivably have practical bearings, we conceive the object of our conception to have. Then our conception of these effects is the whole of our conception of the object.’" \textit{Id.} at 63 (quoting 5 CHARLES SANDERS PEIRCE, THE COLLECTED PAPERS OF CHARLES SANDERS PEIRCE 5.402 (C. Hartshorne & P. Weiss eds., 1934)). Wells then goes on to describe Peirce’s pragmatism and phenomenalism as demonstrating that viewpoint, perspective, and perceptual abilities are all necessary concepts for understanding the world. \textit{Id.} at 66-67.

\textsuperscript{192} \textit{Id.; see also} Catharine Pierce Wells, \textit{Why Pragmatism Works for Me}, 74 S. Cal. L. Rev. 347, 352 (2000) (stating that pragmatism also denies distinction between "fact and value").

\textsuperscript{193} Many Buddhists tracts make clear that enlightenment can be found in daily life and engagement with society, not just by renouncing the world and entering a sanga permanently. \textit{See} LAMA SURYA DAS, \textit{AWAKENING THE BUDDHA WITHIN} 207, 232 (1997). However, inward focus of meditation practice is the cornerstone of Buddhist’s proscription in seeking the middle way.

\textsuperscript{194} Wells, \textit{supra} note 180.

\textsuperscript{195} \textit{Id.} at 60-61.

\textsuperscript{196} \textit{Id.} at 67.
her imagination.197 Normally this question is resolved by "engaging in a
certain kind of discussion: 'I see an elephant. You don't. Am I hallucinating?
Are you blind? What do other people see? How sure are you that there is no
elephant there?'"198 However, Wells is clear that this discussion does not
presume a Kantian "elephant" is out there. Instead, it suggests a more
tentative hypothesis suitable for investigation and explanation, rather than a matter
of finality arrived at either by majority rule or by reconciling all viewpoints
into a coherent whole.199 In this way, Wells distinguishes the pragmatist
version of the parable from the weak perspectivist gambit in which hope is
held out that the complete elephant will be discovered.

Wells also distinguishes the pragmatist vision of reality from that of the
extreme post-modernists. These post-modernists argue that power ultimately
dominate and distorts the social construction of reality and that we are
intellectually unable to free ourselves from our own epistemological privi-
leges. Wells acknowledges the importance of power in this social construc-
tion of reality, but her concern is that such beliefs tend toward nihilism, which
offers no basis for believing reform is possible. Pragmatism, which she calls
old-fashion post-modernism, contends that "the influence of power can be
countered and minimized" by strategies that include freedom of speech and
honoring differences.200 Thus, while Wells acknowledges that post-modern
perspectivism can mean nihilism, she argues that pragmatism offers the oppor-
tunity to "become engaged members of a human community. [While t]his
membership will not solve substantive problems once and for all, [she con-
tends] it can give us a manner of proceeding.201

The complexity and diversity of pragmatist scholarship make it difficult
to summarize its strengths and weaknesses. Perhaps at its best, a pragmatist
outlook brings a sense of dynamism and accessibility to the writing it inspires.

197. Id. at 67.

198. Id. at 76. Wells then goes on to explain how the process by which the public concep-
tion of reality can be tainted by powerful interests, noting that if she sees an elephant but the
"Empress of the World" does not, she is likely to end up in the dungeon. Id. at 77.

199. Although she initially cites to the traditional version, see id. at 66 n.30, Wells then
tries different riffs to illustrate additional points, such as the Empress who doesn't see the
elephant and the blind man with acute smell and hearing who is as capable of finding elephants
as the sighted. Her creative rhetorical use of traditional rhetorical devices adds an element of
creativity and play to this piece, a style this Article endorses later. See infra notes 220-31 and
accompanying text.

200. Id. at 78-79. Returning to the parable, she analyzes that when sighted people too
easily conclude that "a person who is blind knows less about elephants than we do -- [they]
completely overlook the possibility that blindness may yield insights that are unavailable to
those who are sighted" or that a blind person's heightened sense of smell or hearing might
qualify them for the job of "evicting elephants from the palace grounds." Id. at 80.

201. Id. at 82.
By drawing on multiple disciplines, pragmatist legal scholarship infuses scholarly debate with fresh ideas and research. The pragmatists who stress historical context and current consensus add a degree of breadth not present in work written for a narrow elite of like-minded scholars. Moreover, pragmatism’s emphasis on dialogue also seems to influence these scholars to make their work more accessible and somewhat less jargon-laden. Lastly, pragmatism’s inclusive methodology correlates well with the practice of law. After all, good lawyers use whatever arguments advance their client’s interest. Thus, pragmatist scholarship appeals to practicing attorneys and practitioner-scholars and can bridge the academic-practice gap frequently bemoaned in the literature on scholarship.\footnote{202}

The vein of pragmatism that stresses experimentation also has a distinct flavor. By promising a path for reform, this type of pragmatist scholarship brings a sense of hope and possibility that seems more attainable than the purely theoretical models for change proposed by the radical left.\footnote{203} This hopefulness has two aspects. In the larger sense, pragmatists believe that radical perspectivism alone leads to a paralyzing moral relativism.\footnote{204} Pragmatism’s program for dialogue and self-examination of one’s own perspective provides “an alternative to the paralysis of philosophical skepticism.”\footnote{205} By


204. See L. Scott Smith, Truth and Justice on the Scaffold: A Critique of “Hired Gun” Advocacy, 62 Tex. B.J. 1096, 1098-1103 (1999) (arguing that holding the relativity of truth as one’s guiding influence prevents one from condemning Holocaust). Smith seems to adopt pragmatism’s dialogic view by suggesting that while each of us is limited to our own perspective, “when one blind man listens to the other five, he may reasonably conclude that there are truths about the elephant which surpass his own limited experience of it. . . . The fact that our goal of arriving at ‘the truth’ may never be fully realized in any case does not justify the assertion that truth is relative and a ‘secondary concern’ which is ‘ancillary’ to the litigation process.” Id. at 1099.

205. Wells, supra note 192, at 350.
posing a methodology that opens the law to more voices, pragmatism provides one who is both a perspectivist and an advocate for change a workable theory of law. Secondarily, pragmatists who focus on the dialogic theme are also hopeful about the debate over legal theory and political change.

The primary critique of pragmatist legal scholarship is related to the general critique of pragmatism as a philosophy. In short, some contend that pragmatism is not a philosophy at all but an excuse for not having one. Other critics argue that pragmatism contains unresolved epistemic and normative conflicts that undermine its attempt to provide a basis for values despite its perspectivism. Thus, nihilists "trash" pragmatist scholarship for failing to fully embrace the implications of anti-foundationalism. Foundationalist critics, on the other hand, contend that pragmatism ultimately fails to provide a solid ground for making value judgments. In other words, by giving up "the Archimedean standpoint, the pragmatist seems to have lost the leverage to move the world." Thus, although pragmatists seek to interweave the tensions between coherence and experimentalism, and dialogue and pro-

206. Catharine Wells argues that "[d]ifferent viewpoints do not necessarily create an irreducible chasm between each viewer." Id. at 359. Invoking the parable again, she argues that we "should not stop talking in the face of seemingly irreconcilable differences." Id.

