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Essay

Getting Kids Out of Harm's Way: The United States' Obligation to Operationalize the Best Interest of the Child Principle for Unaccompanied Minors

ERIN B. CORCORAN

The government estimates that by the end of the fiscal year over 70,000 unaccompanied children will enter the United States. According to the United Nations High Commissioner for Refugees fifty-eight percent of these children will have been forcibly displaced and will be potentially in need of international protection. The only protections for these children are discrete and narrow forms of immigration relief. Such relief depends on whether someone such as an attorney identifies the available relief and assists the child with the application process. Yet, children are not entitled to government-funded counsel and must proceed before an immigration judge alone. For other children there is no available immigration relief; but they have witnessed unspeakable horrors and have been the victims of violence and abuse, yet there is no answer to their calls for help. They are not simply migrants crossing international borders; they are emblematic of an international humanitarian crisis rapidly unfolding in Central America.

The current crisis on the border has underscored the profound structural deficiencies in our federal agencies that cause them to fail to meet the needs of unaccompanied immigrant children—as children. This Essay contributes to the ongoing discussion on how to best handle the surge of unaccompanied minors crossing the southern border this summer. Specifically, this Essay argues that the United States must provide a solution that both keeps the children in need of international protection out of harm's way, and is grounded in international human rights law and practice. The best interest of the child principle must be operationalized in all U.S. government responses for children through a congressionally created interagency "Child Protection Corps." Further, U.S. immigration protections need to be flexible enough to create an avenue for a child to remain in this country, if it is not in the best interest for the child to return to his or her home country. Specifically, the Department of Homeland Security should consider exercising its administrative prerogatives such as prosecutorial discretion and humanitarian parole to provide children in need of protection with a safe haven.

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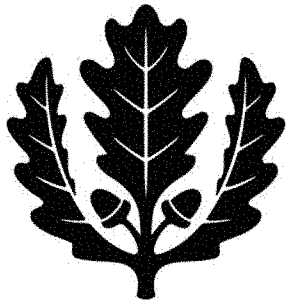

Getting Kids Out of Harm's Way: The United States' Obligation to Operationalize the Best Interest of the Child Principle for Unaccompanied Minors

ERIN B. CORCORAN*

I. INTRODUCTION

> *I am here [in the United States] because I was threatened by the gang. One of them "liked" me. Another gang member told my uncle that he should get me out of there because the guy who liked me was going to do me harm. In El Salvador they take young girls, rape them and throw them in plastic bags. My uncle told me it wasn't safe for me to stay there and I should go to the United States.*
>
> – Maritza, El Salvador, Age 15[1]

Maritza is not alone. Sixty-three percent of children fleeing El Salvador report gang violence as the primary reason for leaving.[2] The Department of Homeland Security (DHS) estimates that by September 30, 2014, upwards of 70,000 unaccompanied minors—children without a parent or legal guardian to provide care and physical custody[3]—will enter the United States,[4] up from 24,668 in 2013.[5] Not only is the number of children

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[1] U.N. HIGH COMM'R FOR REFUGEES, CHILDREN ON THE RUN: UNACCOMPANIED CHILDREN LEAVING CENTRAL AMERICA AND MEXICO AND THE NEED FOR INTERNATIONAL PROTECTION 9 (2014) [hereinafter CHILDREN ON THE RUN], http://www.unhcrwashington.org/sites/default/files/1_UAC_Children%20on%20the%20Run_Full%20Report.pdf.

[2] *Id.* at 32.

[3] 6 U.S.C. § 279(g)(2) (2006 & Supp. IV 2011).

[4] Richard Fausset & Ken Belson, *Faces of an Immigration System Overwhelmed by Women and Children*, N.Y. TIMES, June 6, 2014, at A12. [hereinafter *Immigration System Overwhelmed*]. The U.S. Senate Appropriations Committee further estimates that this number could rise to as high as 145,000 in Fiscal Year 2015. Press Release, Committee on Appropriations, Chairwoman Mikulski Prepared Remarks: FY15 LHHS Subcomm. Markup (June 10, 2014) [hereinafter *Subcommittee Markup*], *available at* http://www.appropriations.senate.gov/news/chairwoman-mikulski-prepared-remarks-fy15-lhhs-subcommittee-markup.

fleeing the region on the rise, their reasons for flight have shifted. Prior to 2011, most children left their home countries to reunite with family living in the United States. Now, most of the children are fleeing armed criminal violence often caused by gangs or drug cartels and horrific abuse at home.[6] These children are primarily fleeing from El Salvador, Guatemala, and Honduras, where murder rates mirror those of conflict zones. Human rights violations in those countries are coupled with a lack of meaningful State protection.[7] Indeed, the United Nations High Commissioner for Refugees recently concluded that at least fifty-eight percent of unaccompanied children arriving from these countries were forcibly displaced and potentially in need of international protection.[8]

However, under U.S. immigration law, unaccompanied children are often seen as illegal migrants and "the law enforcement approach toward unauthorized migrants prioritizes their 'alien' status over their status as children."[9] As the crisis escalates, many of these children are being housed at emergency shelters in "icebox-cold cells—nicknamed *hierleras*, Spanish for freezers"—with no access to food or medical care.[10] This all occurs while DHS attempts to determine which children may have an available sponsor in the United States to be released to and initiates removal proceedings against each child without valid immigration status.[11] The only protections for these children are discrete and narrow forms of immigration relief. Such relief depends on whether someone, such as an attorney, identifies the available relief and assists the child with the

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[5] LISA FRYDMAN ET AL., A TREACHEROUS JOURNEY: CHILD MIGRANTS NAVIGATING THE U.S. IMMIGRATION SYSTEM 2 (2014) [hereinafter TREACHEROUS JOURNEY], *available at* http://www.uchastings.edu/centers/cgrs-docs/treacherous_journey_cgrs_kind_report.pdf.

[6] CHILDREN ON THE RUN, *supra* note 1, at 24–25. *See* WOMEN'S REFUGEE COMMISSION, FORCED FROM HOME: THE LOST BOYS AND GIRLS OF CENTRAL AMERICA 1 (2012) (noting that unaccompanied minors are subject not only to violent gang attacks, but also face targeting by police who mistakenly assume that they are gang-affiliated; additionally girls in particular "face gender-based violence, as rape becomes increasingly a tool of control.").

[7] *See* U.S. CONFERENCE OF CATHOLIC BISHOPS, MISSION TO CENTRAL AMERICA: THE FLIGHT OF UNACCOMPANIED CHILDREN TO THE UNITED STATES 2 (2013), *available at* http://www.usccb.org/about/migration-policy/upload/Mission-To-Central-America-FINAL-2.pdf (concluding that increases of migration are attributed to "generalized violence at the state and local levels and a corresponding breakdown of the rule of law").

[8] CHILDREN ON RUN, *supra* note 1, at 25.

[9] LAUREN HEIDBRINK, MIGRANT YOUTH, TRANSNATIONAL FAMILIES AND THE STATE: CARE AND CONTESTED INTERESTS 42 (2014).

[10] Editorial, *Innocents at the Border*, N.Y. TIMES, June 17, 2014, at A24.

[11] A "sponsor" includes, but is not limited to, the following individuals or entities listed in order of preference: "a parent; a legal guardian; an adult relative (brother, sister, aunt, uncle, or grandparent); an adult individual or entity designated by the child's parent or legal guardian as capable and willing to provide care." OLGA BYRNE & ELISE MILLER, VERA INST. ON JUSTICE, THE FLOW OF UNACCOMPANIED CHILDREN THROUGH THE IMMIGRATION SYSTEM 18 (2012) [hereinafter VERA INSTITUTE].

application process.[12] Yet, children are not entitled to government-funded counsel and must proceed before an immigration judge alone. For other children, there is no available immigration relief; even though they have witnessed unspeakable horrors and have been the victims of violence and abuse. There is no answer to their calls for help. They are not simply migrants crossing international borders; they are emblematic of an international humanitarian crisis rapidly unfolding in Central America.

This Essay argues that the United States must provide a solution that both keeps the children in need of international protection out of harm's way, and is grounded in international human rights law and practice.[13] First, this Essay argues that the best interest of the child principle must be operationalized in all U.S. government responses, approaches, guidelines, and forms of international relief and protection for children through a congressionally created interagency: the "Child Protection Corps." Second, U.S. immigration protections need to be flexible enough to create an avenue for a child to remain in this country if it is not in the best interest of the child to return to his or her home country. Specifically, DHS should consider exercising its administrative prerogatives such as prosecutorial discretion and humanitarian parole to provide children in need of protection with a safe haven. Overall, this Essay seeks to specify discrete steps for Congress and the executive branch to take in addressing significant structural gaps in the federal government's capacity to provide for the best interest of each child in need of international sanctuary.

II. OPERATIONALIZING THE BEST INTEREST PRINCIPLE THROUGH PROCEDURAL DUE PROCESS

In June 2014, the Obama administration allocated two million dollars in grant funding for AmeriCorps to provide one-hundred lawyers and paralegals in twenty-eight states to unaccompanied minors under the age of sixteen in removal proceedings.[14] In addition, the Office of Management and Budget has requested that Congress appropriate an additional $1.9 billion to the Department of Human Health Services (HHS)[15] in order to address the current surge at our borders. These procedural safeguards and

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[12] *See* TREACHEROUS JOURNEY, *supra* note 5, at 37–55 (discussing the failures of the current system to identify unaccompanied minors who are eligible for forms of relief such as Special Immigrant Juvenile Status, T visas, and U visas).

[13] Unless the conditions in their home countries are also addressed, these children will continue to seek safety and protection from the international community. The United States and neighboring countries must undertake measures that address the root causes of flight to reduce, if not eliminate, the factors that force children to leave. While this topic is equally important, it is beyond the scope of this Essay.

[14] Kirk Semple, *Youths Facing Deportation to Be Given Legal Counsel,* N.Y. TIMES, June 6, 2014, at A11.

[15] *Subcommittee Markup*, *supra* note 4.

emergency based relief are important steps, but are insufficient because they do not reform the laws and policies that govern the actual treatment of unaccompanied minors.

Article 3.1 of the Convention on the Rights of the Child (CRC) provides that: "[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration."[16] The current response to unaccompanied immigrant minors does not—through statute or regulation—incorporate the best interest principle required by the CRC into the initial screening of children on arrival, the care and custody decisions thereafter, nor the crucial decision of which avenues of relief to pursue. With this current surge, transit stations are overwhelmed and overcrowded.[17] As a result, children are being housed at facilities built for the use of adults such as Lackland Air Force Base and Naval Base Ventura County in Oxnard, California.[18] In many of these facilities, children complain of the lack of medical care, food, and blankets.[19] Law enforcement officers trained in border security with no training or experience in child development and psychology, with no competence to deliver trauma informed care, and no understanding of how to care for children detained in facilities lacking adequate accommodations, are now responsible for interviewing children as young as three years old. Finally, children are expected to navigate the complicated immigration system and assert claims for relief or face deportation without advocates or attorneys.

Reforms that provide unaccompanied immigrant children greater child-centered procedural due process are imperative. This Essay recommends that Congress establish an interagency known as the "Child Protection Corps," comprised of specialized experts: "child protection officers" who possess both extensive child welfare training and a deep understanding of immigration law. Child protection officers would be deployed to the federal agencies who are either responsible for the care and custody of unaccompanied minors or are charged with determining whether these children have a legal right to remain in the United States. Child protection

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[16] Convention on the Rights of the Child art. 3, Nov. 20, 1989, 1577 U.N.T.S. 3, 46 (entered into force Sept. 2, 1990) [hereinafter CRC].

[17] Christopher Sherman & Astrid Galvan, *Sights, Smells of Holding Cells for Immigrant Kids*, WASH. TIMES (June 19, 2014), http://www.washingtontimes.com/news/2014/jun/18/immigrant-children-held-in-crowded-concrete-cells/.

[18] *Immigration System Overwhelmed*, *supra* note 4.

[19] *See* Letter from Ashley Huebner et al., Nat'l Immigrant Justice Ctr., to Megan H. Mack, Office for Civil Rights and Civil Liberties, DHS & John Roth, Inspector General, DHS (June 11, 2014) *available at* http://www.acluaz.org/sites/default/files/documents/DHS%20Complaint%20re%20CBP%20Abuse%20of%20UICs.pdf (stating that many children reported unsanitary and dangerous conditions).

officers would ensure that government officials apply the best interest of the child principle in determinations about care and custody, as well as in determinations about long-term protection and permanency.[20]

A. *Screening and Classification*

Providing immigrant children with child-centered due process at initial screenings and classification would more fully comply with Article 3.1 of the CRC. Currently, Immigration and Customs Enforcement (ICE)—the interior enforcement branch at DHS—maintains the exclusive jurisdiction to determine if a child entering the United States is with a parent or legal guardian or is entering alone, i.e., unaccompanied.[21] The law provides that if a child is classified as unaccompanied then DHS may not remove the child without a formal removal hearing before an immigration judge.[22] In contrast, if the child is traveling with a legal guardian or parent, and does not possess the requisite documents to enter the United States, DHS can remove both the parent and the child without a hearing through its expedited removal authority.[23]

Under the Child Protection Corps model, child protection officers would be embedded at ICE to initially determine if the child is potentially in need of international protection. Child protection officers would make these determinations instead of Customs and Border Patrol (CBP) or ICE officers, whose primary training and job responsibility is in law enforcement. Child Protection Officers would know how to interview the child in a comprehensive, sensitive manner that takes into account the child's age, maturity, and other pertinent developmental factors. As the screening occurs, the child would also be assigned to a child advocate[24] (comparable to a state court best-interests guardian *ad litem*) whose

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[20] There is no singular definition of best interest, but there are some commonly accepted principles that should persist in assessing the best interest of unaccompanied children including incorporating the child's voice, and prioritizing safety, permanency, and the well-being of every individual child. *See generally* Bridgette A. Carr, *Incorporating a "Best Interests of the Child" Approach into Immigration Law and Procedure,* 12 YALE HUM. RTS. & DEV. L.J. 120, 124–28 (2009) (discussing the standards used by various bodies to interpret the best interest of the child doctrine). *Cf.* Nina Rabin, *Disappearing Parents: Immigration Enforcement and the Child Welfare System*, 44 CONN. L. REV. 99, 114–18 (2011) (presenting empirical research on the systematic failure of federal organizations to protect children of immigrant parents).

[21] *See generally* 8 U.S.C. § 1252 (2006) (establishing various restrictions on judicial review and conferring exclusive jurisdiction to ICE over almost all determinations for removal). At least one federal court has held that these restrictions do not bar a federal court from reviewing a habeas corpus petition where the petitioner has a colorable claim that his constitutional rights have been violated. *See* Enwonwu v. Chertoff, 376 F. Supp. 2d 42 (D. Mass. 2005).

[22] 8 U.S.C. § 1232(a)(5)(D) (2012).

[23] 8 U.S.C. § 1225(b)(1)(A)(i) (2006 & Supp. IV 2011).

[24] This role is already established and defined by federal statute. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 8 U.S.C. § 1322(c)(6) (2012) (authorizing the appointment of Child Advocates for unaccompanied alien children).

primary responsibility would be to assess, evaluate, and then advocate for the best interests of the child.

B. *Custody Determinations and Placement*

In order to comply with Article 37(b) of the CRC, which dictates that the arrest and detention of children should only be used as a measure of last resort and should be for the shortest appropriate period of time, the United States must provide child welfare experts to monitor and guide DHS and HHS regarding decisions about custody and placements.[25] DHS is required to transfer custody of unaccompanied children to the Office of Refugee Resettlement (ORR) within seventy-two hours of apprehension.[26] Presently, ORR is obligated by law to place unaccompanied minors in the least restrictive setting as possible.[27] ORR typically detains these children until the child is released to the care of a parent or close family member, called a sponsor, and if that is not an option, the child is placed in HHS facilities that are licensed to house children.[28] Such placements include long-term foster care, extended-care group homes, and residential treatment centers for children in need of certain psychological or psychiatric services.[29] Yet during the recent surge, unaccompanied minors are being detained in "surge shelters," which are locked temporary shelter programs that are intended to be short-term triage facilities.[30] These surge shelters lack basic child-centered services including outside recreation, schooling, and experts who understand how to work with displaced children.[31]

The Child Protection Corps officers would help ensure that, while the children are in ORR custody, the best interest principle guides all accommodations even in surge shelters, including policies regarding visitation, recreation, education, medical treatment, and nutrition. The Child Protection Corps would coordinate with ORR and Non-governmental organizations (NGOs) that have expertise in identifying linguistically and culturally appropriate community resources, including mental health and integration services. These NGOs could provide such services even at the inundated surge shelters and transit centers.

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[25] CRC, *supra* note 16, art. 37(b), at 55.

[26] 8 U.S.C. § 1232(b)(3) (2012).

[27] 8 U.S.C. § 1232(c)(2)(A) (2012); Stipulated Settlement Agreement, Flores v. Reno, No. CV 85-4544-RJK (Px) (C.D. Cal. Jan. 17, 1997).

[28] VERA INSTITUTE, *supra* note 11, at 17–21.

[29] *Id.* at 16.

[30] WOMEN'S REFUGEE COMMISSION, *supra* note 6, at 1–2.