207. See, e.g., David Luban, What's Pragmatic About Legal Pragmatism?, 18 CARDOZO L. REV. 43, 45 (1996) ("The point is that if legal pragmatism is only eclectic, result-oriented, historically minded antiformalism, it turns out to be a remarkably uncontroversial doctrine. It stands free of philosophical controversy only because it stands free of all controversy, and it avoids controversy by saying very little.").


209. See Singer, supra note 108, at 4 n.8 (offering jibe at pragmatism when he writes, "I prefer not to describe my position as 'irrationalism' – except for the purposes of this footnote – for the same reason that I decline to adopt nihilism as a way to describe myself. It would be misleading and confusing to appear to be advocating that decisions be made 'irrationally' – without connection with discernable goals. A better term might be pragmatism.").; see also RICHARD BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS 1-49, 223-31 (1983); Gerald E. Frug, The Ideology of Bureaucracy in American Law, 97 HARV. L. REV. 1276, 1291-92 (1984) (arguing that world should not be understood in relation to objective/subjective distinction).

210. This philosophical critique is also mirrored by a political one. The left argues that "[i]f the extent that pragmatists rely on coherence with existing beliefs as the basis for decisions, those beliefs limit the possibility of radical improvement." See Farber, supra note 171, at 170. Conservatives critique pragmatism by focusing on the open-ended nature and the experimental side of pragmatism, raising the risk of "unconstrained activism." See id. at 171.

211. Id. at 170.
jectivity, to avoid both acts of risk,\textsuperscript{212} critics of pragmatism are left unconvinced.

In light of these criticisms and regardless of one’s political perspective, pragmatist legal scholarship can also be seen as a complex and unstable house built upon unresolved tensions. While pragmatism is appealing because it attempts to balance competing strains of coherence and experimentation, dialogue and projectivity, and anti-essentialism and the grounding of values, pragmatism has no formula for the proper blend of each, either generally or in each specific situation. Any particular pragmatist’s resolution of an issue becomes vulnerable to criticism that his program is utterly personal. Thus, finishing a pragmatist article, one may be momentarily energized by the author’s hopefulness. However, often, upon further reflection, the program proposed often seems to be lacking in concrete parameters. Moreover, even if one agrees with the author’s resolution of competing considerations, one would have difficulty applying more than the most general insights to a situation because of the specific nature of the piece. In other words, pragmatism’s emphasis on anti-theory, while as effective as nihilism’s, often only creates an illusion of a bridge between radical perspectivism and essentialist truth.

\textit{D. The Parable and Legal Scholarship Revisited}

In this section, an exploration of law review articles that employ the parable with an awareness of its epistemic implications seems to have led to a tour of current legal theory, with at least one representative of each major approach to legal epistemology represented. What explains the appeal of this story to such a diverse group? As alluded to earlier, the best answer is that legal theory, like current philosophy and indeed modern culture, is obsessed with epistemological concerns.\textsuperscript{213} Unable to resolve the postmodern challenge to modernism’s faith in rationality, the blind men and the elephant parable becomes a timely vehicle for encapsulating the centrality of perspectivism to this debate. In fact, the blind men and the elephant parable is not the only Eastern story of the perspectivist’s dilemma to make its mark in current legal theory. Other perspectivist stories, such as the Japanese film \textit{Rashomon}, have been repeatedly cited in the legal literature.\textsuperscript{214} Thus, the frequent use of the

\begin{itemize}
  \item \textsuperscript{212} For example, Peter Margulies notes that pragmatism suffers from a tension between projectivity and dialogue. See Margulies, \textit{supra} note 203.
  \item \textsuperscript{213} See John S. Nelson, \textit{Seven Rhetorics of Inquiry: A Provocation}, in THE RHETORIC OF HUMAN SCIENCES, \textit{supra} note 86, at 407, 412 (discussing modern philosophy’s focus on epistemology).
  \item \textsuperscript{214} See Orit Kamir, \textit{Judgment by Film: Socio-Legal Functions of Rashomon}, 12 YALE J.L. & HUMAN. 39 (2000). As this article describes, the film \textit{Rashomon} consists of several different witnesses to a sequence of events relating their personal understanding of what happened. Each witness offers a completely different version of what took place with "evident
blind men and the elephant parable in modern legal scholarship should be seen not as a unique phenomenon but rather as part of the search for analogies to the legal philosophy's most vexing issue.

IV. Rhetoric, Legal Scholarship & the Parable
A. Rhetorical Theory and the Parable as Trope

Two important questions have not yet been fully answered. First, why do so many legal writers resort to a parable in conveying or elucidating their epistemic beliefs in the first place? Second, is it significant that the parable's point seems to depend on each author's underlying beliefs, even for those who are aware of the parable's epistemic implications? Answers to these two questions lie not in the parable itself but in rhetorical theory, both past and present.²¹⁵

Classical rhetoric is defined as the analysis of persuasive discourse and argumentative technique.²¹⁶ In the Aristotelian model, persuasive rhetoric is divided into logos, pathos, and ethos. Logos refers to the rational dimension of persuasiveness wherein the speaker appeals to the listener's sense of reason "through structured argument and evidentiary proof."²¹⁷ The strength of logos, therefore, depends on the logic and consistency of the argument itself.²¹⁸ Pathos refers to the "emotional aspect of the matter."²¹⁹ A pathos-driven argu-


²¹⁸ Hollander, supra note 215, at 179.

²¹⁹ Michael Frost, Greco-Roman Analysis of Metaphoric Reasoning, 81 J. LEGAL WRITING INST. 113, 115 (1996). Although "Aristotle expressed the wish that rhetoric could deal exclusively with rational appeals, . . . he was enough of a realist to recognize that man is often prompted to do something or accept something by his emotions." Corbett, supra note 216, at 34.
ment can appeal to base needs or to the personal involvement of the listener, or more broadly, to how the audience "feels about concepts, values, conduct, and situations." Ethos refers to the ethical appeal of an argument, which comes "from the character of the speaker, especially as that character was evinced in the speech itself. A man ingratiated himself with his audience—and thereby gained their trust and admiration—if he managed to create the impression that he was a man of intelligence, benevolence, and probity."

While today legal arguments are generally thought of and evaluated on the basis of their logos, classical rhetoricians assumed to the contrary "that legal arguments and analysis do not succeed solely on the basis of their logical integrity." In fact, in the classical tradition, "what we would today regard as legal education was to a significant degree education in rhetoric."

Classic rhetoricians were particularly interested in techniques called tropes that could enhance all three aspects of an argument's persuasive appeal. Tropes are "striking or unusual configuration[s] of words or phrases that change the [ordinary] meaning of a word or words, rather than simply arranging them in a pattern of some sort." The trope relevant to this discussion is "metaphor," defined as an "implied comparison between two things of unlike nature yet have something in common." As scholars have recently ex-

220. Cooley, supra note 217, at 92.
221. CORBETT, supra note 216, at 35; see also Cooley, supra note 217, at 92 (citing JAMES WHITE, THE LEGAL IMAGINATION: STUDIES IN THE NATURE OF LEGAL THOUGHT AND EXPRESSION 815 (1973)).
222. More recently, outsider and narrative scholarship has brought pathos into the picture, intentionally using the power of stories to create scholarship that makes the reader feel as well as think.
223. Frost, supra note 219, at 115.
225. See Scott Brewer, Figuring The Law: Holism and Tropological Inference in Legal Interpretation, 97 YALE L.J. 823, 828 n.24 (1988) (citing RICHARD LANHAM, A HANDBOOK OF RHETORICAL TERMS (1968)) (discussing difficulty of finding core definition of trope that covers all rhetorical theories). The meaning and operation of the "trope" has differed throughout the Western rhetorical tradition and among different theorists. Brewer explains that "[t]he concept of the trope evolved from being only a minor element in rhetorical taxonomy to occupying its current predominant place in Western rhetorical and literary theory. The concept of the trope in Western culture had its origins in the elaborate rhetorical taxonomies of Aristotle, Cicero, Quintilian, and other theorists." Id.; see also JAMES MURPHY, RHETORIC IN THE MIDDLE AGES 20 (1974) (discussing Cicero). Although in earlier Greek theories of rhetoric the trope played a relatively minor role as a means of achieving dignitas, Ciceronian rhetoric gave it a more prominent place in rhetorical theory. As Ciceronian theory came to dominate Western thinking about rhetoric, so did its emphasis on the trope (and the closely related figure of speech), so that rhetoric as a discipline has become almost identified with the use of tropes and figures. PETER DIXON, RHETORIC 36-38 (1971).
226. CORBETT, supra note 216, at 479.
plored, judicial opinions are rich in metaphorical language. According to Michael Frost, "frequently and almost instinctively lawyers use figurative and metaphorical language when they want to emphasize and crystallize their arguments and analysis." However, metaphors do more for the logos of an argument than just condense or clarify. Metaphors can challenge "the audience to seek resemblances where none usually exist . . . . For Aristotle, the act of understanding or ‘solving’ a metaphor is similar to solving a riddle; in both cases the solving is itself an act of learning." However, the rhetorical power of metaphors lies in their simultaneous appeal to pathos and ethos. Metaphoric language invites the reader or listener to become emotionally involved with an argument by appreciating the connection and the surprise that a good metaphor inspires. Aristotle also noted in his RHETORIC that the selection of an apt metaphor also "indicates the advocate’s resourcefulness and insight" and thus enhances his ethos as well.

Within rhetoric, parables are classified as extended metaphors. A parable teaches its moral lesson metaphorically because the details of the story stand for a larger meaning. Parables, however, can have a rhetorical advantage over ordinary metaphors. When a parable comes from a dominant religious tradition or is deeply embedded in a culture’s folkloric wisdom, it can be counted upon to evoke a strong pathos from the audience. Moreover, to the extent that the speaker allies himself with the parable’s religious or historical


228. Frost, supra note 219, at 118. "Cicero too commended metaphors for their ability to convey complex ideas concisely. Quintilian observed that metaphors work subtly . . . " Id. at 119. Bernard Hibbitts argues that metaphors are "fundamental tools of thought and reasoning" and, therefore, they can be used as creative tools that extend and reshape legal language. Zlotnick, supra note 227, at 859 n.82 (citing Hibbitts, supra note 69, at 233-35).

229. See, e.g., Frost, supra note 219, at 129 (equating farm metaphor used by judge in Tinker v. Des Moines School District, 393 U.S. 503 (1969), to style exemplified by Quintilian and his conscious attempt "to establish or increase his own credibility or ethos by playing on the emotional content or pathos of a particular metaphor").

230. Frost, supra note 219, at 121. As Quintilian observed, "[T]he more remote the metaphor is from the subject to which it is applied, the greater will be the impression of novelty and the unexpected which it produces." Id. (quoting 3 QUINTILIAN, at 253) (emphasis added). "The most characteristic emotional response that classical analysts ascribe to metaphors is pleasure." Id. at 120.

231. Id. at 126. While Aristotle and Cicero made only modest claims for a metaphor’s contribution to ethos, Quintilian thought that "good metaphors make an appreciable contribution to the advocate’s ethos." Id. at 126-27.

232. See CORBETT, supra note 216, at 479-80.
moral, his *ethos* is enhanced more so than if he merely employed a metaphor of his own creation. With this background, much like trial lawyers who have long relied on Bible parables to establish a rhetorical foundation for their closing arguments, it is not surprising that legal scholars have turned to an ancient, but still well known parable to convey their epistemic beliefs and arguments.233

Turning to the second question, the chameleon-like quality of the blind men and the elephant parable in legal scholarship also has its roots in a tropologic understanding of metaphor. A key feature of metaphors is their inherent malleability. This malleability arises from the condensed nature of metaphor; a metaphor asserts a comparison but does not make the comparison explicit. A consequence of this omission is that the boundaries of a metaphor's meaning are "left to the reader's imagination."234 This feature leaves a metaphor open to disparate but supportable interpretations by members of the audience.235 The malleability of metaphoric stories explains why although the original version of the blind men and the elephant parable endorsed perspectivism, the basic storyline is now used quite differently. Specifically, the meaning given to the critical symbol, "blindness," seems to determine the epistemic moral of the parable. To the extent that intellectual blindness is seen as an unalterable element of the human condition, the moral remains the Eastern version. If blindness is perceived either as afflicting only some or as a disability that can be overcome, whether by co-operation or technological progress, the moral begins to shift to a Western orientation. However, while malleability helps account for this parable's appeal to legal scholars holding very different epistemic views, the general rhetorical appeal of metaphors and parables to legal scholars goes much further.

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233. Moreover, in addition to stories like the blind men and the elephant parable, classic hypotheticals and even individual scholars (such as Duncan Kennedy or Richard Posner) have become markers in legal scholarship for particular debates or ideas. By invoking these markers, scholars are placing themselves in a context or are using shorthand to express a complex set of ideas. *See* Pierre Schlag, *No Vehicles in the Park*, 23 Seattle U. L. Rev. 381, 389 (1999) (discussing misguided prevalence of articles discussing H.L.A. Hart's hypothetical statute that forbids "vehicles in the park.").