[31] *Id.*

C. *The Adjudication Process*

As Article I immigration judges adjudicate potential relief for unaccompanied minors, statutory and regulatory safeguards must be in place to ensure that the best interest of the child is paramount. Congress should require that all unaccompanied children placed in removal proceedings be afforded a government-funded or pro bono attorney who is trained in representing unaccompanied children. Working with the child and the appointed child advocate, the appointed attorney would apply for immigration relief, including temporary humanitarian options.[32]

Some scholars and advocates have argued that immigrant children, or at the very least unaccompanied immigrant children, have a constitutional right to counsel when facing deportation.[33] For example, in Samantha Casey Wong's Note, *Perpetually Turning Our Back to the Most Vulnerable: A Call for the Appointment of Counsel for Unaccompanied Minors in Deportation Proceedings*, she argues that unaccompanied minors have the same constitutional right to counsel as juveniles in delinquency proceedings because of key similarities between these two populations, including "majority age rule, characteristics of minors, their diminished capacity and culpability, and the seriousness of the legal proceeding."[34] This is a novel argument that attempts to provide much needed protection for this vulnerable population. Yet, tactics to persuade courts that immigrants have a right to government-paid counsel have repeatedly failed.[35] While the Supreme Court of the United States has not specifically addressed whether immigrants in removal proceedings have a right to government-paid counsel, the federal circuit courts have recurrently rejected a constitutionally mandated right to appointed counsel for indigent immigrants facing removal from the United States.[36] If

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[32] *See, e.g.*, Wendy Shea, *Almost There: Unaccompanied Alien Children, Immigration Reform, and a Meaningful Opportunity to Participate in the Immigration Process*, 18 U.C. DAVIS J. JUV. L. & POL'Y 148, 166–67 (2014) (advocating for unaccompanied children's need for counsel).

[33] *See, e.g.*, Samantha Casey Wong, Note, *Perpetually Turning Our Backs to the Most Vulnerable: A Call for the Appointment of Counsel for Unaccompanied Minors in Deportation Proceedings*, 46 CONN. L. REV. 853, 870, 880–81 (2013) (arguing unaccompanied minors facing deportation have the same constitutional rights, including right to government provided counsel, as juveniles have in delinquency proceedings); Sharon Finkel, *Voice of Justice: Promoting Fairness Though Appointed Counsel for Immigrant Children*, 17 N.Y.L. SCH. J. HUM. RTS. 1105, 1105 (2001) (making a case for government-funded counsel for unaccompanied minor children facing removal).

[34] Wong, *supra* note 33, at 870.

[35] *See* Erin B. Corcoran, *Bypassing Civil Gideon: A Legislative Proposal to Address the Rising Costs and Unmet Legal Needs of Unrepresented Immigrations*, 115 W. VA. L. REV. 643, 644 (2012) (arguing that an "underreported crisis in the immigration system is the thousands of immigrants who are appearing before immigration judges without qualified representation").

[36] *See, e.g.*, Zeru v. Gonzales, 503 F.3d 59, 72 (1st Cir. 2007) (quoting Saakian v. INS, 252 F.3d 21, 24 (1st Cir. 2001)) ("While aliens in deportation proceedings do not enjoy a Sixth Amendment right to counsel, they have due process rights in deportation proceedings."); United States v. Perez, 330 F.3d 97, 101 (2d Cir. 2003) ("As deportation proceedings are civil in nature, aliens in such proceedings are

unaccompanied children are to be accorded government funded counsel, it will come through congressional or executive branch action.

In addition to Congress providing unaccompanied children who face deportation with counsel, it should require that all unaccompanied children in removal proceedings be assigned to a dedicated juvenile docket at the immigration court. Every immigration court would maintain a dedicated juvenile docket with at least two dedicated immigration judges assigned to this docket.[37] These judges would receive significant, uniform training from child protection officers on adjudicating children's cases, including children specific relief and how evidentiary rules should be applied to children in these proceedings. Finally, every ICE Trial Attorney unit would have an ICE trial attorney who specializes in immigrant children's cases and has been thoroughly trained on the best interest principle by child protection officers. These ICE attorneys would be educated on when and how to question children in removal proceedings, and be instructed to exercise prosecutorial discretion in favor of not seeking deportation in deserving cases. Lastly, these attorneys would be encouraged to work with appointed counsel to find a solution for the child that is in the child's best interest.

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not protected by the Sixth Amendment right to counsel."); Uspango v. Ashcroft, 289 F.3d 226, 231 (3d Cir. 2002) (citation omitted) ("Second, there is no Sixth Amendment right to counsel in deportation hearings, so any claim of ineffective assistance of counsel advanced by Uspango must be based on the Fifth Amendment's due process guaranty."); Ambati v. Reno, 233 F.3d 1054, 1061 (7th Cir. 2000) ("Deportation hearings are civil proceedings, and asylum-seekers, therefore, have no Sixth Amendment right to counsel."); Mojsilovic v. INS, 156 F.3d 743, 748 (7th Cir. 1998) ("Of course, deportation hearings are civil proceedings and therefore aliens do not have a right to counsel under the Sixth Amendment."); Sene v. U.S. Immigration & Naturalization Serv., 103 F.3d 120 (4th Cir. 1996) (citing INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984)) ("Deportation proceedings are 'purely civil' in nature; thus, constitutional guarantees that apply only to criminal proceedings, such as the sixth amendment right to counsel, do not attach."); Michelson v. INS, 897 F.2d 465, 467 (10th Cir. 1990) ("[N]o sixth amendment right to counsel in a deportation proceeding exists."); Castro-O'Ryan v. U.S. Dep't of Immigration & Naturalization, 847 F.2d 1307, 1312 (9th Cir. 1988) (citing Ramirez v. INS, 550 F.2d 560, 563 (9th Cir. 1977) ("No right to counsel under the Sixth Amendment is recognized in deportation proceedings."); United States v. Campos-Asencio, 822 F.2d 506, 509 (5th Cir. 1987) ("Because deportation is a civil proceeding, potential deportees have no sixth amendment right to counsel."); Aguilera-Enriquez v. INS, 516 F.2d 565, 569 (6th Cir. 1975) ("In Petitioner's case the absence of counsel at his hearing before the Immigration Judge did not deprive his deportation proceeding of fundamental fairness."); Matute v. Dist. Dir., INS, 930 F. Supp. 1336, 1341 (D. Neb. 1996) ("Because deportation hearings are considered civil proceedings, aliens have no Sixth Amendment right to counsel; instead, the right to counsel at a deportation hearing is governed by the due process clause of the Fifth Amendment.").

[37] Currently about half of the country's immigration courts have established juvenile dockets. *See* EXEC. OFFICE FOR IMMIGRATION REVIEW, U.S. DEPT. OF JUSTICE, UNACCOMPANIED ALIEN CHILDREN IN IMMIGRATION PROCEEDINGS (2008), *available at* http://www.justice.gov/eoir/press/08/UnaccompaniedAlienChildrenApr08.pdf (providing agency overview of unaccompanied minor adjudications).

III. PROVIDING WELL BEING, PERMANENCY, AND SAFETY: ALIGNING SUBSTANTIVE IMMIGRATION RELIEF WITH THE BEST INTEREST OF THE CHILD PRINCIPLE

> Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.[38]

Under the CRC, the United States should provide for children fleeing physical harm as well as abuse and neglect. These children are fleeing horrific violence such as sexual abuse, severe beatings, and threats to their lives perpetrated by family members who should be responsible for their well-being. In addition to the violence at home, their home country's government has failed to provide the requisite protection it undoubtedly owes to its own citizens. In some instances, the state has failed to remove a child from an abusive home and to provide a safe alternative; in other cases the government has been unable to stop pervasive gang violence, drug cartels, and organized crime.

Currently, the most common forms of relief for unaccompanied minors are asylum, special immigrant juvenile status (SIJS), and U and T visas. Asylum requires proving a well-founded fear of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.[39] SIJS entails a state court finding that the child has been abused, neglected, and abandoned and a determination by DHS that it is in the best interests of the child not to be returned to his or her home country but to remain permanently in the United States.[40] U and T visas provide long term protection for victims of certain severe crimes and human trafficking.[41] However, some children may legitimately fear violence or have suffered past harm but do not qualify for these forms of immigration relief. For example, fleeing generalized violence perpetrated by armed criminals or gang members, no matter how horrific, is not grounds for asylum, SIJS status, or U and T visas.[42] In these circumstances, DHS should utilize their existing administrative authority, including prosecutorial discretion and humanitarian parole, to provide temporary

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[38] CRC, *supra* note 16, art. 19, at 50.

[39] 8 U.S.C. § 1101(a)(42) (2006 & Supp. V 2012).

[40] 8 U.S.C. § 1101(a)(27)(J)(i-iii) (2006).

[41] 8 U.S.C. § 1101(a)(15)(T), (U) (2006).

[42] *See* Linda Kelly Hill, *The Right to Be Heard: Voicing the Due Process Clause Right to Counsel For Unaccompanied Alien Children*, 31 B.C. THIRD WORLD L.J. 41, 59–60 (2011) (showing that, of the various forms of relief for children, none of the avenues list generalized violence as a qualifier).

protection for these children. Such administrative remedies do not require congressional action and can be implemented immediately.

One option for children with no foreseeable immigration relief, but undoubtedly in need of protection, is to request that DHS exercise its inherent power of prosecutorial discretion for these children in need of protection.[43] Prosecutorial discretion does not provide legal status, nor does it create a path to citizenship. Nevertheless, it is a tool used by the executive branch to stay the removal of certain individuals who have compelling personal circumstances, which warrant compassion and a grant of humanitarian relief. There is current authority for ICE attorneys to administratively close removal proceedings for an unaccompanied minor because the existing guidelines for trial attorneys states that age is a positive factor when considering whether to exercise prosecutorial discretion.[44]

Another option is to grant certain children in protection humanitarian parole on a case-by-case basis.[45] DHS has the authority to grant parole into the United States for "urgent humanitarian reasons," or if the grant would result in a "significant public benefit."[46] This would allow children who are in need of protection to remain in the United States temporarily and not be returned to certain harm.

IV. CONCLUSION

Overall, the current crisis on the border has underscored the profound structural deficiencies in our federal agencies to meet the needs of unaccompanied immigrant children—as children. Congress and the executive branch must conduct a systemic overhaul of federal agencies that operationalizes the best interest of the child principle by creating the Child Protection Corps and by providing immigration relief for children in need of international protection. If these reforms can be realized, the U.S. can provide effective protection to children like Maritza, who flee unspeakable violence that no child should have to endure.

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[43] 8 C.F.R. § 274a.12(c)(14) (2013); Shoba Sivaprasad Wadhia, *The Role of Prosecutorial Discretion in Immigration Law*, 9 CONN. PUB. INT. L.J. 243, 263 (2010).

[44] Memorandum from Doris Meissner, Commissioner, Dep't of Justice, Immigration & Naturalization Serv., to Dirs., Agents, and Counsel of the Dep't of Justice Immigration & Naturalization Serv. 1, 11 (Nov. 17, 2000), *available at* http://www.legalactioncenter.org/sites/default/files/docs/lac/Meissner-2000-memo.pdf.

[45] *See* U.S. DEP'T OF HOMELAND SECURITY, U.S. CITIZENSHIP & IMMIGR. SERVS., HUMANITARIAN PAROLE PROGRAM 8 (2011), *available at* http://www.uscis.gov/tools/resources-congress/presentations-and-reports (stating that for children under 16 humanitarian parole requests should be immediately processed).

[46] 8 U.S.C. § 1182(d)(5)(A) (2006).

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Essay

What "Stop-and-Frisk" Can Teach Us About the First Amendment and Judicial Recusal

LOUIS J. VIRELLI III

The New York Police Department's stop-and-frisk policy has been widely and passionately criticized. When a panel of the Second Circuit Court of Appeals removed District Judge Shira Scheindlin from a case reviewing the policy, it added divisive ethical issues to an already controversial topic. Overlooked in this heated debate, however, are the constitutional ramifications of Judge Scheindlin's removal. This Essay uses Judge Scheindlin's case as a vehicle to consider the unexplored relationship between judicial recusal and the First Amendment. Incorporating the First Amendment into our understanding of recusal is not only worthwhile in its own right, but also provides new perspectives on other underappreciated constitutional issues bearing on recusal, such as due process and the power and legitimacy of the federal courts.

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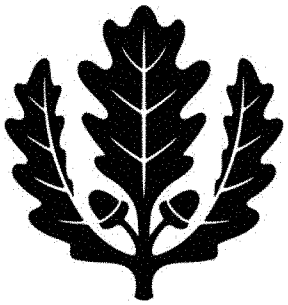

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LOUIS J. VIRELLI III*

I. INTRODUCTION

Judicial recusal—the removal of an individual judge from an individual case—impacts the law by affecting who the ultimate decision maker will be in a given proceeding. It can also implicate the First Amendment rights of the presiding judge, as we learned recently when United States District Judge Shira Scheindlin was removed (sua sponte by the reviewing appellate court) from a case challenging the New York City Police Department's highly controversial "stop-and-frisk" policy.[1] Despite Judge Scheindlin's recent removal and its clear implications for the First Amendment, the intersections between the two have yet to be carefully explored in the academic literature.

This Essay introduces the connections between judicial recusal and the First Amendment, and offers some suggestions for how best to manage them. Part II explains the circumstances surrounding Judge Scheindlin's removal from the stop-and-frisk cases. Part III discusses how judicial recusal fits within existing conceptions of the First Amendment. Part IV considers the relationship between the First Amendment ramifications of recusal and the other constitutional implications of Judge Scheindlin's case.

II. JUDGE SCHEINDLIN'S REMOVAL

When public attention focused on the stop-and-frisk policies of the New York City Police Department, United States District Judge Shira Scheindlin granted press interviews. At the time, Judge Scheindlin was presiding over *Floyd v. City of New York*[2] and *Ligon v. City of New York*,[3]

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[1] "Stop-and-frisk" refers to an NYPD practice of stopping and searching individuals in public settings without the constitutionally required reasonable suspicion. *See, e.g.*, Darius Charney, *The NYPD's Criminal Stop-and-Frisk Record*, THE GUARDIAN (May 15, 2012, 1:43 PM), http://www.theguardian.com/commentisfree/cifamerica/2012/may/15/nypd-criminal-stop-and-frisk-record. The policy has come under particularly intense criticism for its alleged targeting of men of color. *Id.*

[2] 959 F. Supp. 2d 540 (S.D.N.Y 2013).

[3] 925 F. Supp. 2d 478 (S.D.N.Y. 2013).

two class action civil rights suits challenging the constitutionality of stop-and-frisk.[4] In May 2013, a series of articles about Judge Scheindlin appeared in publications including the *New York Law Journal* and *The New Yorker*.[5] Less than six months later, a panel of the United States Court of Appeals for the Second Circuit ordered sua sponte that Judge Scheindlin be removed from further proceedings in *Floyd* and *Ligon*.[6] The panel concluded that Judge Scheindlin "ran afoul of the Code of Conduct for United States Judges" by failing to appear impartial—an issue none of the parties in *Floyd* or *Ligon* had ever raised.[7] The court ordered that the consolidated cases be randomly assigned on remand to another district judge, whose sole job was to implement the stay and await resolution of the appeal.[8]

Judge Scheindlin raised a procedural challenge to the Second Circuit's decision to remove her without providing her an opportunity to be heard.[9] While she did not explicitly raise a First Amendment claim, she noted that "[d]iscussion of important legal issues by members of the judiciary . . . is consistent with the values underlying the First Amendment."[10] The Second Circuit panel denied Judge Scheindlin's motion based on the federal recusal statute, 28 U.S.C. § 455(a), which requires disqualification of a judge "in any proceeding in which [her] impartiality might reasonably be questioned."[11] The panel was careful to announce that it had not found "misconduct, actual bias, or actual partiality on the part of Judge Scheindlin."[12] Instead, it reasoned that Judge Scheindlin's appearance of

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[4] Judge Scheindlin issued a remedial order covering both cases in August, 2013. *Floyd*, 959 F. Supp. 2d at 671–91.

[5] *See* Mark Hamblett, *Stop-and-Frisk Judge Relishes Her Independence*, N.Y. L.J., May 20, 2013 (discussing Judge Scheindlin's judicial rulings and view of legal practices); Jeffrey Toobin, *Rights and Wrongs: A Judge Takes on Stop-and-Frisk*, THE NEW YORKER, May 27, 2013 (discussing Judge Scheindlin's rulings in *Floyd* and *Ligon*).

[6] Ligon v. City of New York, 538 F. App'x 101, 103 (2d Cir. 2013).

[7] *Id.* at 102.

[8] *Id.* at 103.

[9] Request for Leave to File Motion to Address Order of Disqualification at ¶¶ 14–25, *In re* Order of Removal of District Judge (No. 13-3123), 538 Fed. App'x. 101 (S.D.N.Y. 2013) (arguing that the Motion Panel's sua sponte Order was procedurally deficient by denying Judge Scheindlin an opportunity to be heard regarding allegations of judicial misbehavior).

[10] *Id.* at ¶ 43.

[11] 28 U.S.C. § 455(a) (2012); Motion Order, Denying Motion for Leave to Appear at 4, In re Order of Removal of District Judge (No. 13-3123), 538 Fed. App'x. 101 (S.D.N.Y. 2013). Another provision of the federal recusal statute, 28 U.S.C. § 455(b)(3), requires recusal where a judge "expressed an opinion concerning the merits of the particular case in controversy." It is not addressed further here for several reasons. First, it would not materially affect the present analysis. Second, the Second Circuit panel that ordered Judge Sheindlin's removal did not cite it in its order, and third, her public comments did not explicitly refer to either of "the particular case[s] in controversy," *Floyd* and *Ligon*.

[12] Ligon v. City of New York, 736 F.3d 118, 124 (2d Cir. 2013), *vacated in part*, Ligon v. City of New York, 743 F.3d 362 (2d Cir. 2014).

objectivity had been compromised by her conversation with the plaintiffs' counsel more than six years earlier in a case alleging racial profiling in connection with stop-and-frisk,[13] and by her decision in 2013 to grant media interviews relating to *Floyd* and *Ligon*.[14]

The unusual nature of Judge Scheindlin's removal raises a range of interesting questions concerning judicial decision making and administration, as well as the proper role of appellate judges in the recusal process. Most important for present purposes, however, is the effect of Judge Scheindlin's recusal on her First Amendment rights.

III. JUDICIAL RECUSAL AND THE FIRST AMENDMENT

The Second Circuit's decision to remove Judge Scheindlin raises a threshold question of whether the federal recusal statute represents an unconstitutional infringement on a judge's First Amendment right to free speech. The Supreme Court has never addressed the constitutionality of general restrictions on the speech of sitting judges, let alone on the relationship of the First Amendment to judicial recusal. In the absence of clear judicial guidance, three First Amendment doctrines emerge as potential vehicles for analyzing judicial speech limitations: the content-based speech doctrine, the public employee speech doctrine, and the attorney speech doctrine.

A. *Content-Based Speech*

The Supreme Court applied the content-based speech doctrine to judicial speech in *Republican Party of Minnesota v. White*,[15] when it struck down a provision of the Minnesota Code of Judicial Ethics that regulated the political speech of candidates for judicial office.[16] The canon of conduct prohibited a candidate from "announc[ing] his or her views on disputed legal or political issues."[17] The Court concluded that the canon constituted a content-based speech restriction—and thus should be subject to strict judicial scrutiny—because it prevented judicial candidates from publicly discussing their opinions on almost all specific legal questions.[18]

Addressing the State's purported interest in ensuring the actual and apparent impartiality of its judges, Justice Scalia, writing for the Court, identified two kinds of impartiality at issue: impartiality toward parties and impartiality toward legal issues. First, although he concluded that the

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[13] *Id.* at 124–25.
[14] *Id.* at 126–27.
[15] 536 U.S. 765 (2002).
[16] *Id.* at 788.
[17] *Id.* at 768 (quoting MINN. CODE OF JUDICIAL CONDUCT, Canon 5(A)(3)(d)(i) (2000)).
[18] *Id.* at 773.

government has a compelling interest in preserving judicial impartiality toward the *parties* to legal proceedings, he held that the canon was not narrowly tailored to achieve the necessary impartiality because it restricted speech indicating a judicial bent on legal subject matter (a "bias" that could be applied equally to all parties).[19] Second, Justice Scalia explained that judicial impartiality toward legal *issues* was not itself a compelling state interest because it is neither possible nor desirable to find judges with no preconceived legal ideas.[20] Therefore, because the canon was unable to satisfy strict scrutiny in preventing bias against either the parties or the issues in a particular proceeding, the Court held that it violated the First Amendment.[21]

White involved the speech of judicial candidates, rather than sitting judges, and thus did not directly address judicial recusal. To the extent its content-based analysis is relevant to the First Amendment ramifications of judicial recusal, it appears that the recusal statute (especially the provision applied to Judge Scheindlin) would survive *White*'s strict scrutiny test.[22] Section 455(a)'s requirement that a judge recuse themselves "in any proceeding in which [their] impartiality might reasonably be questioned,"[23] includes the government's compelling interest in maintaining impartiality toward the parties. The question of whether a reasonableness standard is narrowly tailored to protect the parties' interest in an impartial decision is a closer call, as an objective standard could prohibit conduct that does not in fact deprive the litigants of a fair proceeding. Nevertheless, when viewed in light of the due process rights of litigants to a neutral arbiter, there is good reason to hold that requiring recusal based on an objective determination of partiality is the only way to effectively balance litigants' due process rights against the removed judge's rights under the First Amendment. Requiring actual, subjective proof of bias, which is prohibited in section 455(b)(1),[24] places too great a burden on litigants to obtain what

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[19] *Id.* at 776–77.

[20] *Id.* at 777; *see also* Kermit Roosevelt, *Ways A Judge Should, and Should Not, Be Impartial* N.Y. TIMES (Nov. 3, 2013, 7:49 PM), http://www.nytimes.com/roomfordebate/2013/11/03/ judges-appearance-of-impartiality/ways-a-judge-should-and-should-not-be-impartial ("A judge who had no opinions about the law before a case began would not be impartial; she would be incompetent. Judges should have views about the law, even about unsettled legal questions. Expressing those views should not be seen as compromising neutrality.").

[21] *White*, 536 U.S. at 788.

[22] *Id.* at 774–75. The Court has divided government restrictions on private speech into two categories: content-based restrictions, which are subject to strict scrutiny, and content-neutral restrictions, which are subject to intermediate scrutiny. *See* Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 641 (1994). Under strict scrutiny, a restriction on speech must be "narrowly tailored to serve a compelling state interest." Washington v. Glucksberg, 521 U.S. 702, 721 (1997).

[23] 28 U.S.C. § 455(a) (2012).

[24] *See id.* § 455(b)(1) (requiring a judge to recuse himself "[w]here he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding").

the Constitution unquestionably meant to guarantee: a fair and unbiased decision maker.[25]

In addition to offering a platform upon which to consider recusal's relationship with the First Amendment, *White* provides some (modest) insight into how the Justices may treat a First Amendment challenge to recusal standards. In his concurring opinion in *White*, Justice Kennedy expressly distinguished recusal from judicial campaign speech. He explained that the campaign speech at issue was political speech, fundamental to the First Amendment, and that the State "may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards."[26] He recognized that limitations on the speech of sitting judges were not at issue, and suggested that the law regarding public employee speech could therefore provide a more helpful tool for assessing such limitations in the future.[27]

B. *Public Employee Speech*

Public employees receive less First Amendment protection than other citizens. In *Pickering v. Board of Education*,[28] the Court held that the speech of government employees is protected by the First Amendment, subject to a balancing test weighing the interests of the employer "in promoting the efficiency of the public services it performs through its employees" against the interests of the employee "in commenting upon matters of public concern."[29] The Court has since narrowed its approach to public employee speech. In three cases since *Pickering*, the Court has established and clarified a pair of threshold questions for First Amendment claims by public employees. In *Connick v. Myers*,[30] the Court held that public employee speech must relate to a matter of public concern in order to be protected by the First Amendment.[31] It explained that matters of public concern are judged by "content, form, and context."[32] The Court

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[25] To the extent section 455(a) is read to also prohibit judges from participating in cases in which there is a reasonable appearance of partiality with regard to the issues, rather than the parties, it is possible that this reading of section 455(a) could fail to meet the compelling interest requirement of strict scrutiny, just as Canon 5(A)(3)(d)(i) did in *White*. The possibility that such a construction of section 455(a) could render it constitutionally infirm, however, is the basis of an as-applied, rather than a facial, challenge.

[26] *White*, 536 U.S. at 794 (Kennedy, J., concurring).

[27] *Id.* at 796 (Kennedy, J., concurring).

[28] 391 U.S. 563 (1968).

[29] *Id.* at 568; *cf.* Adam Shinar, *Public Employee Speech and the Privatization of the First Amendment*, 46 CONN. L. REV. 1, 4–5 (2013) ("[T]he decreasing speech protections for public employees result from a background understanding that views public employees as no different from private employees . . . .").

[30] 461 U.S. 138 (1983).

[31] *Id.* at 154.

[32] *Id.* at 147.

concluded that "an employee grievance concerning internal office policy"[33] was not protected under the First Amendment because it only tangentially implicated a matter of public concern.[34] In *Garcetti v. Ceballos*,[35] the Court held that, in addition to protecting only speech involving a matter of public concern, the First Amendment applied only to speech made by an employee speaking as an ordinary citizen, rather than as part of their official government duties.[36] In *Lane v. Franks*,[37] the Court clarified *Garcetti*'s general rule protecting only non-work related speech by stating that "[t]he critical question under *Garcetti* is whether the speech at issue is itself ordinarily within the scope of an employee's duties, not whether it merely concerns those duties."[38] Taken together, the public employee speech doctrine only protects speech by public employees that is outside the scope of their ordinary duties and addresses a matter of public concern. Such speech may still be restricted under the *Pickering* balancing test if the employer's interests in efficient government operation outweigh the employee's interest in the speech.

In light of Justice Kennedy's suggestion in *White* that the appropriate First Amendment doctrine to apply in recusal cases is the public employee speech doctrine,[39] the inevitable next question is what does the doctrine mean for the constitutionality of the recusal statute? First, the semantics of the public employee doctrine make it inapposite to judicial recusal. It is awkward to think of life-tenured federal judges as public "employees." On the one hand, they are paid from the public fisc and are clearly associated with the federal government.[40] On the other hand, it is difficult to characterize a life tenured federal judge as anyone's "employee." Congress is the only entity with the power to "terminate" federal judges, and it may only do so via impeachment, which is entirely distinct from recusal.[41] More

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[33] *Id.* at 154.

[34] *Id.*

[35] 547 U.S. 410 (2006).

[36] *See id.* at 426 ("We reject, however, the notion that the First Amendment shields from discipline the expressions employees make pursuant to their professional duties. Our precedents do not support . . . a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job.").

[37] 134 S. Ct. 2369 (2014).

[38] *Id.* at 2379. The speech at issue in *Lane* was a public employee's subpoenaed testimony in a criminal trial, which the Court concluded was not part of the employee's professional duties as a director of a community college's program for underprivileged youth. *Id.*

[39] Republican Party of Minn. v. White, 536 U.S. 765, 796 (2002) (Kennedy, J., concurring).

[40] *See* U.S. CONST. art. III, § 1 ("The Judges, both of the supreme and inferior Courts . . . shall, at stated Times, receive for their Services, a Compensation.").

[41] U.S. CONST. art. I, § 2, cl. 5; U.S. CONST. art. I, § 3, cl. 6; *see* Louis J. Virelli III, *The (Un)Constitutionality of Supreme Court Recusal Standards*, 2011 WIS. L. REV. 1181, 1211–13 (distinguishing the constitutional remedy of impeachment from recusal). This point is confirmed by the fact that the concept of recusal does not apply to either of the other government actors subject to impeachment—members of Congress and the President.

specifically, judges have been empowered to decide their own recusal issues since the beginnings of the English common law, subject only to the traditional standards of appellate review.[42] Appellate courts retain significant authority over district courts, but they do not exercise the same control an employer does over an employee. Federal judges are thus more like members of Congress and the President than traditional employees, and as such do not seem like proper subjects of the public employee doctrine.

Awkward terminology aside, the recusal statute's requirement that judges remove themselves from a case based on a reasonable appearance of impropriety does not square with even the Court's most permissive articulation of the public employee doctrine—the *Pickering* balancing test. The statutory recusal standards comport nicely with the judiciary's public service obligation to provide adjudication that is not only unbiased, but that also appears so to a reasonable observer. The recusal standards do not, however, accommodate the public employee's countervailing interest in public discourse recognized in *Pickering*. Recusal is statutorily required under section 455(a) as soon as a judge's speech puts their impartiality reasonably in question; no consideration is paid to the subject of the judge's speech or its import to the public at large.[43] This omission is particularly relevant when judicial independence is taken into account. Article III grants federal judges tenure "during good [b]ehaviour" and prohibits any reduction in their salary.[44] How does this focus on judicial independence comport with the idea that, as a public employee, judges may be removable (or otherwise censured) for speech that is within their official duties or is not about a matter of public concern? There is a strong argument that with the security of independence comes both the constitutionally protected freedom to speak without fear of reprisal and a corresponding duty to engage in public discourse and education about the law.[45] If recusal can be justified under the public employee doctrine simply on the basis of a judge making a speech to law students about constitutional principles—a topic that could very plausibly create an appearance of impartiality sufficient to trigger recusal under section

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[42] *See* John P. Frank, *Disqualification of Judges*, 56 YALE L.J. 605, 612 (1947) ("In the Supreme Court disqualification has always been the prerogative of each individual Justice."); Virelli, *supra* note 41, at 1186 (noting "the longstanding practice of individual jurists deciding their own recusal questions").

[43] 28 U.S.C. § 455(a) (2012).

[44] U.S. CONST. art. III, § 1.

[45] *See* David Lat, *Err on the Side of Allowing Speech*, N.Y. TIMES (July 30, 2014, 1:57 PM), http://www.nytimes.com/roomfordebate/2013/11/03/judges-appearance-of-impartiality/err-on-the-side-of-allowing-judicial-speech ("One of judges' duties is civic education."); Deborah Rhode, *Judges Have a First Amendment Right, Too*, N.Y. TIMES (Nov. 4, 2013, 3:35 PM), http://www.nytimes.com/roomfordebate/2013/11/03/judges-appearance-of-impartiality/judges-have-a-first-amendment-right-too ("Judicial credibility is enhanced, not diminished, by opportunities for public education.").

455(a)—then a serious question exists as to whether the current recusal standards should survive under *Pickering*, let alone its more restrictive progeny.

Justice Kennedy may be correct that the State "may adopt recusal standards more rigorous than due process requires, and censure judges who violate these standards."[46] That does not resolve, however, whether those recusal standards ally with the rights and obligations of an independent judiciary to speak openly on matters of civic concern. To the extent that the public employee speech doctrine is the appropriate vehicle for evaluating the speech of sitting judges, current recusal standards appear to run afoul of the First Amendment.

C. *Attorney Speech*

Like public employees, attorneys enjoy fewer First Amendment protections than other citizens. While Justice Kennedy's concurrence in *White* did not expressly mention applying the attorney speech doctrine to judicial speech restrictions, neither did it foreclose the possibility. And, as Professor Chemerinsky has observed, "there is a logic to holding attorneys and judges to the same standard."[47] The leading case governing attorneys' First Amendment rights is *Gentile v. State Bar of Nevada*,[48] which involved an attorney being reprimanded for violating a state ethical rule during a press conference.[49] The *Gentile* Court explained that attorneys' in-court First Amendment rights are "extremely circumscribed,"[50] and that lawyers' "extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative."[51] It held that Nevada's "substantial likelihood of material prejudice" test struck an appropriate balance between attorneys' First Amendment rights and the State's interest in a fair judicial system.[52]

The material prejudice test could be under-inclusive with respect to judicial recusal for two reasons. First, it appears to apply only to attorney statements about an active case.[53] This is a sensible way to balance the

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[46] Republican Party of Minn. v. White, 536 U.S. 765, 794 (2002) (Kennedy, J., concurring).

[47] Erwin Chemerinsky, *Is It the Siren's Call: Judges and Free Speech While Cases Are Pending*, 28 LOY. L.A. L. REV. 831, 843 (1995).

[48] 501 U.S. 1030 (1991).

[49] *Id.* at 1038.

[50] *Id.* at 1030, 1071.

[51] *Id.* at 1074.

[52] *Id.* at 1075 (internal quotation marks omitted).

[53] The circuit courts are split, for instance, on the broader question of when a court may punish an attorney for speech critical of the court and its judges. *Compare* Standing Comm. on Discipline of the U.S. Dist. Ct. v. Yagman, 55 F.3d 1430 (9th Cir. 1995) (permitting punishment for critical comments by an attorney only where actual malice was present), *with In re* Palmisano, 70 F.3d 483, 487–88 (7th Cir. 1995) (allowing punishment for false factual statements by an attorney about the court).

individual rights of attorneys with their professional role as public servants. It also resonates as an analog to *Garcetti*'s holding that public employees' speech is more likely to be protected when done in the employee's role as a private citizen, i.e., outside the course of their professional duties.[54] The recusal statute, however, does not recognize such a distinction and thus sanctions a far wider range of speech than either the attorney speech doctrine or *Garcetti*.[55]

Second, the attorney speech doctrine is substantively under-inclusive. While speech that would materially affect the outcome of a case would likely jeopardize the appearance of impartiality, the converse is not necessarily true. It is possible to create a reasonable appearance of impropriety without materially altering the course of a proceeding. Imagine a case where a judge spoke in favor of diversity on college campuses and then was faced with an affirmative action case. The judge's prior speech may create precisely the sort of reaction in a reasonable observer that would require recusal under section 455(a)'s reasonable appearance standard.[56] It may not, however, materially affect the proceeding, as the judge (unbeknownst to a reasonable observer of the original statement) may have been referring to gender or socioeconomic diversity while the case at hand involved race. One possible solution would be to read the material affects test as synonymous with the reasonable appearance of impropriety test, such that any speech that created reasonable doubt about a judge's impartiality would be treated as materially affecting the proceeding under the attorney speech doctrine. This interpretation would substantively align the recusal statute with the attorney speech doctrine, but would require a very broad reading of one or the other concepts, as the above example illustrates, and would create the same conflict with judicial independence as the public employee doctrine. It would also still fail to address the first basis of under-inclusiveness—the doctrine's focus on speech pertaining to active proceedings.

In sum, it is surprising that the most restrictive First Amendment doctrine, the content-based speech doctrine, is the one that best tolerates the federal recusal statute. By focusing on a wide range of government interests, the content-based speech doctrine offers maximum appreciation for the goals and purposes of judicial recusal. By contrast, more permissive doctrines like the public employee and attorney speech doctrines grant the government greater authority, but do so in a narrower set of contexts that do not align as well with recusal. What does this tell us about the fate of the federal recusal statute? Perhaps not much. As discussed above, the content-based speech doctrine is likely the most natural fit with recusal

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[54] Garcetti v. Ceballos, 547 U.S. 410, 411 (2006).

[55] 28 U.S.C. §§ 455(a), (b)(1) (2012).