234. Michael Boudin, *Antitrust Doctrine and the Sway of Metaphor*, 75 Geo. L.J. 395, 407 (1986); *see* e.g., Hibbits, *supra* note 69, at 233-34 (noting that good metaphor may subvert original meaning); James E. Murray, *Understanding Law as Metaphor*, 34 J. Legal Educ. 714 (1984) (arguing that analogical, metaphoric thinking may be fundamental to law); Yelnosky, *supra* note 227, at 815-16 (noting that metaphor may confuse reader if he gives it different meaning than author intended).

235. Metaphors therefore permit the common law advocate or judge to extend an existing rule to a new situation or to create a new rule without saying so explicitly and without delineating the extent of the change. *See* Hollander, *supra* note 215, at 185-86 (questioning degree to which well known metaphors have authoritative, precedential value in judicial opinions).
First, one must recognize distinct rhetorical agendas of the full-time legal academician engaged in scholarly work. Clearly, an author’s first rhetorical agenda is to choose the best arguments available to support his or her thesis. The rhetoric that supports this agenda is both explicit and obvious. At the same time, academicians engage in scholarship for other reasons: i.e., to advance a political agenda or simply to improve their standing among their peers. These more implicit agendas have their own rhetorical imperatives. Obviously, in a perfect academic world, each work would be evaluated on its merits, regardless of authorship. But with thousands of articles being published in hundreds of student and peer edited journals, it is often an author’s perceived status that influences an article’s impact. Certainly, an author’s status, or *ethos*, is often based on factors external to the work itself, such as the reputation of the scholar’s academic home and the reception of their past work. As the ancient rhetoricians noted, delivery also impacts *ethos*. Thus, some of the rhetoric of a typical piece of legal scholarship is designed to first persuade law review editors to publish and then to encourage scholars to read and cite the piece.

Among the many factors that contribute to the perception that the work is important is the self confidence projected by the work itself. Thus, for the arrogant doctrinalist, the parable’s rhetorical assertions of breadth, originality, and truth are part of an implicit rhetoric of self-promotion that is distinct from the *logos* of the thesis. For those I have called inter-disciplinarians and optimists, the parable’s rhetorical message is slightly different, but functionally similar. Here the parable expresses confidence in the ultimate solution of a problem to which the author claims to be making a valuable contribution. Rhetorically speaking, this is wise, for there is little appeal to

236. Many faculty members view themselves as independent contractors, each doing essentially independent work and competing with each other for the perks doled out by the administration. While this model captures a great deal of academic life, I have always felt that the feudal model better summarizes the interactions among tenured and untenured faculty and deans.

237. This ideal runs counter to the old saw among legal academics about the three rules of the article selection process: "Something by somebody, nothing by somebody, or something by nobody."

238. *See supra* notes 76-79 and accompanying text. The status of the journal in which the article appears also seems to "count" to many law faculties’ assessments of the worth of the work.

239. This is true regardless of whether the underlying motivation for the piece is the author’s belief in the essentialist truth of his thesis, his desire to achieve his political objectives, or simply his attempt to advance his career.

240. Within law review articles, other rhetorical, stylized features are part of the rhetorical structure as well, such as an article’s length and number of footnotes.

241. *See supra* notes 49-90 and accompanying text.
an article that states it is a contribution to a problem that is unlikely ever to be solved.\textsuperscript{242}

Metaphors and parables are not just the self-promotional tools of modern legal scholars. Just as they did for the classic rhetoricians, metaphors and parables contribute to the logos of legal scholarship - indeed to its very creation. The classic rhetorician’s first step for every speech was \textit{inventio}: the unique challenge of formulating the arguments for the topic at issue.\textsuperscript{243} Thus, classic rhetoric disputed the opposition between rhetoric and substance.\textsuperscript{244} Cicero also asserted that the speaker who had "a native, intuitive sense for proper arguments" had a great advantage over those who selected arguments by method or mere diligence.\textsuperscript{245} \textit{Inventio} is particularly critical to legal scholars because scholarship is most often judged on its creativity.\textsuperscript{246} This evaluation depends in large part on an article’s ability to make readers think differently about its subject matter.\textsuperscript{247} Metaphoric language helps legal scholars face this challenge. Because every metaphor requires an interpretative act by the reader, a writer’s ability to express a proposition in an apt metaphor creates a space for the audience to be stimulated by the idea across a range of meaning and even in directions unanticipated by the author. Moreover, because a succinct metaphor evokes a strong \textit{pathos} of appreciation, legal scholars can get more

\begin{itemize}
\item \textsuperscript{242} Another example far from the episodic issues discussed in this Article demonstrates the importance of thinking about one’s rhetoric of ethos. One of the most cited law review articles of all time is John Hart Ely’s article attacking the reasoning of \textit{Roe v. Wade}. John Hart Ely, \textit{The Wages of Crying Wolf: A Comment on Roe v. Wade}, 82 \textsc{Yale L.J.} 920 (1973). In his introduction, however, Ely declares his personal support for a woman’s right to choose abortion. \textit{Id.} at 923. Certainly, this declaration of personal opinion does not support the logos of the article and its presence still serves to irk both supporters of abortion rights and purists in legal scholarship. \textit{See id.} However, his stated opposition to the possible consequence of his arguments (the overturning of a decision whose result he supports), quite possibly garners credibility for his critique of the decision. \textit{Id.} at 947. Spending one’s hard won ethos in this fashion is exceedingly dangerous in academia, and it is unlikely that someone of lesser stature would have tried such a rhetorical ploy.

\item \textsuperscript{243} \textsc{Corbett}, \textit{supra} note 216, at 33.

\item \textsuperscript{244} \textit{Invention} is the first canon of rhetoric. "The skill of invention is concerned with discovering and formulating arguments on any subject, opinions on the resolution of any problem, or reasons for or against any proposed course of action." Balkin, \textit{supra} note 224, at 212.

\item \textsuperscript{245} \textsc{Corbett}, \textit{supra} note 216, at 33.

\item \textsuperscript{246} Certainly, scholarship is also evaluated on the depth of research and quality of writing, but those qualities alone translate as merely workman-like and enjoyable. \textit{See Lasson, supra note 76}, at 935 (stating that scholarship must provide analysis that increases reader’s understanding of problem).

\item \textsuperscript{247} One legal historian acknowledged that the impetus for many of his projects began with a sense of some insight that was different than the current consensus. He further acknowledged that his belief that he had something different to say was often the dominant reason for choosing a project. For this type of scholar, the underlying logos serves the personal rhetorical agenda — to be seen as someone who is clever, thoughtful, and even profound.
\end{itemize}
rhetorical hang from a comparison stated as a metaphor than as a simple logical proposition. Thus, legal scholars have frequently gone to the "metaphoric well" to craft critical elements of their theses. In this context, the blind men and the elephant parable is simply a recurring example of how metaphorical language plays an important role in legal scholarly activity.