[56] *Id.* § 455(a).

because federal judges are poorly conceptualized as public employees and have a wider range of professional autonomy and responsibility than either public employees or practicing attorneys.

But even if the recusal statute is constitutionally valid under the content-based speech doctrine, that does not end Judge Scheindlin's story. The Second Circuit's removal of Judge Scheindlin includes some structural and institutional issues that are both unusual to the law of recusal and important to the First Amendment.

IV. ARTICLE III, DUE PROCESS, AND CONSTITUTIONAL LEGITIMACY

Judge Scheindlin's removal is not particularly noteworthy as a generic recusal case. A judge's public comments about an active lawsuit before her trigger all manner of recusal concerns. What is unusual—and troubling—is the *way* in which Judge Scheindlin was removed from the stop-and-frisk cases. The Second Circuit panel removed her sua sponte, without even an informal indication from either of the parties that they supported her removal, and without any findings by Judge Scheindlin, despite the fact that judges traditionally decide their own recusal cases in the first instance.[57]

The Second Circuit's conduct raises several ethical and procedural issues beyond the scope of this Essay. It also, however, casts new light on First Amendment questions regarding recusal that are at the heart of the current discussion. What does the Second Circuit's decision to act sua sponte tell us about the broader question of judges' First Amendment rights? The fact that the appellate court did not have the benefit of the district court's factual findings on the matter raises issues about the veracity and accuracy of the factual record regarding recusal, as well as serious concerns about the potential for abuse of judicial power by the reviewing court. In Judge Scheindlin's case, she was removed by the Second Circuit from a case that had been stayed and thus was neither active nor likely to require anything beyond ministerial participation by a district court judge going forward.[58] Removal under those circumstances seems at best like overkill, and at worst like vindictiveness on behalf of the panel.[59] It highlights the importance of protecting lower court judges from

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[57] *See, e.g.*, RICHARD E. FLAMM, JUDICIAL DISQUALIFICATION: RECUSAL AND DISQUALIFICATION OF JUDGES 513–17 (2007) (noting that judges typically resolve for themselves recusal motions directed at their ability to participate in a case).

[58] *See* Ligon v. City of New York, 538 F. App'x 101, 103 (2d Cir. 2013) (ordering that the case be reassigned on remand to a judge whose sole job is to implement the stay and await resolution by the circuit court).

[59] *See* Nancy Gertner, *Which Judges Breached the Rules?*, N.Y. TIMES (Nov. 3, 2013), http://www.nytimes.com/roomfordebate/2013/11/03/judges-appearance-of-impartiality/which-judges-breached-the-rules (describing the Second Circuit's decision to remove Judge Scheindlin "[w]ithout a party raising the[] issues . . . [as] a 'cheap shot'").

overreaching by the appellate courts, especially in cases where the district court judge was not afforded the opportunity to determine her own recusal status.

The Second Circuit's conduct also implicates Article III's assignment of the "judicial power" to the federal courts.[60] The ability to decide cases is at the core of the judicial power,[61] and the distinction between the fact-finding power of trial courts and the reviewing power of appellate courts is critical to the structure of our judicial system. Moreover, the potential chilling effect on the district court of a sua sponte removal order from a circuit court has consequences for the principle of judicial independence embodied in Article III. The First Amendment can serve as valuable support for all of these constitutional principles, reminding us why we should be vigilant about First Amendment protections in recusal cases.

In addition to the potential for overreaching by reviewing courts, Judge Scheindlin's case reflects the delicate constitutional balance at work for the parties in such cases. The ability to participate, however small, in the choice of the presiding judge is a powerful tool for litigants. The Second Circuit's decision to remove Judge Scheindlin impacted the defendants' due process rights in at least two ways. First, it deprived them of their preferred decision maker.[62] Second, by addressing the removal issue sua sponte, the court denied the defendants the opportunity to be heard at the removal proceeding. These decisions are even more curious in light of the fact that the government lodged no objection to Judge Scheindlin's partiality at either the district or circuit court. Therefore, even if the sua sponte removal of a judge were ultimately held to be permissible under the Due Process Clause (say in a more traditional case where the defendant requested the recusal or the district judge stood to play a significant role in the case moving forward), including due process principles in the broader discussion of recusal helps illuminate the full scope of the problem created by the Second Circuit, including the First Amendment's role in helping to strike the appropriate balance between the goals of recusal and the entire range of constitutional protections implicated by the decision to recuse.

Finally, the Second Circuit's decision to remove Judge Scheindlin has consequences for the legitimacy of the courts. Removing a judge without

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[60] U.S. CONST. art. III.

[61] *See* James S. Liebman & William F. Ryan, *"Some Effectual Power": The Quantity and Quality of Decisionmaking Required of Article III Courts*, 98 COLUM. L. REV. 696, 771 (1998) ("'[T]he judicial Power' means the Article III judge's authority and obligation, in all matters over which jurisdiction is conferred, independently, finally, and effectually to decide the whole case and nothing but the case on the basis, and so as to maintain the supremacy, of the whole federal law.").

[62] I say "preferred" in this instance because the defendants had already won a judgment from Judge Scheindlin. In cases where the defendant has not already been victorious, the lack of a recusal motion provides at least some indication that the defendant is satisfied with the judge in their case, and that disturbing this satisfactory status quo is relevant to defendants' due process rights.

the consent of the parties in a case where the judge stands to have little, if any, future involvement turns the perceived value of recusal on its head. What was designed to be a protection against biased judges becomes a tool for the reviewing court to censure a district judge for conduct that the reviewing court finds undesirable. Even assuming that the circuit court is correct in its evaluation of the district judge's conduct, that decision could easily be perceived as arbitrary. The legitimacy of the courts is not just an instrumental end—it is what allows the courts to fulfill their constitutional mission.[63] To the extent that the First Amendment can offer some protection for that legitimacy, it should be part of the broader conversation about recusal.

V. CONCLUSION

When we think of the First Amendment, judicial recusal is likely not the first thing that springs to mind. Perhaps that is why the interaction of recusal and the First Amendment has been largely overlooked. None of this means, of course, that the two are not meaningfully related or that their relationship is unimportant. A neutral and constitutionally legitimate decision maker is essential to our system of justice, and recusal plays a key part in protecting litigants against potentially biased judges.

But what about when recusal comes into contact with the principle of free speech? To date, we have simply assumed (or rather hastily determined) that precluding a federal judge from participating in a case is permissible under the First Amendment. That may still be true in most cases. The foregoing discussion nevertheless seeks to complicate the issue by asking two distinct but related questions. First, under which First Amendment doctrine, if any, is recusal based on judicial speech permitted? The short answer is that of the three most commonly cited doctrines, only the content-based speech doctrine offers a convincing case for permitting recusal based on an appearance of judicial partiality. This is important because it answers the question of how recusal should be treated under the First Amendment, and because it gives us a clearer picture of the answer to the second question, namely, what are the relevant factors to consider when evaluating recusal decisions? Using Judge Scheindlin's recent removal as an example, I contend that the First Amendment's impact on recusal decisions should be viewed in light of judges' role in society and the constitutional principles brought to bear in judicial recusals, including the due process rights of litigants, the core features of Article III judicial

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[63] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992) ("The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.").

power, and the legitimacy of the courts. Precisely how each of these principles should be employed in individual cases is beyond the scope of this Essay. I hope, however, that raising a more intricate picture of recusal and the First Amendment will help facilitate a larger discussion about judges' roles in our constitutional democracy.

CONNECTICUT
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Essay

The Gradually Reduced Credit for Biomass Energy in Connecticut: A Vague But Still Constitutional Standard

BRIAN M. GIBBONS

In a 2013 report, the Connecticut Department of Energy and Environmental Protection pointed out multiple problems with relying on biomass and landfill gas energy to satisfy Connecticut's renewable energy portfolio standards. In response, the legislature delegated authority to the Commissioner of Energy and Environmental Protection to reduce the renewable energy credit value for biomass and landfill gas energy. The law providing that authority is so vague that it gives nearly unlimited discretion to the Commissioner in how and when to reduce the credit. Despite its vagueness, however, the law likely satisfies Connecticut's lenient judicial standards for delegating legislative power to administrative agencies.

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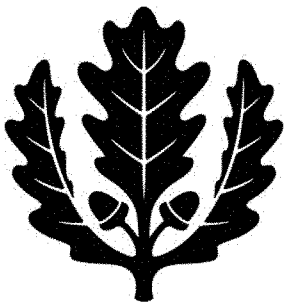

The Gradually Reduced Credit for Biomass Energy in Connecticut: A Vague But Still Constitutional Standard

BRIAN M. GIBBONS*

I. INTRODUCTION

Connecticut's renewable energy portfolio standards took effect in 2006, requiring electric suppliers and distributors to utilize a steadily increasing percentage of renewable energy resources.[1] In prescribing these standards, the legislature recognized that not all renewable sources are equally desirable; this is part of the reason why different sources of renewable energy are assigned as either "Class I" or "Class II."[2] Facilities burning biomass to produce renewable energy can be classified as either Class I or Class II depending on factors such as age, generation capacity, emission rate of nitrogen oxides per million BTU of heat input, and whether they use "sustainable biomass fuel."[3]

Biomass energy is by far the largest source of Class I renewable energy in Connecticut.[4] In 2010, biomass accounted for seventy-six percent of Connecticut ratepayer investment in renewable energy generation.[5] Landfill gas is the second largest source, accounting for thirteen percent of Connecticut's Class I resource mix.[6] Together, these two sources provide eighty-nine percent of Connecticut's Class I requirements.[7]

On April 26, 2013, the Department of Energy and Environmental Protection (DEEP) issued a report recommending that Connecticut's Renewable Portfolio Standards be restructured.[8] The report cited problems with Connecticut's reliance on biomass and landfill gas. First, biomass

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* J.D. 2014, University of Connecticut School of Law. I am grateful to Paul McCary, Adjunct Professor and co-chair of Murtha Cullina's Energy Industry Group, for providing the topic for this Essay.

[1] CONN. GEN. STAT. § 16-245a(a)(1) (2014).

[2] CONN. GEN. STAT. §§ 16-1(a)(20)–(21) (2014).

[3] *Id.* "Sustainable biomass fuel" is defined as biomass "cultivated and harvested in a sustainable manner," subject to certain exclusions and exceptions to the exclusions. *Id.* § 16-1(a)(39).

[4] CONN. DEP'T OF ENERGY & ENVTL. PROT., RESTRUCTURING CONNECTICUT'S RENEWABLE PORTFOLIO STANDARD i, 10 (2013), *available at* http://www.ct.gov/deep/lib/deep/energy/rps/rps_final.pdf.

[5] *Id.*

[6] *Id.*

[7] *Id.* at 19.

[8] *Id.* at i.

plants are "among the least 'clean' Class I resources."[9] Second, the primary plants providing biomass and landfill gas are located in Maine, New Hampshire, and New York, meaning that ratepayer investment in these resources provides no economic benefit to Connecticut.[10] Finally, some of the landfill gas projects in New York are already being counted towards renewable energy standards there; "thus, the output from these resources is being double counted."[11]

II. A VAGUE NEW LAW

The legislature responded to DEEP's recommendation by amending the Renewable Portfolio Standards. Specifically, they added subsection (h) to Connecticut General Statue section 16-245a, effective June 5, 2013:

> On or before January 1, 2014, the Commissioner of Energy and Environmental Protection shall, in developing or modifying an Integrated Resources Plan in accordance with sections 16a-3a and 16a-3e, establish a schedule to commence on January 1, 2015, for assigning a gradually reduced renewable energy credit value to all biomass or landfill methane gas facilities that qualify as a Class I renewable energy source pursuant to section 16-1 . . . . The Commissioner of Energy and Environmental Protection may review the schedule established pursuant to this subsection in preparation of each subsequent Integrated Resources Plan developed pursuant to section 16a-3a and make any necessary changes thereto to ensure that the rate of reductions in renewable energy credit value for biomass or landfill methane gas facilities is appropriate given the availability of other Class I renewable energy sources.[12]

This law reflected an obvious legislative disapproval of using biomass as a renewable energy source. Subsection (h) delegates authority to the Commissioner of Energy and Environmental Protection to assign "a gradually reduced renewable energy credit value" to facilities using biomass to produce renewable energy.[13] The statute, however, provides little in the way of standards or criteria for the Commissioner to follow in scheduling this reduction. Beyond the term "gradually," the only guidance the Commissioner has is to "ensure that the rate of reductions . . . is appropriate given the availability of other Class I renewable energy

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[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] 2013 Conn. Acts 13-303 (Reg. Sess.).
[13] CONN. GEN. STAT. § 16-245a(h) (2014).

sources."[14]

This language establishes a nebulous standard providing nearly unlimited discretion to the Department of Energy and Environmental Protection. First, the statute does not specify a particular method for reducing the value of renewable energy certificates from biomass. Renewable energy certificates are tradable[15] and have a market value that fluctuates depending on a number of factors.[16] The current market value of a renewable energy certificate is not always readily ascertainable.[17]

The simplest way for DEEP to reduce the value of renewable energy certificates from biomass would be to subtract a percentage of megawatt hours (MWh). For example, if the Commissioner wanted to decrease the value of biomass renewable energy certificates by twenty percent, he could declare that ten MWh of biomass is worth only eight MWh of Class I renewable energy. But section 16-245a(h) does not specifically prescribe this methodology; the Commissioner can implement his reductions any way he deems appropriate.

Second, the gradual reduction in credit value could conceivably take place over any period of time. The statute specifies that the reduction schedule is to commence in 2015,[18] and Connecticut General Statutes section 16a-3a(b) requires the Integrated Resources Plan to be prepared biennially,[19] so presumably the Commissioner will evaluate the appropriateness of the reduction every two years. Each reduction, however, will be very difficult to predict due to the lack of any real legislative standard. The Commissioner can drastically reduce the credit value and make biomass renewable energy certificates worthless in just a few years, or he can reduce the value of the credits so infinitesimally slowly that there is no significant impact on the renewable energy certificate market. The requirement that the reduction be "gradual"[20] could be satisfied by four twenty-five percent reductions over eight years or a two percent biennial

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[14] *Id.* The other Class I renewable energy sources include solar, wind, fuel cell, geothermal, "anaerobic digestion or other biogas derived from biological sources" (for which the legislature took care to not reduce the credit value, *id.*), thermal direct energy conversion from another Class I source, wave or tidal power, and select hydropower. *Id.* § 16-1(a)(26).

[15] *See* CONN. GEN. STAT. §§ 16-245a(b), (g) (2014) (allowing an electric supplier or distribution company to purchase and contract for renewable energy certificates from different sources).

[16] *Renewable Energy Certificates (RECS)*, U.S. DEP'T OF ENERGY, http://apps3.eere.energy.gov/greenpower/markets/certificates.shtml?page=5 (last visited Sept. 29, 2014).

[17] *See id.* ("REC prices, in both the voluntary and compliance markets, can be difficult to determine without the assistance of a broker, and even then, available information only indicates the transactions made by one broker.").

[18] CONN. GEN. STAT. § 16-245a(h).

[19] CONN. GEN. STAT. § 16a-3a(b) (2013).

[20] *Id.* § 16a-3a(a) (stating that the purpose of the Integrated Resources Plan is to "minimize[] the cost of all energy recourses to customers *over time* and maximizes consumer benefits consistent with the state's environmental goals and standards") (emphasis added).

reduction over one hundred years.

III. CONNECTICUT GENERAL STATUTE SECTION 16-245A(H) IS LIKELY CONSTITUTIONAL DESPITE ITS DELEGATION OF LEGISLATIVE POWER

Relative to other states, the Connecticut judiciary has been lenient in permitting the General Assembly to delegate its legislative powers to administrative agencies.[21] "The test for constitutionally sufficient standards to govern the exercise of delegated powers requires only that the standards be 'as definite as is reasonably practicable under the circumstances.'"[22] The Supreme Court of Connecticut explained this standard in detail in *State v. Campbell*[23]:

> [I]t is inherent in this separation of powers, since the law-making function is vested exclusively in the legislative department, that the Legislature cannot delegate the law-making power to any other department or agency. We have held, however, that the legislature may expressly authorize an administrative agency to fill up the details of a law. In order to render admissible such delegation of legislative power, however, it is necessary that the statute declare a legislative policy, establish primary standards for carrying it out, or lay down an intelligible principle to which the administrative officer or body must conform.[24]

Though Connecticut General Statute section 16-245a(h) is very vague, it likely satisfies this lenient delegation standard. If section 16-245a(h) were challenged as violating the separation of powers, the State could make two strong arguments in its defense. First, the State could argue that the standard is "as definite as is reasonably practicable under the circumstances."[25] The legislature may want to phase out biomass as a Class I renewable, but it is not in a good position to predict the availability of replacement Class I resources. Therefore, it would be inappropriate and impractical for the legislature to prescribe a specific gradual decrease

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[21] *See* Gary J. Greco, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. AM. U. 567, 588–90, 593, 597 (1994) (placing Connecticut within a category of states that have relaxed safeguards and standards and requiring "only a general statement of policy to validate a delegation of power"); *see also* Bottone v. Town of Westport, 553 A.2d 576, 578 (Conn. 1989) ("[I]n passing upon the constitutionality of a legislative act, we will make every presumption and intendment in favor of its validity. . . . The party challenging a statute's constitutionality has a heavy burden of proof; the unconstitutionality must be proven beyond all reasonable doubt.").

[22] State v. Campbell, 617 A.2d 889, 895 (Conn. 1992) (quoting Univ. of Conn. Chapter, AAUP v. Governor, 512 A.2d 152, 159 (Conn. 1986)).

[23] 617 A.2d 889 (Conn. 1992).