Indeed, carrying this concept even further, some current rhetoricians have asserted that much academic scholarship "is only debased poetry, a mixture of metaphors, images and ambitious language." Influenced by the same post-modern attack that provoked the epistemic crisis in legal theory, these rhetoricians argue that academicians can no longer deny the rhetoric they use to give their work the veneer of objectivity. Instead, claiming an epistemic kindred with the early Greek sophists, they use rhetoric to examine academic work as "an incomplete, ambiguous, and uncertain world, interpreted and understood by means of language." Their basic premise, therefore, is


251. Leff, supra note 215, at 22.

252. Nelson et al., supra note 86, at 5. Socrates was a Sophist but beginning with his student Plato and through Descartes, Western philosophers saw themselves as truth seekers and relegated rhetoric to courtroom hacks. Id.

that "[s]cholarship uses argument, and argument uses rhetoric . . . . In matters from mathematical proof to literary criticism, scholars write rhetorically."254

As its task, post-modern rhetoric seeks to study the structure of academic discourse. While maintaining that all disciplines rely on rhetorical argumentation, post-modern rhetorical theory contends that "[e]very field is defined by its own special devices and patterns of rhetoric – by existence theorems, arguments from invisible hands, and appeals to textual probabilities or archives – themselves textures of rhetoric."255 While the full range of insights that has resulted from the application of post-modern rhetorical theory to legal discourse is beyond the scope of this Article, the recent legal scholarship in this area generally shares the view that a more self-conscious approach to the rhetoric of legal discourse is the first step.256 This process begins by looking at scholarship "as a practice that is carried out by a community."257 This raises one more question: How does legal scholarship's treatment of epistemic issues impact the rhetorical structure of the discourse?258

Some contend that the feature that most distinguishes legal scholarly rhetoric from other academic disciplines is its prescriptive voice – its con-

254. Nelson et al., supra note 86, at 3; see also Rubin, supra note 73, at 1842 (contending that legal scholarship does not consist of "disembodied utterances, existing in some neutral space where they can be objectively evaluated. Rather, they are acts of speech, initiated by a particular speaker, or kind of speaker, and directed toward a particular audience . . . . Whatever voice they use, these acts of scholarly speech are intended to persuade their audience").

255. Nelson et al., supra note 86, at 4-5.


257. Rubin, supra note 73, at 1842.

258. This Article takes as given that there are differences between academic and practitioner rhetoric. The accepted distinction is that scholarship is supposed to be devoted entirely to logos whereas for practitioner's appeals, pathos and ethos are seen as having a role. See Rubin, supra note 73, at 1846. While the discussion above refutes the notion that academic discourse is free of pathos and ethos, this difference still exists as a matter of degree. See also infra notes 272-75 and accompanying text for a discussion of outsider scholarship and pathos.
scionly declared desire to improve the performance of legal decision makers by critiquing judicial opinions. This rhetorical model of legal scholarship does seem to capture the logos of much doctrinal scholarship, and it does distinguish legal scholarship from the still dominant objective rhetoric of the sciences and social sciences. However, the explicit rhetorical agenda of much of today's legal scholarship seems broader than just doctrinal advocacy. On one hand, there is still a strong vein of pretensions to objectivity, particularly in model building scholarship. On the other hand, from critical legal studies to the law and economics movement, scholars have a self avowed political purpose broader than just critiquing judicial opinions. At the other end of the rhetorical spectrum, the typical nihilist piece, as discussed earlier, is usually devoted to deconstructing another's arguments much more so than advancing a favored interpretation. Nevertheless, there does seem to be a less objective, distinctively normative aspect to legal scholarship.

Focusing solely on the explicit rhetorical goals of the author, however, yields little insight into the underlying structure of the discourse. For legal scholarship, I believe the epistemic crisis created by the post-modern critique of objectivity has had important structural rhetorical ramifications. Because so many legal scholars focus on the normative and technical and ignore the ontological and epistemic issues, they must structure their rhetoric to emphasize the former and avoid the latter. Metaphors assist in this rhetorical frame shifting. It works like this: because a metaphor's openness is not readily apparent, each reader typically interprets the metaphor's meaning and boundaries unconsciously (as opposed to the explicit evaluation that takes place when one undertakes a logic-based comparison between two things is made). Thus, metaphors can also be used to cloak an uncertain or contradictory concept in evocative and convincing language for both the author and the audi-

259. Rubin, supra note 73, at 1854.

260. "Crits" tried to unmask, and thereby undermine, the power structure that underlies the law. See, e.g., Eric Blumenson, Mapping the Limits of Skepticism in Law and Morals, 74 Tex. L. Rev. 523, 523-24 (1996) (attacking antifoundationalist theory). Similarly, outsider scholarship seeks to bring new voices to legal discourse, again with deeper structural reforms of both academic scholarship and the larger legal and political world in mind. See infra notes 272-75.

261. See supra notes 129-31 and accompanying text. During a round table discussion on scholarship at my home institution, a variety of political motivations and epistemic positions were revealed. One colleague admitted he consciously chose theses that supported his political agenda and admitted that if he found historical evidence that undermined his political agenda, he would drop the project rather than hurt his cause or be dishonest in his writing. Another colleague chose to use classic liberal theory to analyze legal issues because he believes that his philosophy best represents the intent of the Declaration of Independence and the Constitution.

262. See Schlag, supra note 84.
ence. This is especially likely if the metaphor or parable is deeply ingrained in some cultural context or web of belief. In legal scholarship, the blind men and the elephant parable serves this purpose because it allows an author to metaphorically assert essentialist beliefs without making them explicit. In the post-modern era, the parable thereby serves as a stabilizing mechanism to cloak the otherwise contradictory structure of legal rhetoric — explicit normative and political arguments side-by-side with unsupported essentialist beliefs about ontological and epistemic issues.

This discussion of the blind men and the elephant parable as a rhetorical trope is, therefore, an example of the broader lesson of modern rhetorical theory — that there are benefits "from increased rhetorical self-consciousness." Some of the benefits are practical. The more aware one is of one's own rhetorical agendas and the underlying structure of the discourse in which one participates, the more likely one is to be consistent and persuasive, and conversely, the less likely to undermine some aspect of one's agenda. For example, when a writer unselfconsciously chooses a rhetorical device, such as the arrogant version of the blind men and the elephant parable, his readers may be misled into thinking his epistemic agenda is grander than the more modest goal of sharing one scholar's slice of the truth. In this way, rhetoric

263. This cloaked imprecision is what accounts for much of metaphor's appeal to common law lawyers and judges. See Boudin, supra note 234, at 407 (stating that imprecision makes metaphor sharper weapon and harder to parry); Hibbits, supra note 69, at 268 (noting that men use metaphors in discussions to keep other groups from participating); Yelnosky, supra note 227, at 815-16 (noting that baseball metaphor is confusing to readers).