[24] *Id.* at 895 (citations omitted) (internal quotation marks omitted).

[25] *Id.*

analogous to the annually increasing percentage of electricity that must be generated from renewable energy sources per Connecticut's general renewable portfolio standards.[26] The legislature can force Connecticut to use more renewable energy in general, but phasing out a specific renewable energy source is a more delicate balancing act better considered by a specialized administrative agency.

The Connecticut Supreme Court has previously upheld laws that delegated a great deal of legislative authority. For example, in *University of Connecticut Chapter, AAUP v. Governor*,[27] the court rejected an argument that a statute authorizing the governor "to reduce budgetary allotments when there was 'a change of circumstances' or when he 'deems necessary' contained constitutionally deficient standards to guide the governor's exercise of delegated power."[28] In that case the court recognized that "[t]o require any more specificity in the standards . . . would hamper the flexibility needed for the governor" to administer the budget.[29] Similarly, in *State v. Campbell*, the court upheld "merely general guidelines" governing the ability of a state mental institution to determine whether a criminal defendant should be committed rather than imprisoned.[30] The court reasoned that the delegation was appropriate where the determination involved medical data, expertise, and diagnoses.[31] Likewise, DEEP requires similar flexibility to use its expertise in renewable energy markets to appropriately reduce the value of renewable energy certificates from biomass.

Second, the State could argue that section 16-245a(h) "lay[s] down an intelligible principle"[32] for the Commissioner to follow in reducing the credit value for biomass energy. Crucial to this argument is the phrase "given the availability of other Class I renewable energy sources."[33] This phrase infuses the law with an intelligible principle of reducing the biomass credits in accordance with the practical availability of replacement Class I resources. It directs the Commissioner to examine and consider a specific set of factual circumstances, not unlike the standard of "public convenience and necessity," which the Appellate Court upheld as constitutional in *Rudy's Limousine Service, Inc. v. Department of Transportation*.[34] In that case the court rejected a challenge to the Department of Transportation's statutory responsibility to issue permits for

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[26] CONN. GEN. STAT. § 16-245a(a) (2014).
[27] 512 A.2d 152 (Conn. 1986).
[28] *Id.* at 159.
[29] *Id.*
[30] *Id.* at 891–92, 896.
[31] *Id.* at 895–96.
[32] *Id.* at 895.
[33] CONN. GEN. STAT. § 16-245a(h) (2014).
[34] 826 A.2d 1161, 1167 (Conn. App. Ct. 2003).

livery service.[35]

IV. CONCLUSION

Ultimately, section 16-245a(h) more closely resembles statutes that have been upheld than statutes that the Supreme Court has declared unconstitutional. Connecticut courts have seldom struck down statutes on nondelegation grounds, and have done so only in cases where there were no factual standards or intelligible principles.[36] Despite its general vagueness, the statute confers at least token guidance with the phrase "given the availability of other Class I renewable energy sources."[37] Though the statute affords DEEP a great deal of discretion, that discretion is warranted given the specialized duty of predicting availability of replacement Class I resources and reducing the biomass credit value accordingly.

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[35] *Id.* at 1163.

[36] *See* Town of New Milford v. SCA Servs. of Conn., 384 A.2d 337, 339 (Conn. 1977) (finding no intelligible principle for a municipal commission to follow in permitting garbage treatment plants); Mitchell v. King, 363 A.2d 68, 69 n.1, 71 (Conn. 1975) (finding a statute providing municipal boards of education the ability to expel students "found guilty of conduct inimical to the best interests of the school" unconstitutional).

[37] CONN. GEN. STAT. § 16-245a(h).

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Essay

Police Misconduct in Connecticut

SARAH RICCIARDI

The cultural divide between indigent communities and law enforcement is a symptom of the cyclical nature of police misconduct. Because police misconduct is notoriously difficult to prosecute, it leads to mutual distrust. Officers resent the allegations of misconduct, and when they are not disciplined, civilians lose respect for the system. Community-specific outreach programs are the best way to combat this pervasive problem. By interacting on a personal level, law enforcement officers and members of the community can work together to rebuild trust among themselves.

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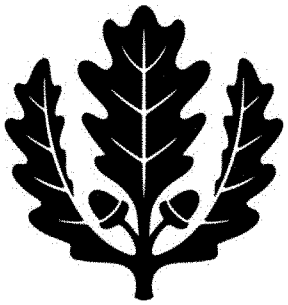

Police Misconduct in Connecticut

SARAH RICCIARDI*

I. INTRODUCTION

Even in the twenty-first century, police misconduct continues to plague urban communities.[1] In 2010, the National Police Misconduct Statistics and Reporting Project found 4,861 reports of police misconduct, involving 6,613 officers and 6,826 alleged victims—23.8% of which involved excessive force.[2] Complaints against 897 of the 1,575 officers who were reportedly involved in excessive force incidents alleged physical force, including fist strikes, throws, choke holds, and baton strikes.[3] Two-hundred and thirty-two officers were involved in firearm-related claims and one-hundred and sixty-six were related to taser use.[4]

Incidents of police misconduct cost municipalities tens of millions of dollars in legal costs each year.[5] Towns in Connecticut are no exception. There were at least 218 excessive force complaints filed between January 2008 and December 2012 across the New Haven area.[6] New Haven, Hamden, West Haven, and East Haven had the majority of the area's excessive force allegations.[7] Unremarkably, the larger cities (with the

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* University of Connecticut School of Law, J.D. Candidate 2015; New York University, B.A. 2005. I would like to thank Drew Alan Hillier, Brendan Gooley, Alex Zeman, Felicia McGinniss, and the rest of the *Connecticut Law Review* staff for their invaluable editorial assistance. I would especially like to thank the staff and inmates at the Manson Youth Institution for inspiring this Essay.

[1] There has been a long history of law enforcement violence in this country. *See* Jennifer E. Koepke, *The Failure to Breach the Blue Wall of Silence: The Circling of the Wagons to Protect Police Perjury*, 39 WASHBURN L.J. 211, 219 (2000) ("[V]iolence has been and continues to be the primary tool used by the dominant class to preserve the order, culture and hierarchical structure of the status quo.").

[2] David Packman, *2010 NPMSRP Police Misconduct Statistical Report*, CATO INST. (draft version Apr. 5, 2011, 12:55 AM), http://www.policemisconduct.net/2010-npmsrp-police-misconduct-statistical-report/ [hereinafter *NPMSRP Report*].

[3] *Id.*

[4] *Id.*

[5] DAVID WEISBURD ET AL., THE ABUSE OF POLICE AUTHORITY: A NATIONAL STUDY OF POLICE OFFICERS' ATTITUDES 9 (2001). In 2010, the amount spent on misconduct related legal costs neared $350 million. *NPMSRP Report*, *supra* note 2.

[6] Michelle Tuccitto Sullo, *Police Brutality Suits: New Haven, Hamden, West Haven, East Haven Face Most Complaints in Greater New Haven*, NEW HAVEN REG. (Apr. 27, 2013, 12:00 AM), http://www.nhregister.com/general-news/20130427/police-brutality-suits-new-haven-hamden-west-haven-east-haven-face-most-complaints-in-greater-new-haven.

[7] *Id.*

larger police departments) faced the most allegations.[8] The New Haven Police Department was the greatest offender with thirty-four cases in five years.[9] Hamden, West Haven, and East Haven followed with twelve, eleven, and six cases, respectively.[10] While population may have impacted the statistics, it is not definitive in all cases. Hartford had almost double the number of claims than New Haven, despite having similarly sized populations.[11] Most other towns in the area had two complaints of excessive force *at most* during the same time period.[12] Further, several communities had no complaints, including Cheshire, Guilford, Madison, and Wallingford.[13]

There is reason to believe that the problem is much bigger than the statistics suggest. The number may grossly underestimate the prevalence of excessive force because many of these suits may be settled early on[14] or the complaints never reach the proper authorities.[15] In many instances, people are simply afraid to report police brutality.[16] According to the American Civil Liberties Union of Connecticut, police departments respond to complaints in different ways.[17] "Some departments are more open to accepting and investigating claims of police misconduct than other departments. One department may be open to hearing from the public, while others make it nearly impossible."[18]

While the conduct that leads to excessive force complaints may be the root of the problem, the effect on the community is the real threat.[19] What happens after a police officer has been convicted (or at least formally charged) is what determines the scope of the issue of police misconduct

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[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] *See* David Packman, *The Truth About Police Misconduct Litigation*, CATO INST. (Feb. 22, 2010, 10:18 AM), http://www.policemisconduct.net/the-truth-about-police-misconduct-litigation/ (noting that, out of 925 civil lawsuits that the organization tracked, 74% settled out of court).

[15] *See NPMSRP Report*, *supra* note 2 ("Another factor to consider is the continuing movement towards less transparency about police misconduct in several states which could be leading to increased under-reporting rates.").

[16] Sullo, *supra* note 6 ("'The number of complaints is very small compared to the number of actual beatings [by police]—because people are afraid of the police. They are afraid to make complaints.'" (quoting Paul Garlinghouse, an attorney in New Haven)).

[17] Press Release, ACLU of Conn., Study Finds Deficient Police Complaint Practices, (Dec. 4, 2012), [hereinafter *ACLU*] *available at* http://www.acluct.org/updates/study-finds-deficient-police-complaint-practices/ (addressing the lack of uniformity or statewide standards with respect to reporting police misconduct).

[18] Sullo, *supra* note 6 (quoting David McGuire, staff attorney for the ACLU of Connecticut).

[19] This Essay focuses on criminal liability for police misconduct. Thus, the discussion of the effect of excessive force litigation on the community is in the context of criminal sanctions and not civil suits for damages.

within a community.[20] Since many of these cases settle or prosecutors decide not to press charges,[21] many officers do not receive a formal punishment from the judiciary. In all likelihood police departments will impose some type of sanction.[22] However, in those cases where departments are solely responsible for the discipline of their own officers, there is a risk that the punishments may not be as effective as those enforced by an outside entity.[23] The reason for this disparity is the brotherhood mentality of police departments and the lack of accountability for those on the force who tolerate acts of corruption and wrongdoing.[24]

Part II of this Essay will discuss the difficulty of pursuing excessive force claims, namely the obstacles attributed to the brotherhood culture of police departments. It will also identify the most common sanctions imposed on offenders in light of several recent Connecticut cases. This Essay will then explore the impact of excessive force suits on the community, specifically addressing the lost trust between civilians and police officers. Part III will highlight existing programs and policies that have improved the excessive force situation in Connecticut and elsewhere.

II. THE CYCLE

The current status quo of excessive force litigation continues to fall short in reducing police abuse.[25] There is an agreement that "police crimes

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[20] *Police Discipline and Community Policing: New Models*, COMMUNITY POLICING DISPATCH (Aug. 2008), http://cops.usdoj.gov/html/dispatch/August_2008/new_model.htm [Hereinafter *Police Discipline*] ("An agency that routinely fails to take proper action when discovering that its officers have committed acts of misconduct will eventually lose its credibility in the community."). A tension is created between doing too little to discipline officers, which causes more misconduct because officers think they can get away with it, and imposing too oppressive penalties, which may cause officers to avoid contact with citizens so as to prevent future complaints. *Id.*

[21] *See* Sa'id Wekili & Hyacinth E. Leus, *Police Brutality: Problems of Excessive Force Litigation*, 25 PAC. L.J. 171, 188 (1994) ("[P]rosecutorial discretion is one of the several obstacles private citizens face when they bring brutality charges against police officers.").

[22] *Coping with Police Misconduct in West Virginia: Citizen Involvement in Officer Disciplinary Procedures*, W. VA. COMM. TO THE U.S. COMM'N ON CIVIL RIGHTS (Jan. 2008), http://www.usccr.gov/pubs/sac/wv0104/ch2.htm (reporting that 30 percent of all complaints filed in West Virginia from 2000 to 2002 were sustained).

[23] William K. Rashbaum, *More Police Officers Being Punished, But Not More Severely*, N.Y. TIMES, July 28, 2000, at B6 (noting that officers often receive "insignificant penalties" that amount to "a slap on the wrist").

[24] *See* WEISBURD ET AL., *supra* note 5, at 10 ("It is the lack of internal, systematic controls, and not 'a few rotten apples,' that perpetuates problems of misconduct and abuse by police."); Rashbaum, *supra* note 23 ("[M]ismanagement at the top of the Police Department which refuses to acknowledge the extent of police misconduct, refuses to punish it adequately, refuses to adopt available and successful reforms and, as bad, tolerates a police culture more likely to wink at than really punish police abuse." (quoting New York City Public Advocate Mark Green)).

[25] *See, e.g.*, Tim Lynch, *National Police Misconduct NewsFeed Daily Recap 05-02-14*, CATO INST. (May 5, 2014, 5:03 PM), http://www.policemisconduct.net (listing the ten reports of police misconduct tracked for the day this Essay was written).

are underreported, underinvestigated, underprosecuted and under-convicted."[26] Police misconduct is a self-perpetuating problem. The cycle begins with the initial wrongdoing by the officer and is followed by the reporting of the incident (if the police department policies allow for it).[27] Next, an investigation is conducted, and it is determined whether charges should be filed.[28] Finally, some form of disciplinary action is taken, which, more likely than not, will be minimal.[29] Depending on the severity of the punishment, officers may continue to abuse their authority.[30] If the department imposes no punishment, officers may feel they can continue to get away with the misconduct.[31] The following Sections will address the factors involved at each step that contribute to the cyclical nature of police misconduct.

A. *Pursuing Excessive Force Claims*

A civilian will encounter several issues when trying to bring an excessive force claim. First, reporting police misconduct can be a challenge in and of itself. "Several high-profile investigations and reports about Connecticut police agencies, including most recently the East Haven Police Department, have shown serious deficiencies in procedures for handling complaints of police misconduct."[32] After "hearing from too many people who [had] difficulty filing complaints with their local police departments," the American Civil Liberties Union of Connecticut conducted a telephone survey of 104 Connecticut law enforcement agencies.[33] The results were unsettling. In general, "police employees could not answer questions about their departments' complaint procedures, refused to answer questions, provided inaccurate information or contradicted information from other employees."[34] Nearly a quarter of the

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[26] Koepke, *supra* note 1, at 230 (internal citation omitted).

[27] *See supra* note 17 (referring to problems with reporting misconduct in Connecticut).

[28] *See* Rob Yale, *Searching for the Consequences of Police Brutality*, 70 S. CAL. L. REV. 1841, 1846 (1997) (noting that prosecutors exercise their discretion to pass up excessive force prosecutions).

[29] *See* Rashbaum, *supra* note 23 ("Based on a review of cases of police misconduct substantiated against 664 officers, [the study] found that 75 percent of the officers disciplined received insignificant penalties that [can be] characterized as a 'slap on the wrist.'").

[30] *See Police Discipline*, *supra* note 20 ("[I]f officers feel that the discipline system gives them no reason to obey the rules, some of them won't.").

[31] *See id.* ("The public may see the results [of a department's failure to discipline its officers] in more acts of police misconduct.").

[32] *ACLU*, *supra* note 17.

[33] *Id.* (quoting David McGuire, staff attorney for the ACLU of Connecticut). "Trained volunteers telephoned the police agencies' routine, non-emergency numbers during January and February of 2012 during normal hours and asked 10 specific multi-part questions about the civilian complaint process." *Id.*

[34] *Id.*

departments claimed that they had no complaint form for civilians at all.[35] More than half said that they would not accept anonymous complaints, while 10% failed to answer the question.[36] Most disturbing, 15% of the departments said "they would report a complainant to immigration authorities" and over 50% "expressed uncertainty" or refused to answer the question as to whether they would alert immigration authorities.[37] While uniform standards will help to alleviate the inconsistencies among departments, a lasting solution will most likely have to address police culture as a whole.[38]

Once an incident is successfully[39] reported, there is no guarantee that it will be pursued by prosecutors.[40] The district attorney and the police department have a working relationship.[41] Prosecutors rely on the police to help convict criminals.[42] What happens when the police officers are the criminals? First of all, attorney-client privilege makes it difficult for local attorneys to "reveal information about the suit to the district attorneys."[43] "[A] prosecutor will be very hesitant to file a[n] . . . action against an officer or a department with which he works on an intimate or regular basis."[44] This is especially true in a state like Connecticut, where the bar is relatively small.[45] District attorneys and police departments "have a close rapport, creating a built-in conflict of interest for the district attorneys."[46] Depending on the jurisdiction, there are a limited number of prosecutors, making it difficult to find one that is not routinely tied to the respective police department. The district attorney has "exclusive discretion to prosecute or dismiss a citizen's charge of police brutality."[47] No clear guidelines tell local, state, or federal prosecutors whether to take on a

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[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *See* Koepke, *supra* note 1, at 220 (noting that, when attempting to report an incident of police brutality, it is "[m]ore likely than not [that] the civilian is met with disbelief and is discouraged by police officers from making the complaint").

[39] That is, the report makes it to the proper authorities, such as the District Attorney.

[40] *See* Asit S. Panwala, *The Failure of Local and Federal Prosecutors to Curb Police Brutality*, 30 FORDHAM URB. L.J. 639, 651 (2003) ("[P]rosecutors often fall back on their discretion to decline rather than pursue a victim's complaint." (internal quotation marks omitted)).

[41] Wekili & Leus, *supra* note 21, at 188.

[42] *Id.*

[43] Alison L. Patton, *The Endless Cycle of Abuse: Why 42 U.S.C. § 1983 Is Ineffective in Deterring Police Brutality*, 44 HASTINGS L.J. 753, 796 (1993).

[44] Koepke, *supra* note 1, at 225.

[45] *National Lawyer Population By State*, A.B.A. (2013), available at http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/2013_natl_lawyer_by_state.authcheckdam.pdf (listing lawyer populations per state and territory). In 2013, there were 21,150 active attorneys residing in Connecticut. *Id.* In Massachusetts, there were 43,008 attorney residents. *Id.*

[46] Patton, *supra* note 43, at 796.

[47] Wekili & Leus, *supra* note 21, at 188.

particular police brutality case.[48] This lack of compulsion to prosecute makes it more likely that valid excessive force claims will slip through the cracks.[49]

Even if a police misconduct claim makes it to the courtroom, the likelihood of a favorable outcome for the victim is low.[50] On a rudimentary level, there is something to be said about who the players are in excessive force cases. The victim is often a criminal (though not always), and the defendant is a police officer.[51] Even those most critical of police action may find it difficult to find the "victim" as credible as a police officer that has sworn to protect the public.[52] This lack of credibility comes into play not only with jurors but also with prosecutors during investigations.[53]

The very nature of excessive force cases makes credibility a crucial factor in litigation. It is difficult to prove beyond a reasonable doubt "that [an] arresting officer intended to use excessive force."[54] Similarly, "[j]urors often struggle with whether the officer's actions were reasonable because the police officer is frequently the only witness as to how much resistance she encountered."[55] Without other witnesses, the majority of those testifying in cases of excessive force are other police officers,[56] most of whom are reluctant to testify against each other in the first place.[57]

The "Blue Wall of Silence," also known as the "Code of Silence" or the "Blue Curtain," is one of the most persistent obstacles in excessive force litigation.[58] The idea of a code of silence is not completely

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[48] Panwala, *supra* note 40, at 640.

[49] *See* Wekili & Leus, *supra* note 21, at 188 (noting that there are not statutes or departmental regulations that compel the prosecution of certain cases); *cf.* Panwala, *supra* note 40, at 642–43 (describing instances where federal prosecutors dismissed complaints without thoroughly investigating them). Further, the police reports that serve as the basis for the investigations may often be misleading or self-serving. Panwala, *supra* note 40, at 642–43.

[50] *See, e.g.*, Panwala, *supra* note 40, at 644 ("[The New York County District Attorney's Official-Corruption Unit's] conviction rate at trial in 1998 was a mere twenty-five percent, far below New York County's general conviction rate of approximately seventy-five percent.").

[51] *See* Panwala, *supra* note 40, at 644 ("[T]he victim was usually committing a crime at the time of the abuse.").

[52] *See id.* ("[P]olice officers have the advantage of inherent credibility with juries simply by virtue of their position." (internal quotation marks omitted)).

[53] *See* Wekili & Leus, *supra* note 21, at 189 ("[N]ot only the prosecutors but the jurors are more inclined to believe the police rather than the victim.").

[54] Panwala, *supra* note 40, at 643.

[55] *Id.* at 644; *see also* Wekili & Leus, *supra* note 21, at 189 ("Precisely because police receive training to be expert witnesses, are often their own witnesses, and are usually the only witness other than the victim, it is difficult to refute their assertions.").

[56] *See* Panwala, *supra* note 40, at 650 ("[P]olice officers are often the only witnesses who can substantiate a claim of police brutality.").

[57] *Id.* at 648.

[58] *See* Koepke, *supra* note 1, at 214 ("[Due to the] Blue Wall of Silence, police brutality and police perjury have been, and continue to be, protected and facilitated by the police culture."). For other aspects of police culture that effect the cycle of police misconduct, see *infra* Part II.B.

unimaginable. Police officers are faced with life and death situations more frequently than the public likely realizes, and a certain level of trust is expected out of necessity.[59] However, the brotherhood mentality that has formed over time has become a barrier to transparency. "The code of silence, adhered to by any officer who intends to remain on the job, provides a virtually impenetrable layer of protection for violence-prone officers."[60] This mentality is instilled in cadets at the outset of their training at the police academy.[61]

What happens if one were to break the Blue Wall of Silence? Cooperation with investigations is seen as a betrayal. The officer who chooses to cooperate risks "retaliation in the form of harassment, ostracism, complaints[,] and threats."[62] Thus, officers often will not speak up unless asked and when they do, they end up perjuring themselves.[63] "[A]t the very least, [officers may] say they did not witness the event, rather than speak out against a colleague."[64] Consequently, "[o]fficers guilty of using excessive force are fully confident that fellow officers will either remain silent, or verify their cover story."[65] Considering the potential consequences for testifying against their peers, it is not surprising that police perjury is characteristic of cases involving police misconduct.[66]

One of the most frequent avenues for police perjury is falsification of reports.[67] In October of last year, a jury found several East Haven police officers guilty of various civil rights offenses,[68] one of which was the falsifying of police reports.[69] The officers wrote inaccurate reports in order

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[59] Patton, *supra* note 43, at 763.

[60] Koepke, *supra* note 1, at 211.

[61] *Id.* at 233.

[62] *Id.* There have even been examples where officers who have cooperated with internal investigations were told not to expect back up in times of need. *See, e.g.*, Domenech v. City of N.Y., 919 F. Supp. 702, 705 (S.D.N.Y. 1996) (describing a situation where a police officer was told that "if she ever called in as an 'officer in trouble,' nobody would respond"). One officer explained that "'[i]f they mark you as a rat . . . no one talks to you . . . your family gets obscene calls and every day you have to wonder if someone is going to be a little slow in backing you up in a life or death situation." Koepke, *supra* note 1, at 234 (quoting Selwyn Raab, *The Unwritten Code that Stops Police from Speaking*, N.Y. TIMES, June 16, 1986, at D6).

[63] Patton, *supra* note 43, at 763–64.

[64] *Id.* at 764.

[65] Panwala, *supra* note 40, at 648.

[66] Koepke, *supra* note 1, at 221. In fact, the Mollen Commission Report, which investigated police corruption in New York City, found that police corruption during the litigation process was "so prevalent . . . that it evolved into its own word: testilying." *Id.*

[67] *See id.* ("[P]olice falsification, [is] the most common form of police corruption . . . .").

[68] Dave Altimari, *Ex-East Haven Officer Gets 30 Months in Civil Rights Case*, THE HARTFORD COURANT (Jan. 21, 2014), http://articles.courant.com/2014-01-21/news/hc-east-haven-cops-0122-20140121_1_david-cari-dennis-spaulding-cari-and-spaulding.

[69] Evan Lips, *Closing Arguments Tell Two Tales of Accused East Haven Cops*, NEW HAVEN REG. (Oct. 16, 2013, 9:07 PM), http://www.nhregister.com/general-news/20131016/closing-arguments-tell-two-tales-of-accused-east-haven-cops.

to cover up their other violations.[70] This case was unusual in that there was an abundance of evidence of police perjury. One arrest report, involving two of the accused officers, went through twenty-six drafts.[71] Further, there was a video recording of a portion of the arrest, which the prosecutors compared to the final version of the police report.[72] One cannot help but wonder, if the evidence had not been as damning, whether the officers would have gotten away with it merely because the U.S. Attorney would have chosen not to pursue the case.

B. *Is It Worth It?*

When a complaint against a police officer is sustained, it is widely believed that the disciplinary sanctions are not harsh enough to deter future wrongdoing.[73] In the case of the East Haven police officers, a federal judge sentenced all three implicated officers to jail time,[74] stating that he believed the sentences would send a message to other officers.[75] While potential prison time may deter future misconduct, as discussed earlier, not all complaints of excessive force make it to court.

When the judiciary is uninvolved, police departments tend to impose insignificant penalties, such as "a reprimand from a superior, a note in an officer's file or the loss of a few vacation days."[76] According to a review of New York cases involving police misconduct, 75% of the guilty officers received only minor disciplinary action.[77] While police spokesmen are adamant that their departments take excessive force complaints seriously, actions seem to speak louder than words.[78] Lieutenant Anthony Duff, who is in charge of internal affairs for the New Haven Police Department, told the *New Haven Register*, "It is our job to investigate any and all complaints. We try to make the complaint process as open as possible. The role of Internal Affairs is to seek the truth, and to investigate misconduct or allegations of misconduct. This department has a long history of disciplining its officers."[79] Despite Duff's assertions, there have still been a

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[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] Rashbaum, *supra* note 23 (noting the insignificant punishments issued by police departments).

[74] Evan Lips, *Ex-East Haven Cop Dennis Spaulding Sent to Federal Prison for 5 Years*, NEW HAVEN REG. (Jan. 23, 2014, 4:38 PM), http://www.nhregister.com/general-news/20140123/ex-east-haven-cop-dennis-spaulding-sent-to-federal-prison-for-5-years. Officer Dennis Spaulding was sentenced to five years in federal prison; Officer David Cari was sentenced to thirty months in prison; and Officer Jason Zullo, who pled guilty, was sentenced to two years. *Id.*

[75] Altimari, *supra* note 68.

[76] Rashbaum, *supra* note 23 (quoting New York City Public Advocate Mark Green).

[77] *Id.*

[78] Sullo, *supra* note 6 (discussing the expansion of the New Haven Police Department's Internal Affairs division).

[79] *Id.*

number of officers who have either avoided disciplinary action completely or received minimal sanctions.[80]

A situation that has received significant media attention is the ninth internal investigation in six years of Officer Dennis O'Connell.[81] O'Connell has also been sued four times for excessive force in five years.[82] Nevertheless, the department "ultimately found no wrongdoing and determined no discipline was warranted."[83] Even more surprising, O'Connell was promoted to detective in 2013.[84] While the department insists that the numerous allegations were "thoroughly investigated,"[85] it begs the question: is this a frequent occurrence or just an unfortunate phenomenon? Conversely, Wallingford had no formal complaints of misconduct between 2008 and 2012.[86] Douglas Dortenzio, the Chief of Police in Wallingford, attributes the town's low rate of excessive force litigation to department policies.[87] "Any time a Wallingford officer uses any force, they have to complete an internal form, so it is tracked . . . . If any officer were to be the subject of multiple complaints, it would be addressed to see if it is an anomaly. If not, then corrective action would ensue . . . ."[88]

Aside from the perpetuation of the police misconduct cycle, the insufficient punishments imposed on police offenders destroy the trust between civilians and officers. "How police officers are disciplined for acts of misconduct affects how the community views the police . . . . An agency that routinely fails to take proper action when discovering that its officers have committed acts of misconduct will eventually lose its credibility in the community."[89] For example, as a result of the failure of the New Haven Police Department to address the repeated allegations against Officer O'Connell, "the community has no faith in the credibility of the internal affairs division or the police department in general."[90]

The bigger problem is that continued police misconduct reinforces the

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[80] *Id.* For example, in 2010 "an officer was suspended for five days . . . for a Taser use incident, and an officer got a written reprimand for excessive force while handcuffing." *Id.*

[81] Melinda Tuhus & Thomas MacMillan, *Cop Accused of Brutality—A 9th Time*, NEW HAVEN INDEP. (Jan. 7, 2011, 3:02 PM), http://www.newhavenindependent.org/index.php/archives/entry/another_brutality_complaint_is/.

[82] Sullo, *supra* note 6.

[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Police Discipline*, *supra* note 20; *see also* Koepke, *supra* note 1, at 229 ("Civilians have . . . cited the leniency in police brutality and police perjury sentencing as factors that have generally dissipated the trust in both officers and the legal system.").

[90] Tuhus & MacMillan, *supra* note 81.

cultural divide between indigent communities and the police, "further developing the 'us vs. them' mentality."[91] Abusive officers are aware that "disadvantaged groups will not be able to afford attorneys and lack the resources to pursue lawsuits,"[92] while at the same time, the "victims are unlikely to develop respect for the law when officers abuse their lawful authority."[93] Thus, both groups are responsible for deepening the divide between them and, ultimately, for increasing violence in the community.[94] Perhaps most frightening of all is that the effects of police misconduct span generations. "[I]t makes [civilians] lose their belief in justice in this country . . . [which] is usually the greatest harm inflicted from police brutality. The bruises and cuts heal, but the disillusionment with society does not go away. The result is generations of very angry and embittered youths."[95]

III. WHAT WE ARE DOING WELL

Police misconduct is not a problem flying under the radar. Countless academic studies have been conducted and extensive government initiatives have been developed.[96] There is a consensus that "police brutality is a systemic problem evolving out of a militant police culture"[97] and a recognition that lasting police reform should be focused on addressing this "overly aggressive police culture that facilitates and rewards violent conduct."[98] So if we know what to do, why is the problem not getting better? "Often, an investigation is undertaken, followed by recommendations for sweeping change, which are ignored or halfheartedly implemented. The cycle is so habitual that one steadfast aspect of each new report is a section wondering why the recommendations in past reports haven't been carried out."[99] While police misconduct is a widespread

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[91] Koepke, *supra* note 1, at 229.

[92] *Id.* at 231.

[93] Panwala, *supra* note 40, at 639.

[94] *See id.* at 640 (noting that police brutality causes communities to "become fearful of the police and understandably fail to cooperate in stopping crime").

[95] Patton, *supra* note 43, at 803 (quoting Gordon Greenwood, Deputy Public Defender at the San Fransisco Office of the Public Defender).

[96] *See* Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 454 (2004) ("Despite all of the attention that has been paid to this issue in recent years—the news coverage, lawsuits, task forces, commissions, and congressional hearings—recurring incidents of police brutality have led many citizens to wonder why very little seems to change.").

[97] Wekili & Leus, *supra* note 21, at 172.

[98] Armacost, *supra* note 96, at 455; *see* Koepke, *supra* note 1, at 237 (proposing "[a]n '[o]verall [o]verhaul' of the [p]olice [c]ulture").

[99] Armacost, *supra* note 96, at 454–55 (quoting Terry McDermott, *Behind the Bunker Mentality*, L.A. TIMES, June 11, 2000, at A1); *cf.* Josh Blackmun & Shelby Baird, *The Shooting Cycle*, 46 CONN. L. REV. 1513, 1515 (2014) (describing how public support for gun control swells after a violent incident but quickly dissipates before lasting reform is achieved).

problem, the lack of improvement suggests that the solution should be implemented on a micro level—community by community.

There are two general avenues for reducing police misconduct in communities. The first is repairing relations between community members and police officers. The second is establishing standards for both dealing with misconduct allegations and imposing uniform penalties. It is likely that a combination of these initiatives would provide the best results.[100] The Wallingford Police Department, which has one of the lowest misconduct rates in Connecticut,[101] encourages community outreach in addition to enforcing strict policies.[102] According to Chief of Police Douglas Dortenzio, "We do training. We have community surveys . . . . We remind officers that their role is to protect rights, which sets the tone and culture for the organization."[103] Some departments are attempting to transform disciplinary action itself into outreach programs. For example, in the Houston Police Department, instead of a standard suspension without pay, the punishment is an "opportunity to participate in community projects within the jurisdiction, like doing free home repairs for persons who could not otherwise afford the labor costs in the open market."[104] This unconventional option "provides help in tangible ways to community members who most need it, thereby directly improving community-police relations."[105] The wisdom behind this type of innovation is commendable, but the implementation would likely be difficult in communities that distrust their local departments. It takes trust to build trust.

One of the most promising programs in Connecticut was an initiative sponsored by Connecticut's Juvenile Justice Advisory Committee.[106] The "mini-grant program" consisted of seven participating youth organizations across Connecticut.[107] The seven-week program offered community forums, discussions with police, and joint service projects.[108] Both the police ambassadors and the youth participants acknowledged that

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[100] For examples of promising initiatives, see U.S. DEP'T OF JUSTICE: OFFICE OF CMTY. ORIENTED POLICING SERVS., BUILDING TRUST BETWEEN THE POLICE AND THE CITIZENS THEY SERVE: AN INTERNAL AFFAIRS PROMISING PRACTICES GUIDE FOR LOCAL LAW ENFORCEMENT 3–4 (2008).

[101] *See* Sullo, *supra* note 6 (noting that Wallingford's police department had no excessive force litigation between 2008 and 2012).

[102] *See id.* (explaining that the Wallingford Police Department focuses on the community's interests).

[103] *Id.*

[104] *Police Discipline*, *supra* note 20.

[105] *Id.*

[106] *Cops, Kids Stop Giving Each Other a Bad Rap*, OFFICE OF POL'Y & MGMT. (2013), http://www.ct.gov/opm/cwp/view.asp?q= 460236.

[107] *Id.*

[108] *Id.*

"[t]here's a gap there that has to be narrowed between [them]."[109] One member explained that, before she sat down with the officers in plain clothes, she did not see police officers as people.[110] At the end of the seven weeks, Daniel Garcia, a Bridgeport officer, admitted that the experience changed his perception of youth in the community.[111] He explained that he now understands that "[t]hey are willing to talk to you . . . It's how you approach them."[112]

Because the program was so community-specific, the interaction between law enforcement officers and civilians was "intensely personal" for many of those involved.[113] In one instance, a youth participant actually "work[ed] side-by-side with a police officer who'd arrested him."[114] Due to the success of the program, Deborah Stewart, the director of the Youth Development and Training Resource Center, is encouraging other organizations to set up similar projects throughout the state.[115] This type of program—that directly addresses situations locally—may have the biggest impact. While police misconduct is not going to disappear overnight, programs like the one described above are a promising way to break stereotypes and build positive relationships between the police and indigent communities.

IV. CONCLUSION

Police misconduct is a pervasive problem. Law enforcement officers do not want to testify against each other. Prosecutors do not want to charge their peers. Police departments do not want to address the allegations. As a result, the unanswered excessive force claims create distrust among communities and law enforcement officers and reinforce cultural and racial divides. In order to combat the police misconduct cycle, indigent communities and police departments need to work together on a personal level. With the initiative sponsored by Connecticut's Juvenile Justice Advisory Committee and other outreach programs like it, Connecticut is making very real strides in rebuilding trust within local communities.