264. See, e.g., Zlotnick, supra note 227, at 872-73 (demonstrating how subtle metaphor, "species of a lesser included offense" was used to mask weak argument and modify doctrinal rule in double jeopardy doctrine).

265. Rubin admits that legal scholars still quite frequently "speak of law as if it has some fixed existence, or treat texts as repositories of unambiguous meanings that quietly await discovery inside their web of words," but he insists these examples are solely attributable to the less sophisticated or to lapses into professional shorthand. Rubin, supra note 73, at 1854-55. Moreover, he asserts that the important question is "how these scholars explain their enterprise when called upon to do so, not how they express themselves on all occasions." Id. I believe that residual essentialism is a more pernicious problem that Rubin suggests. While a scholar may begin his research with limited ontological goals, the process of research and writing feels to many like discovery rather than invention, leading to both unintentional and intentional essentialist claims. As an example, in a faculty seminar on scholarship, one professor exclaimed that he hoped we were doing something different than writing a brief. Another later confided that while he agreed that most scholars were unable to overcome their individual perspectives, he believed he was able to discover objective truth in his research.

266. Nelson et al., supra note 86, at 15. Rubin argues that this requires "a community of scholars to develop an understanding of their own pattern of thought, and to evaluate its operation." Rubin, supra note 73, at 1843-44.

267. When pressed (and in private), many legal scholars will admit that their particular insight in an article is not in all honesty a grand theory of the truth but merely a twist or insight
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is "essentially pragmatic in orientation, because it is directed to the solution of difficulties placed before the student." 268

B. The Parable and the Debate Over Narrative Scholarship

This Article’s exploration of the blind men and the elephant parable’s role in the rhetoric of legal discourse may also shed some light on the debate over the legitimacy of outsider and narrative scholarship. In his influential 1989 article, Storytelling for Oppositionists and Others: A Plea for Narrative, Richard Delgado called for a new wave of legal scholarship.269 He challenged academics to abandon the orthodoxy of formulaic, doctrinal articles and instead to experiment with form and content using personal narratives, stories, and parables.270 His agenda was overtly political. Delgado asserted that traditional scholarship’s focus on the sanitized legal reasoning in judicial opinions necessarily excluded the voices of political "outgroups" such as racial minorities, the poor, gays and lesbians, and others.271 By providing a forum for the views of these outgroups, Delgado hoped radical legal scholars could help undermine the ideology that disempowered these groups in the legal arena.

In some ways, Delgado has been wildly successful. The trickle of articles became a flood. Now, the most prestigious law reviews routinely publish narratives, imaginary dialogues, and autobiographical revelations that are considered the cutting edge of legal scholarship.272 But there has also been a severe backlash, both in the literature and, some assert, in the promotion and tenure process. More traditional legal scholars have argued that outsider scholarship and storytelling is not legitimate and that it lacks the objectivity, rigor, and analytic content that have been the identifying features of academic discourse about the law.273 Outsiders have vigorously defended themselves. Indeed, the debate for and against outsider scholarship comprises a literature on its own.274 But by many accounts, this debate has gotten ugly, personal, and overblown.275

268. Balkin, supra note 224, at 212.
270. Id. at 2414.
271. Id. at 2425-35.
272. See Farber & Sherry, supra note 60 (discussing use of storytelling by legal scholars).
275. See Farber, supra note 83, at 164 (noting that debate over pornography is ugly, personal, and overblown). Farber discusses the "unpromising" prospects for future intellectual
However, looking at this debate, in part, as a question of epistemic rhetoric takes a step back from absolutist arguments about legitimacy. First, it may be that an implicit essentialism has helped fuel the debate. In traditional doctrinal scholarship, while vigorously contesting each other's models, scholars basically agree about first principles; that is, scholarship is about law, theory building, and the pursuit of an elusive and disputed but ultimately singular truth. Outsider scholarship refuses to stay within this formalist universe because it elevates the significance of individual subjective voices. Arguing that the closed world of doctrine is intellectually limiting and used to exclude the interests of oppressed minorities, outsider scholarship explicitly rejects essentialism.276 Because of their implicit assumptions about what the law is, some traditional scholars see narrative scholarship as un-rigorous, unverifiable, and, ultimately, not legal scholarship at all. In this debate, the arrogant version of the blind men and the elephant parable can be seen as not merely a harmless rhetorical flourish but as a symptom of the reification of the scholarly enterprise as seen from an essentialist perspective. While an admonition to refrain from essentialist rhetoric and the concomitant goal of raising consciousness about our implicit epistemic beliefs may not resolve this debate, greater self-reflection about the grandiosity of traditional doctrinal models might perhaps temper the rejection of scholarship based upon very different epistemic assumptions.

As the storytellers have pointed out, majoritarian scholarship uses storytelling as well.277 The difference is that majoritarian stories, such as the blind

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men and the elephant parable, are often so imbedded in culture that it is hard to see them as persuasive rhetoric. Moreover, because traditional stories evoke a shared understanding, they can be made in shorthand.278 Outsiders, on the other hand, must be more explicit, precisely because they seek to counter some existing cultural understanding. These differences impact all aspects of the outsider scholar’s rhetoric. Taking ethos as an example, much of traditional scholarship’s ethos building is by citation to previous articles by prominent scholars on the same subject. A professed familiarity with a body of work establishes the legitimacy of the author as a participant in the dialogue. Because little outsider scholarship existed until recently, these scholars had no option but the risky rhetorical strategy of selling themselves and their own stories to establish their credibility.279 Similarly, narrative scholarship intentionally places a greater emphasis on pathos, hoping to use emotion to unsettle accepted notions of law and culture. In these ways, rhetorical theory can help reframe and rationalize the ongoing debate over narrative scholarship. Moreover, the study of "neutral" stories, such as the blind men and the elephant parable, can be part of this project by clearly showing how all legal scholarship uses rhetoric’s pathos and ethos as fundamental components of its enterprise.

V. Conclusion

This Article has attempted to offer insights into the different groups of scholars who have employed the blind men and the elephant parable in their writing. For the majority of scholars who have used the parable unselfconsciously, the moral of this Article might be that you can run but you cannot hide from the ontological and epistemic questions at the heart of the discourse of legal scholarship. Regardless of whether we tackle the tax code or constitutional law, this exploration of one epistemically oriented parable suggests that our beliefs about the relationship between our work and truth will resurface in our rhetoric. However, because most writers choose their rhetorical tropes by instinct, as a spontaneous part of the creative act of writing, much of what they reveal about our deeply held beliefs about truth is communicated unintentionally.280 Therefore, I suggest that the only choice we face is whether we

278. Even today, most of the stories in legal writing or advocacy tend to reinforce existing social ideology. Nevertheless, there has been little study of the orthodox use of narrative, stories, and parables in case law and legal scholarship. This Article hopes to contribute to that effort.