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[109] *Id.* (quoting Bridgeport Police Officer Daniel Garcia).
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.*

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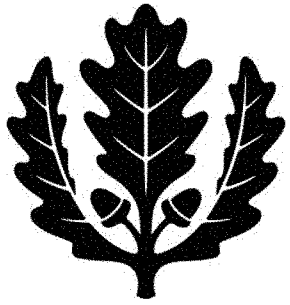
Essay

The Use of Economics in Defense of General Motors' Decision Not to Fix Faulty Ignition Switches Demonstrates that Economics Is Not A Moral Theory

DANIEL M. ISAACS

The General Motors Company recently faced problems with a faulty ignition switch. One might think that GM's handling of its ignition problem was obviously disastrous, as it killed and maimed many innocent people. Leading law and economics scholar Eric Posner disagrees. He maintains that GM's actions may have been reasonable if the cost to GM to fix the defect was less than the amount the ordinary person would pay to avoid the risk. His perspective is important and dangerous, because it will encourage similar behavior. Nonetheless, he offers an argument that on the surface seems persuasive. In this Essay I propose to show how Posner is wrong and what makes GM's actions wrong. Moreover, I offer a different model to understand how companies like GM should approach similar problems.

ESSAY CONTENTS



The Use of Economics in Defense of General Motors' Decision Not to Fix Faulty Ignition Switches Demonstrates that Economics Is Not A Moral Theory

DANIEL M. ISAACS*

> "While GM heard over and over from various quarters—including customers, dealers, the press, and their own employees—that the car's ignition switch led to moving stalls, group after group and committee after committee within GM that reviewed the issue failed to take action or acted too slowly. Although everyone had responsibility to fix the problem, nobody took responsibility."
>
> –ANTON R. VALUKAS, JENNER & BLOCK, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTOR COMPANY REGARDING IGNITION SWITCH RECALLS 2 (2014).

I. INTRODUCTION

General Motors Company (GM) engineers knew for years that the company installed faulty ignition switches in its vehicles.[1] The switches, when jostled, caused the cars to stall, leaving drivers unable to maintain their speed and disabling air bags.[2] Nevertheless, in meeting after meeting, and despite a toll of numerous deaths and many injuries, those with the authority and responsibility to fix the problem failed to act.[3]

To most people, GM's actions were clearly wrong. However, Eric

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[1] *See* ANTON R. VALUKAS, JENNER & BLOCK, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS 1–2 (2014) (stating that despite GM engineers' knowledge of problems with the ignition switch in early stages of production, the switch was approved for installation in several vehicles and was not recalled until 2014); Eric Posner, *In Defense of GM*, SLATE (Apr. 10, 2014), http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/04/in_defense_of_gm_its_risk_assessment_about_the_faulty_ignition_switch_may.html ("GM may have known of the problem as early as 2001 but believed that a design change fixed the problem.").

[2] VALUKAS, *supra* note 1, at 2; Posner, *supra* note 1.

[3] VALUKAS, *supra* note 1, at 1–2; Tom Krisher, *Death Toll from General Motors Ignition Switches Rises to 57*, ASSOCIATED PRESS (Feb. 23, 2015), http://hosted.ap.org/dynamic/stories/U/US_GM_IGNITION_SWITCH_DEATHS?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT.

Posner, a leading law and economics scholar,[4] disagrees and argues that the public may be asking the wrong question in condemning GM.[5] He maintains that his application of economics as a moral theory demonstrates that GM may have acted properly.[6] He contends that a manufacturer's decision as to whether to fix a defective component should turn on whether the cost of fixing the component exceeds what the "ordinary person" would pay to avoid the risk.[7] That is, Posner asserts that if it would cost the manufacturer more than the amount the ordinary person would pay to avoid the risk, the manufacturer would be morally justified in keeping its defective product in the stream of commerce.[8]

I disagree, and maintain that economics is a poor tool for making normative decisions like the ones GM faced. Economics does have the advantage of giving definitive answers to difficult questions, and Posner's argument has some facial appeal. The problem is that he and GM are wrong and other businesses may be following GM's lead in using economics to make normative decisions. That is why Posner's perspective is so important and yet dangerous. GM's lawyers say that everyone was responsible, but no one took action.[9] However, economics is not a measure of human responsibility to others or to society and it is, therefore, a poor tool for making the normative decisions that GM faced.

II. POSNER'S ECONOMIC DEFENSE OF GM

Posner argues that we should not be so quick to condemn GM for its failure to recall its cars with faulty ignition systems.[10] Based on economic theory, he maintains that GM may have acted properly.[11] While Posner maintains that it is hard to know whether GM acted reasonably or not, his economic argument as to how to analyze the question is flawed.[12] His argument is based on the hypothetical amount that people would pay to

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[4] *Eric Posner*, U. CHI. L. SCH., http://www.law.uchicago.edu/faculty /posner-e (last visited Feb. 26, 2015) ("Eric Posner is [a] Kirkland and Ellis Distinguished Service Professor of Law . . . . and a member of the American Law Institute."). He is also the son of Richard Posner, an earlier leader of the law and economics movement. Simon Kupi, *Book Notes: The Perils of Global Legalism, by Eric A. Posner*, 49 OSGOODE HALL L.J. 403, 403 (2011) (reviewing ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM).

[5] Posner, *supra* note 1.

[6] *Id.*

[7] *Id.* Of course, GM has since recalled vehicles with faulty ignition switches. *See, e.g.*, *GM Announces Six Safety Recalls*, GM NEWS (June 30, 2014), http://media.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/us/en/2014/Jun/0630-recall.html.

[8] Posner, *supra* note 1.

[9] VALUKAS, *supra* note 1, at 2.

[10] Posner, *supra* note 1.

[11] *Id.*

[12] *Id.*

avoid the risk of death as a result of GM's faulty ignition system.[13] Posner also argues that the public should not focus on the claim that it would have cost GM fifty-seven cents per car to fix the ignition switch defect.[14] Instead, he calculates that the risk of being killed as a result of a faulty ignition switch is extraordinarily low, ".0000007 . . . . [t]hat's less than one in a million."[15] He reasons that during the same time period the defect increased the risk of death in 2002 "(by .0000007) from .0000567 [in other GM cars] to .0000574."[16] He then applied:

> a concept known as the "value of a statistical life," which is derived from studies of how much people need to be paid in order to accept a slightly greater risk of death. . . . The current standard is $7 million. The $7 million figure implies that an ordinary person would be willing to pay about $5 to avoid a .0000007 risk of death in a given year.[17]

Doing the math, Posner calculates that GM "should have fixed the ignition switch if the cost was less than $5 per car, multiplied by the number of years left in the car's useful life."[18] Based on the value of a statistical life analysis, Posner argues that GM should have paid "$40, or $5 per car multiplied by the average eight years of remaining time on the road."[19] GM claims that in 2007 it would have cost $50 to fix each car, so

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[13] Posner recognizes that:

> GM may have known of the problem as early as 2001 but believed that a design change fixed the problem. It revisited the issue in 2004 after receiving a complaint from a customer that the vehicle 'can be keyed off with knee while driving.' In 2005 engineers concluded that possible fixes were too costly or inadequate, and later GM told dealers to tell customers to remove heavy items from key rings. Also in 2005, a fatal accident occurred that may have been caused by the ignition switch problem. In 2006 GM began installing modified ignition switches in 2007 models. Over the ensuing years, more fatal accidents occurred and GM conducted additional investigations.

Id. However, GM did not recall vehicles containing faulty ignition switches until February 2014. Tanya Basu, *Timeline: A History of GM's Ignition Switch Defect*, NPR (Mar. 31, 2014), http://www.npr.org/2014/03/31/297158876/timeline-a-history-of-gms-ignition-switch-defect (setting forth a more detailed timeline concerning GM's knowledge of the ignition switch defect, which appears to have stretched back to 2001).

[14] Posner, *supra* note 1. It should be noted, however, that GM was aware of the risk at least as early as 2005 but "reject[ed] a proposal to fix the problem because it would be too costly and take too long[,]" which is akin to the analysis that Ford conducted with respect to the Pinto. *See* Basu, *supra* note 13.

[15] Posner, *supra* note 1.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* For a similar analysis involving the infamous Ford Pinto fires, see Dennis A. Gioia, *Pinto Fires and Personal Ethics: A Script Analysis of Missed Opportunities*, 11 J. BUS. ETHICS 379, 383 (1992).

Posner concluded that although "it's close . . . if it cost $50 to repair an ignition switch, then GM acted reasonably by saving this money rather than recalling cars for the sake of a benefit of $40."[20]

III. POSNER'S ECONOMIC ARGUMENT IN DEFENSE OF GM IS FLAWED

Posner's argument with respect to the proper moral theory GM managers should have applied in determining whether to recall the faulty ignition systems is flawed for three main reasons. First, with respect to a known defect, like the one at issue at GM, the analysis should not be based on the amount "the ordinary person" would pay to avoid the risk compared with the cost to the employer to make the repair. GM was not dealing with random events. Instead, Posner is considering a known defect that manifested in personal injuries and deaths. The rate of injury and cost of repair are immaterial when the actions at issue are known ones, as they were in the case of GM's actions concerning the faulty ignition switch. For example, if I were to swing a bat in a public space (even if I were blindfolded) I would not know who I am going to hit, but eventually, I am likely to injure someone. When I do, factors such as my costs of not swinging the bat, the amount of time people are in the area, or the amount of money people would pay to avoid the risk of being hit are irrelevant to the question of whether I am morally justified in swinging the bat. Once GM knew that the ignition switch was defective, and that it could cause the airbags to fail to deploy, Posner's cost-based analysis is, at best, a barometer of the improper behavior—a measure of how bad the action is—but it is irrelevant to the moral questions the company faced because he offers a measure that begins above the threshold line of unethical behavior. As a matter of business ethics, if a company knows that a component is defective, and is on notice that the defect caused injury, it should fix the defect—or not sell the product—not balance the cost of fixing the defect against the amount the average person would pay to avoid the risk so as to see whether it should do so as Posner advocates.

Second, Posner does not claim that GM actually conducted a hypothetical "value of a statistical life" analysis with respect to the GM customers who purchased vehicles with faulty ignition switches; and he recognizes that his calculations exclude the costs of personal injuries, the damage to property, and the possibility that GM knew about the defect earlier than it claims.[21] Similarly, it is odd that Posner accepts 2007 as the date to conduct the risk benefit analysis, when GM appears to have known about the problem much earlier.[22]

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[20] Posner, *supra* note 1.

[21] *Id.*

[22] *See* Basu, *supra* note 13 (providing a detailed timeline of GM's actions).

Third, no one appears to have actually disclosed the risk of death or injury to GM's customers before they purchased their vehicles or actually paid them to avoid the risk. Specifically, it does not appear that GM told potential purchasers that their cars may stall in the middle of an intersection, that their airbags would not deploy, and that GM may have known that a faulty ignition switch would cause injuries or death to some of them and that they, for a price, could avoid the risk by purchasing a product that did not contain the defect.[23]

Relying on Posner's economic theory is akin to holding someone to a hypothetical contract that provides that where the cost to the company of repairing a known defect is less than the amount the consumer would pay to avoid the risk, the manufacturer would have no duty to make the repair. No one would enter into such a foolish bargain. The costs of making the repairs constitute a moral burden for the manufacturer to bear, not the customer. More generally, a problem with hypothetical contracts is that while they may be useful in modeling rules for a society,[24] they are not the same as real contracts, and a person should not be bound to a contract that he or she never entered into because the force of a contract comes from the will of the parties.[25] The buyers could not have manifested assent to the purchase of cars with faulty ignition systems because they were not offered such a contract, they did not accept it, they did not receive consideration for it, and they lacked the necessary facts—which were known by GM—to make an informed decision.[26] Professor Ronald Dworkin reasoned that: "[a] hypothetical contract is not simply a pale form of an actual contract; it is no contract at all . . . . hypothetical contracts do not supply an independent argument for the fairness of enforcing their terms."[27] The fairness of their terms must come from the surrounding events, not from some hypothetical agreement.[28]

Posner does not argue that GM and its customers actually entered into a hypothetical contract that provided that GM would only have to recall a defective part if the costs of doing so were less than the amount a hypothetical customer would pay to avoid the increased risk of driving the

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[23] *Id.*

[24] *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).

[25] Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 485 (2008).

[26] *See* Ronald Dworkin, *The Original Position*, 40 U. CHI. L. REV. 500, 501 (1973) (discussing how terms of a contract cannot be enforced against a person when there was only "hypothetical agreement" to be bound by that contract).

[27] *Id.*

[28] *Id.* Posner does say that if GM knew about the increased risk earlier, or "if it turns out that more deaths can be traced to the ignition switch defect, then GM looks worse." Posner, *supra* note 1. He also recognized that he "ignored the cost of injuries and damaged property, which would change the cost-benefit analysis." *Id.*

vehicle.[29] Instead, he seems to imply that if rational consumers and manufacturers were to consider the situations in which customers and GM were to negotiate concerning the point when a recall was required, they would necessarily select the very point that efficiency theories identify, and that they should be bound by that hypothetical agreement.[30] However, no one did, and no one would enter into such an agreement.[31] As noted above, to the extent that GM knew of the defective ignition switches, it was not dealing with accidental events. Instead, GM and its customers were dealing with what appears to have been GM's intentional decision to keep the product in the stream of commerce knowing that it injured some people. If no reasonable buyer would enter into such a contract, the hypothetical contract that Posner implicitly proposes would have no

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[29] *Id.*

[30] *Compare* Steven Shavell, *Why Breach of Contract May Not Be Immoral Given the Incompleteness of Contracts*, 107 MICH. L. REV. 1569, 1570 (2009) (arguing that people should be bound by hypothetical contracts because they generally contain what people would reasonably have believed was contained in a more detailed contract), *with* Arthur Kuflik, *Hypothetical Consent*, *in* THE ETHICS OF CONSENT THEORY AND PRACTICE 132–62 (Franklin G. Miller & Alan Wertheimer eds., 2009) (arguing against the enforcement of hypothetical contracts).

[31] In contrast, a report that GM asked its own outside attorney to prepare (dated a month after Posner's article) paints the picture in substantially more haunting terms:

> In the fall of 2002, General Motors ("GM") personnel made a decision that would lead to catastrophic results—a GM engineer chose to use an ignition switch in certain cars that was so far below GM's own specifications that it failed to keep the car powered on in circumstances that drivers could encounter, resulting in moving stalls on the highway as well as loss of power on rough terrain a driver might confront moments before a crash. Problems with the switch's ability to keep the car powered on were known within GM's engineering ranks at the earliest stages of its production, although the circumstances in which the problems would occur were perceived to be rare. . . . The failure of the switch meant that drivers were without airbag protection at the time they needed it most. This failure, combined with others documented below, led to devastating consequences: GM has identified at least 54 frontal-impact crashes, involving the deaths of more than a dozen individuals, in which the airbags did not deploy as a possible result of the faulty ignition switch.
>
> The below-specification switch approved in 2002 made its way into a variety of vehicles, including the Chevrolet Cobalt. Yet GM did not issue a recall for the Cobalt and other cars until 2014, and even then the initial recall was incomplete. GM personnel's inability to address the ignition switch problem for over 11 years is a history of failures.
>
> While GM heard over and over from various quarters—including customers, dealers, the press, and their own employees—that the car's ignition switch led to moving stalls, group after group and committee after committee within GM that reviewed the issue failed to take action or acted too slowly. Although everyone had responsibility to fix the problem, nobody took responsibility. It was an example of what one top executive described as the "GM nod," when everyone nods in agreement to a proposed plan of action, but then leaves the room and does nothing.

VALUKAS, *supra* note 1, at 1–2.

persuasive or moral force.[32]

I further maintain that the concept of integrity, as addressed by Bernard Williams,[33] provides an independent argument against Posner's economic argument. Williams criticizes utilitarianism based on the idea that our personal dreams and desires matter, and that choices cannot be viewed dispassionately for the benefit of all by the individual to whom the decision matters most. This is because who we are as individuals matters when we make decisions.[34] A frequently used hypothetical demonstrates the point. You take a boat out from a volcanic island for the day and on the way back you notice that the volcano is about to erupt. You can save five people on one side of the island or one person on the other side (and there is no time for you to pick up the five and then get the one, nor is there a way for the one to get to the five or the five to get to the one). The problem is that the "one" is your life partner, of whom you are very fond. What is the right thing to do? The point is not that you should save the five or the one, but that the decision maker matters in ethical questions. By its own terms the economic analysis offered by Posner leaves out the decision-makers because it does not offer them the opportunity to pay an additional amount to eliminate the risk and appears to have failed to provide those human beings with sufficient information to exercise their freedom to decline to purchase the GM vehicle based on known risks.

IV. ACCORDING TO CLASSICAL LIBERALISM, THE ISSUE OF PRINCIPLE FOR GM IS ONE OF DISCLOSURE AND AVOIDANCE OF FRAUD, WHICH IS INSUFFICIENT

Among the strongest reasons for rejecting Posner's economic arguments in favor of GM comes from "an unexpected friend," Milton Friedman[35] and classical liberalism.[36] Friedman tempered wealth maximization with certain responsibilities. Although he argued that managers have no social responsibility other than to maximize profits for the corporation's owners (who he identified as the shareholders), he did so

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[32] *See* JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 182 (1990) (arguing that it is not the hypothetical contract that binds the parties but rather the strength of the reasons given for them to have actually entered into the agreement at issue); Dworkin, *supra* note 26, at 501 ("[H]ypothetical contracts do not supply an independent argument for the fairness of enforcing their terms.").