279. See e.g., Delgado, supra note 277, at 666-67 (noting that outsiders will not be taken seriously if they differ too much from traditional story); Robson, supra note 273, at 1400.

280. Richard Delgado makes a similar point. Richard Delgado, Mindset & Metaphor, 103 Harv. L. Rev. 1872, 1874 (1990) (stating that "the choice of metaphors and other word-pictures can give a glimpse into how the writer reasons and can show the hidden contours of his or her mental world").
select, and then perhaps moderate, our epistemic rhetoric ourselves, or default
to one of the two unreflective belief systems of current legal scholarship - that
of either arrogant or optimistic essentialism.

As I noted in the Introduction, however, this Conclusion is focused more
on advocacy than on recapitulation. But this first suggestion, that legal
scholars of all stripes, not just legal theorists, more carefully consider their
epistemic assumptions might seem banal. If taken seriously, however, one can
never read or write a piece of legal literature the same way again. Once the
seed of epistemic self-consciousness is planted, a sense of detachment begins
to accompany one’s participation in the discourse. As writers, this detach-
ment can have great benefits. It can improve the persuasive appeal of our
work and especially help to avoid an unintentional intellectual arrogance that
seems all too often a part of the law professor’s persona. It may also help us
to develop our own epistemic voices. Because the rhetorical structure of legal
discourse actively discourages an investigation of the epistemic and ontologi-
cal in favor of the normative and technical, it is difficult to find the right voice
to discuss our own claims about the truth of our work without sounding either
arrogant, overly hopeful, or at the other extreme, uncharacteristically insecure.
If legal scholars become willing to examine and then put their epistemic
conceptions on the table, the discourse of legal scholarship will also be
enriched by the depth and likely diversity of these views.

We must begin, however, by appreciating the difficulty of achieving
epistemic distance from our own work. Legal scholarship is by its nature a
solipsistic process. A germ of an original idea or insight leads to months or
even years of intensive exploration and development. Thus, quite apart from
the external pressure to sound original and profound, it is easy to see how
one can come under the spell that one has achieved a monopoly on the truth
about the subject. Thus, the Buddha’s advice not to become attached to our
own views might seem unrealistic for the academician. Nevertheless, there
is hope if one begins with epistemic self-awareness. This advice is similar to
Steven Winter’s call for "situated self consciousness." He suggests that even
though each person’s understanding is bound by their cultural and historical
context, "[w]e constantly use our imaginative capacities to recast what we find
and reconstruct our context in a variety of ways." We must have confidence
that the simple flux of the world produces anomalies that, when combined
with the human power of imagination, provide plenty of fodder for articles
that are worthwhile, useful, and original, and in some partial sense, still
"true." Under this approach, putting aside political objectives for the

281. See supra notes 78-79 and accompanying text.
282. Winter, supra note 69, at 664.
283. See id. at 676 (stating that "the imaginative process of metaphoric reasoning often
produces the anomaly that prompts change").
moment, the ontological aspiration of scholarship is to help each other understand our dynamic world. It also recognizes that the best legal scholarship comes from the same place as all creative writing - from a need to express some personal truth. Thus, there is nothing wrong with believing that our ideas and insights say something about truth that has not been said before, nor with hoping that our truths will resonate and inspire others.

In essence, I am suggesting that even two thousand years later, the Buddha’s version of the parable has a useful message for legal scholars – that there is a middle way through the arrogance of essentialism, the false hope for epistemic deliverance, and the despair of nihilism. Properly understood, the middle way of scholarly inquiry does not require us to suppress the desire to re-conceptualize, to look for insights in other disciplines, or to deny our political agendas. The only requirement is that we resist the myth that the avenue we have chosen will be the one that leads to the essentialist vision of truth. In modern terms, this Buddhist approach to legal scholarship finds a close kin in pragmatism. In both world views, whatever we do is more a practice than a means to an end. Like the Buddhist practice of meditation, good scholarship requires concentration and self-discipline. But like pragmatism (and some aspects of Buddhism), a practice is also measured by whether it has a positive impact on one’s community. 284

My second major theme draws from Part IV. In that Part, I further warned that if we do not consider our epistemic beliefs, we risk conveying beliefs we do not hold and weakening our arguments with contradictory rhetoric. 285 I also suggested that there are other causes of contradictory epistemic rhetoric besides inattention, such as how the parable’s Western versions appeal to our need to inflate our ethos for purposes of publication and tenure despite the more modest nature of our actual logos and the perhaps unresolvable nature of the issues we consider. Based on these observations, this Conclusion advances two additional suggestions about scholarly rhetoric.

284. This concept of impact on one’s community bears some elaboration. First, while fine in the abstract, the divisions of culture create many “nested communities.” Therefore, one must still be careful that actions that benefit one community do not harm another. Second, let me emphasize again that being a pragmatist or Buddhist about the practice of legal scholarship does not suggest that one cannot choose an essentialist or nihilist position in one’s works, but only that one remain pragmatic or skeptical about the absolute truth of one’s conclusions. Note also the quintessential pragmatic nature of my advice: it is optimistic and hopeful without specifying a particular program to be followed, or for that matter, any clear criteria for establishing that one has achieved the goal.

285. As an example, I suggest that few authors who reflexively invoke the strongest Western version of the parable actually intended to assert the degree of intellectual arrogance this version conveys. The loss to ethos can be devastating if the trope is susceptible to multiple meanings of which the author is unaware. See Frost, supra note 219, at 127 (offering Quintil- lion’s comments on bad metaphors and their effect on ethos).
First, beyond just avoiding contradictions, a self-conscious use of rhetoric is also about investing the same care in organizing rhetorical motifs and tropes that we give to tracing precedent and history. My research demonstrates that even when authors anchor a central argument with a story, parable, or well known metaphor, they rarely do more than give a casual citation for the trope.286 The result can be akin to what Mark Tushnet calls the practice of "history lite" in legal scholarship – a term he uses to describe the practice of selecting snippets of original historical sources to support a contemporary position.287 Similarly, Brian Leiter coined the phrase "intellectual voyeurism" for the superficial and ill-informed quotation of serious philosophers to impress or titillate the reader.288 Similarly, one could apply the label of "Rhetoric Lite" or "rhetorical voyeurism" to the legal writers who use the blind men and the elephant parable as an organizing metaphor without an investigation of the story's history and meaning.289

In a more positive light, reflection upon our rhetorical choices can invigorate our creativity, spurring the inventio at the heart of the scholarly endeavor. Consider this contrast: Trial lawyers choose their stories, parables, and other tropes to make juries comfortable. If a lawyer can convince the jury that their theory of the case is consistent with the jury's current understanding of the world in which they live, the lawyer's client prevails. Scholarship, on the other hand, is not always supposed to make the audience feel comfortable.290 In other words, we can choose to use rhetorical devices to extend and

286. The inquiry I am suggesting is the genesis of this Article. While trying to decide whether to use the parable to describe the conflicting scholarship on Justice Scalia's jurisprudence, I became curious about its origins and searched WESTLAW for background on the parable. See Zlotnick, supra note 51, at 1381 (using parable to indicate perplexing divergence of opinion in Scalia's constitutional jurisprudence).


288. Brian Leiter, Intellectual Voyeurism in Legal Scholarship, 4 YALE J. L. & HUMAN. 79, 80 (1992). Although Tushnet used Leiter's article as a jumping off point, others feel that Leiter's attack on Gerald Frug was the ultimate "gotcha" scholarship aimed simply to prove that Leiter had a Ph.D. in philosophy and Frug did not, without further illuminating the underlying issues at stake in the subject piece.

289. See supra notes 6-8, 43-47, and accompanying text. Moreover, this critique reaches some of the scholars in Part III who clearly recognized the parable's epistemic implications. Note, however, that I am not suggesting that we must research every metaphor or literary allusion we use. That would be impracticable and pointless. Rather, I only suggest that when a legal scholar chooses a trope as a central motif, it behooves her to investigate it more than superficially.

290. This is not to be confused with conforming to a standard format with introduction and footnotes. In fact, even the outsider and narrative scholarship have their own internal norms. My point is directed to content.
challenge our conceptions of the subject matter rather than rely on it. Thus, this Article challenges scholars to do more than just understand the history of the parable or well-known metaphor they select. If possible, instead of being satisfied with the conventional meaning, scholars should instead look for a way to use the familiar in unfamiliar ways. In fact, several writers have done exactly this with the blind men and the elephant parable with great effect. For example, D. Marvin Jones argues in his essay, "We’re All Stuck Here for Awhile": Law and the Social Construction of the Black Male, that "[w]e have a name for race but no name for the racialization of male identity." To bring home this point metaphorically, he invokes the blind men and elephant story but with an intentional twist. He suggests that for this issue, it is not just that we all describe the elephant differently, but that

we bump into the elephant without "seeing" an elephant in the cave at all. It is not merely that we have no idea how the elephant looks as a whole, we have no paradigm, no discursive vocabulary in which we could examine with our mind’s eye our observations of the phenomenon into which we keep bumping.

This image of the blind men bumping into something in the cave and having no words to describe their impressions (rather than the familiar partial descriptions in the original story), drives home his point about the deep and entrenched difficulty of his issue.

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291. This argument finds a home in Daniel Farber’s desire for a return to a greater “play of intelligence” in legal scholarship (which he defines as a combination of imagination, detachment, and humor). Farber also argues that part of the problem is a “fixation on stylized rhetoric” which parallels my previous contention about uncreative uses of rhetoric. Farber, supra note 83, at 165.

292. This is similar to Justice Cardozo’s famous aphorism that metaphors can both liberate and enslave. See Berkey v. Third Ave. Ry., 155 N.E. 58, 61 (1926) (“Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it.”).


294. Id. at 42.

295. This use of the parable also reinforces the better known image of black males as invisible in our culture, first coined by Ralph Ellison in Invisible Man with which Jones begins his essay. RALPH ELLISON, INVISIBLE MAN (1952), see also Lucinda M. Finley, Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning, 64 NOTRE DAME L. REV. 886, 897 n.54 (1989) (using parable to compare positive notion of justice being “blind” with usual negative connotation of blindness in parable); Parren J. Mitchell & John Alfred Turner, Jr., “Adarand 101,” 7 Md. J. CONTEMP. LEGAL ISSUES 451, 468 (1996) (suggesting that advocates for minority business must teach others about meaning of Adarand or risk being turned into parts of elephant by those who might misinterpret decision); Zlotnick, supra note 51 (suggesting search for unitary elephant representing Justice Scalia’s constitutional
I acety, my suggestion to use rhetorical theory to evaluato and rationalize the debate over outsider scholarship would have come as no surprise to the original rhetoricians. In the ancient world, rhetoric was "a means for public deliberation about public issues under conditions of uncertainty."\textsuperscript{296} What better description could there be for legal discourse in the post-modern era?\textsuperscript{297} Whether phrased in terms of rhetorical theory, pragmatism or Buddhist philosophy, the practice of legal scholarly discourse can only benefit from a healthy dose of self-aware perspectivism.\textsuperscript{298} As a counterpoint to overexposure to one's own ideas, pressure from a tenure committee, or the insidious pull of a persistent Western essentialism, Grant Gilmore’s advice about our own work says it best –

\textquote{The principal lesson to be drawn from our study is that the part of wisdom is to keep our theories open-ended, our assumptions tentative, our reactions flexible. We must act, we must decide, we must go this way or that. Like the blind men dealing with the elephant, we must erect hypotheses on the basis of inadequate evidence. That does no harm – at all events it is the human condition from which we will not escape – so long as we do no delude ourselves into thinking that we have finally seen our elephant whole.}\textsuperscript{299}

\footnote{Juriaprudenc was fruitless as no such entity exists and that Scalia's opinions should be viewed as product of three warring influences).}

\textsuperscript{296} Balkin, \textit{supra} note 224, at 212.

\textsuperscript{297} Self-awareness will not, however, supply a particular consensus. Rather, "[b]y becoming aware of the inherently normative nature of the field, scholars can acknowledge that there is no consensus, and that lack of consensus itself provides the unified vision that defines the practice... The entire point of standard legal scholarship is to explore and contrast the pragmatic implications of conflicting normative positions." Rubin, \textit{supra} note 73, at 1892-93.

\textsuperscript{298} A few legal scholars invoke the blind men and the elephant parable in exactly this way while writing about topics far afield from epistemology. Thus, while these articles have a degree of self-awareness, they note rather than belabor the epistemic implications. \textit{See} Metzger & Dalton, \textit{supra} note 45, at 493-95 (using parable to criticize scholarly descriptions of corporation, then suggesting use of organizational theory, but noting that "[w]e merely hope to get a little better picture of the elephant and whatever incremental increase in understanding that such a picture can provide").

\textsuperscript{299} GRANT GILMORE, \textsc{The Ages of American Law} 110 (1977). In this spirit, I conclude with the words of a Buddhist sage as my comment about my contribution: "Please understand that I am merely joining my one drop to the rivers and the oceans or adding my candle to the sun and the moon, hoping in this way to increase even slightly the volume of water or the brilliance of the light." Teeter, \textit{supra} note 137, at 297 (quoting Nichiren, \textit{The Fourteen Stanzas}, \textit{in The Major Writings of Nichiren Daishonin} 205, 215 (Gasho Translation Committee ed. & trans., 1985)).