[33] *See* J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM FOR AND AGAINST 108, 116–17 (1973).

[34] *Id.* at 116–17.

[35] Milton Friedman, of course, was one of the leaders of the free market economics school of thought at the University of Chicago, where Eric Posner is now a Professor.

[36] *See generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962) (discussing the concept of laissez-fair economics).

with a caveat.[37] He cautioned that managers must maximize profits so long as they comply with the law and avoid fraudulent actions.[38] So, Friedman would have also considered whether the actions at issue amounted to "deception or fraud" and asked whether they conformed to the "basic rules of the society, both those embodied in law and those embodied in ethical custom."[39]

By way of analogy, in the context of Friedman's analysis of the Ford Pinto defective fuel tank, Friedman maintained that the question of principle did not involve a cost benefit analysis because such an approach would merely result in a useless debate as to whether the manufacturer picked the right numbers.[40] Instead, he maintained that the question of principle involved whether Ford should have been required to advise Pinto drivers that it made the car $X cheaper and in doing so increased the risk of death or injury by Y%.[41] He reasoned that absent such a warning, the manufacturer could be subject to liability and that such a result "was a desirable part of the market."[42] It follows that, according to Friedman, Ford—and, by analogy, GM—needed to disclose that they made their vehicles cost $X less than they would have cost had they designed the car differently and that the risk of dying or being injured in the vehicles increased Y%.[43]

A warning would have improved GM's moral position, but warnings—and particularly GM's warnings—are inadequate for several reasons. Generally, the idea of warnings alone is problematic because they are likely to be buried, insufficiently detailed, legally impractical for the manufacturer to state, disregarded by the average person, and most fundamentally, they do not address the underlying wrong.[44] Additionally, GM does not appear to have fully disclosed, let alone obtained consent of consumers, or paid them to undertake the increased risk.[45] It is also not

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[37] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970.

[38] *Id.* It is questionable whether GM followed this directive. *See* Basu, *supra* note 13 (noting that in March 2005, "GM reject[ed] a proposal to fix the problem because it would be too costly and take too long"); *see also id.* (claiming that June 2013 was the date when "[a] deposition by a Cobalt program engineer [said] the company made a 'business decision not to fix this problem,' raising questions of whether GM consciously decided to launch the Cobalt despite knowing of a defect").

[39] Friedman, *supra* note 37. Friedman identifies "freedom as the ultimate goal and the individual as the ultimate entity in the society." FRIEDMAN, *supra* note 36, at 5. This view seems to be the source of his requirement that corporations obey the law and avoid fraud.

[40] *See* pplholdthepower, *Milton Friedman Puts a Young Michael Moore in His Place*, YOUTUBE (Feb. 8, 2013), https://www.youtube.com/watch?v=VdyKAIhLdNs (debating the merits of a cost-benefit analysis).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] Basu, *supra* note 13; Gioia, *supra* note 19, at 387.

[45] Basu, *supra* note 13.

clear whether a non-defective ignition switch would have cost more than a defective one. Indeed, if the costs are the same, Posner's argument may fail by its own terms. That is so because if managers are going to conduct an economic analysis it needs to be performed at the time of purchase, as that is when the consumer is supposedly considering whether to accept the risk. According to Posner, the numbers at issue at that point are the amount the customer would pay to avoid the risk and the difference in cost between a non-defective component and a defective one.[46] If the customer would pay $40 to avoid the risk, and the cost of a non-defective product was no more than the cost of a defective one, then Posner's argument fails on its own terms.

The problems for economic theory as applied to the automobile defect cases run even deeper. The underlying assumption of Adam Smith's invisible hand theory[47] is that everyone has full information and that where everyone has full information the market will operate efficiently.[48] Yet, Posner does not require full disclosure or any disclosure to the consumer.[49] The company is the one that makes the decision for the consumer as to how much risk she should bear based on whether the cost of fixing the defect is more or less than the amount a hypothetical consumer would pay to avoid the risk and the cost of making the repair.[50] In this way, the consumer does not have full information. As such, Posner's economic theory is internally inconsistent.

V. SEEKING A SOLUTION

For a moral theory to avoid monstrous results, its rules must yield results consistent with our moral intuitions of justice.[51] Although deontological principles may sometimes lack the clarity of an economic formula, sometimes one must think after applying company scripts.[52] For Dennis Gioia, the Ford recall manager before the recall of the Pinto and the catastrophic deaths of four teenage girls, the focus, in retrospect, is based

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[46] Posner, *supra* note 1.

[47] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 456 (R.H. Campbell et al. eds., 1976).

[48] *See id.* at 23, 130 (describing how merchant prices relate to information, and comparing information to success overall in the market).

[49] Posner, *supra* note 1.

[50] *Id.*

[51] *See generally* Richard Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1990). Friedman did not advocate disclosure because he favored consumers over shareholders (he did not), but rather because he believed in maximizing individual freedom. Because Posner's economic analysis would allow GM to withhold facts material to consumers' decisions to purchase the product based on considerations of efficiency, the corporation rejects the ability of individuals to make free choices and thereby violates the principles that underlie classical liberalism. *Id.*

[52] Gioia, *supra* note 19, at 387.

on other principles.[53] He believes that he should have recalled the vehicle despite the economic analyses on the ground that some things are just wrong.[54] It follows that to the extent that GM knew that its ignition switches were defective and likely to cause some injuries as a result of the defect, it had a responsibility to correct the defect. Posner's economic analysis is irrelevant to the question of whether we want to live in a society where companies can knowingly place defective products in the stream of commerce with the knowledge that people are likely to and are actually being harmed as a result—even if the percentage of people hurt out of the total number of customers is small.[55] The following example highlights the point, albeit somewhat dramatically. To someone forced to play Russian Roulette, rates and chances of death are irrelevant to the question of whether it was wrong for others to force them to play. Death in the game is certain for at least one person; the questions of who and when are unknown but are nearly irrelevant to the question of whether the directors of the game should remove the bullet (or, in the case of GM, the defective product).

As Gioia recognizes, he must live with the likelihood that his decision (and the decisions of others at Ford) to follow a cost benefit analysis caused the death of innocent people the manufacturer had a duty to protect.[56] It follows that the issue is not about assessment of economic risks. The question is about the autonomy and rights of human beings to not be subjected to risks manufacturers know to exist. Therefore, to determine if GM had a duty to fix the faulty ignition switches, we should not rely upon economic rules that risk human life and injury based on a comparison of costs and benefits. Instead, we must consider the facts of each case and determine what the company knew, when it knew it, and what it did with the information that it had.

VI. CONCLUSION

To the extent that GM knowingly left cars with defective ignition switches that it knew could cause cars to stall and air bags to fail to deploy in the stream of commerce, GM's actions were morally wrong. GM cannot be excused from those moral wrongs based upon the vast number of

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[53] *Id* at 380, 382. Gioia critically analyzed Ford's cost benefit analysis with respect to its decision whether to recall the Pinto. *Id.* at 383–84. The Pinto, of course, had a defect in its design that made it more likely that its fuel tank would rupture causing the car to explode when hit from behind. *Id.* at 381.

[54] *Id.* at 382.

[55] Richard Posner sought to distinguish utilitarianism and other moral theories and defend wealth maximization as a basis for making legal decisions on the grounds that it avoids some monstrous results of utilitarianism. *See generally* Posner, *Utilitarianism, Economics, and Legal Theory*, *supra* note 51.

[56] Gioia, *supra* note 19, at 382.

vehicles it manufactures and the low risk of harm to individual drivers. It may be that the chances of winning a lottery are low, but people play because they know someone is going to win. Posner essentially argues that the chances of your car being the one with the faulty ignition switch that malfunctions at a time and place that you cannot safely get off the road may be too low for GM to care about. But I maintain that where GM knows of the defect and that human beings have been injured as a result of it, GM must care. To the extent that concern for profits or application of Posner's economic theories might permit a manufacturer not to care, it may maximize profits, but it cannot be said to be acting morally.

In short, Posner's implicit proposition that there should be no consideration of happiness, human flourishing, right and wrong, or fairness or justice (other than a cost benefit analysis) in connection with an evaluation of ethical issues in business—like GM's question of whether to recall defective ignition systems—is inconsistent with the moral intuitions of most people. Certainly, it is far from clear that the "good life"[57] is better approached from the perspective of wealth than from happiness or personal autonomy. Richard Cory had all the money a man could want.[58]

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[57] R. SOLOMON, MORALITY AND THE GOOD LIFE: AN INTRODUCTION TO ETHICS THROUGH CLASSICAL SOURCES 1–10 (2009).

[58] EDWIN ARLINGTON ROBINSON, COLLECTED POEMS (1922) (highlighting that considerations other than economic ones matter most Edwin Arlington Robinson wrote *Richard Cory*).

> *Whenever Richard Cory went down town,*
> *We people on the pavement looked at him:*
> *He was a gentleman from sole to crown,*
> *Clean favored and imperially slim.*
>
> *And he was always quietly arrayed,*
> *And he was always human when he talked,*
> *But still he fluttered pulses when he said,*
> *"Good-morning," and he glittered when he walked.*
>
> *And he was rich—yes, richer than a king—*
> *And admirably schooled in every grace:*
> *In fine, we thought that he was everything*
> *To make us wish that we were in his place.*
>
> *So on we worked, and waited for the light,*
> *And went without the meat and cursed the bread;*
> *And Richard Cory, one calm summer night,*
> *Went home and put a bullet through his head.*

Id.

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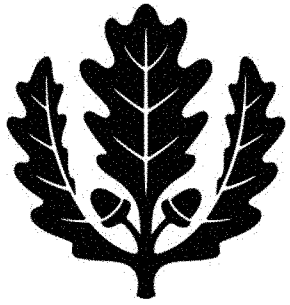
Essay

The Use of Economics in Defense of General Motors' Decision Not to Fix Faulty Ignition Switches Demonstrates that Economics Is Not A Moral Theory

DANIEL M. ISAACS

The General Motors Company recently faced problems with a faulty ignition switch. One might think that GM's handling of its ignition problem was obviously disastrous, as it killed and maimed many innocent people. Leading law and economics scholar Eric Posner disagrees. He maintains that GM's actions may have been reasonable if the cost to GM to fix the defect was less than the amount the ordinary person would pay to avoid the risk. His perspective is important and dangerous, because it will encourage similar behavior. Nonetheless, he offers an argument that on the surface seems persuasive. In this Essay I propose to show how Posner is wrong and what makes GM's actions wrong. Moreover, I offer a different model to understand how companies like GM should approach similar problems.

ESSAY CONTENTS



The Use of Economics in Defense of General Motors' Decision Not to Fix Faulty Ignition Switches Demonstrates that Economics Is Not A Moral Theory

DANIEL M. ISAACS*

> "While GM heard over and over from various quarters—including customers, dealers, the press, and their own employees—that the car's ignition switch led to moving stalls, group after group and committee after committee within GM that reviewed the issue failed to take action or acted too slowly. Although everyone had responsibility to fix the problem, nobody took responsibility."
>
> –ANTON R. VALUKAS, JENNER & BLOCK, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTOR COMPANY REGARDING IGNITION SWITCH RECALLS 2 (2014).

I. INTRODUCTION

General Motors Company (GM) engineers knew for years that the company installed faulty ignition switches in its vehicles.[1] The switches, when jostled, caused the cars to stall, leaving drivers unable to maintain their speed and disabling air bags.[2] Nevertheless, in meeting after meeting, and despite a toll of numerous deaths and many injuries, those with the authority and responsibility to fix the problem failed to act.[3]

To most people, GM's actions were clearly wrong. However, Eric

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* Assistant Professor of Legal Studies, Fox School of Business.

[1] *See* ANTON R. VALUKAS, JENNER & BLOCK, REPORT TO BOARD OF DIRECTORS OF GENERAL MOTORS COMPANY REGARDING IGNITION SWITCH RECALLS 1–2 (2014) (stating that despite GM engineers' knowledge of problems with the ignition switch in early stages of production, the switch was approved for installation in several vehicles and was not recalled until 2014); Eric Posner, *In Defense of GM*, SLATE (Apr. 10, 2014), http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/04/in_defense_of_gm_its_risk_assessment_about_the_faulty_ignition_switch_may.html ("GM may have known of the problem as early as 2001 but believed that a design change fixed the problem.").

[2] VALUKAS, *supra* note 1, at 2; Posner, *supra* note 1.

[3] VALUKAS, *supra* note 1, at 1–2; Tom Krisher, *Death Toll from General Motors Ignition Switches Rises to 57*, ASSOCIATED PRESS (Feb. 23, 2015), http://hosted.ap.org/dynamic/stories/U/US_GM_IGNITION_SWITCH_DEATHS?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT.

Posner, a leading law and economics scholar,[4] disagrees and argues that the public may be asking the wrong question in condemning GM.[5] He maintains that his application of economics as a moral theory demonstrates that GM may have acted properly.[6] He contends that a manufacturer's decision as to whether to fix a defective component should turn on whether the cost of fixing the component exceeds what the "ordinary person" would pay to avoid the risk.[7] That is, Posner asserts that if it would cost the manufacturer more than the amount the ordinary person would pay to avoid the risk, the manufacturer would be morally justified in keeping its defective product in the stream of commerce.[8]

I disagree, and maintain that economics is a poor tool for making normative decisions like the ones GM faced. Economics does have the advantage of giving definitive answers to difficult questions, and Posner's argument has some facial appeal. The problem is that he and GM are wrong and other businesses may be following GM's lead in using economics to make normative decisions. That is why Posner's perspective is so important and yet dangerous. GM's lawyers say that everyone was responsible, but no one took action.[9] However, economics is not a measure of human responsibility to others or to society and it is, therefore, a poor tool for making the normative decisions that GM faced.

II. POSNER'S ECONOMIC DEFENSE OF GM

Posner argues that we should not be so quick to condemn GM for its failure to recall its cars with faulty ignition systems.[10] Based on economic theory, he maintains that GM may have acted properly.[11] While Posner maintains that it is hard to know whether GM acted reasonably or not, his economic argument as to how to analyze the question is flawed.[12] His argument is based on the hypothetical amount that people would pay to

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[4] *Eric Posner*, U. CHI. L. SCH., http://www.law.uchicago.edu/faculty /posner-e (last visited Feb. 26, 2015) ("Eric Posner is [a] Kirkland and Ellis Distinguished Service Professor of Law . . . . and a member of the American Law Institute."). He is also the son of Richard Posner, an earlier leader of the law and economics movement. Simon Kupi, *Book Notes: The Perils of Global Legalism, by Eric A. Posner*, 49 OSGOODE HALL L.J. 403, 403 (2011) (reviewing ERIC A. POSNER, THE PERILS OF GLOBAL LEGALISM).

[5] Posner, *supra* note 1.

[6] *Id.*

[7] *Id.* Of course, GM has since recalled vehicles with faulty ignition switches. *See, e.g.*, *GM Announces Six Safety Recalls*, GM NEWS (June 30, 2014), http://media.gm.com/media/us/en/gm/news.detail.html/content/Pages/news/us/en/2014/Jun/0630-recall.html.

[8] Posner, *supra* note 1.

[9] VALUKAS, *supra* note 1, at 2.

[10] Posner, *supra* note 1.

[11] *Id.*

[12] *Id.*

avoid the risk of death as a result of GM's faulty ignition system.[13] Posner also argues that the public should not focus on the claim that it would have cost GM fifty-seven cents per car to fix the ignition switch defect.[14] Instead, he calculates that the risk of being killed as a result of a faulty ignition switch is extraordinarily low, ".0000007 . . . . [t]hat's less than one in a million."[15] He reasons that during the same time period the defect increased the risk of death in 2002 "(by .0000007) from .0000567 [in other GM cars] to .0000574."[16] He then applied:

> a concept known as the "value of a statistical life," which is derived from studies of how much people need to be paid in order to accept a slightly greater risk of death. . . . The current standard is $7 million. The $7 million figure implies that an ordinary person would be willing to pay about $5 to avoid a .0000007 risk of death in a given year.[17]

Doing the math, Posner calculates that GM "should have fixed the ignition switch if the cost was less than $5 per car, multiplied by the number of years left in the car's useful life."[18] Based on the value of a statistical life analysis, Posner argues that GM should have paid "$40, or $5 per car multiplied by the average eight years of remaining time on the road."[19] GM claims that in 2007 it would have cost $50 to fix each car, so

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[13] Posner recognizes that:

> GM may have known of the problem as early as 2001 but believed that a design change fixed the problem. It revisited the issue in 2004 after receiving a complaint from a customer that the vehicle 'can be keyed off with knee while driving.' In 2005 engineers concluded that possible fixes were too costly or inadequate, and later GM told dealers to tell customers to remove heavy items from key rings. Also in 2005, a fatal accident occurred that may have been caused by the ignition switch problem. In 2006 GM began installing modified ignition switches in 2007 models. Over the ensuing years, more fatal accidents occurred and GM conducted additional investigations.

Id. However, GM did not recall vehicles containing faulty ignition switches until February 2014. Tanya Basu, *Timeline: A History of GM's Ignition Switch Defect*, NPR (Mar. 31, 2014), http://www.npr.org/2014/03/31/297158876/timeline-a-history-of-gms-ignition-switch-defect (setting forth a more detailed timeline concerning GM's knowledge of the ignition switch defect, which appears to have stretched back to 2001).

[14] Posner, *supra* note 1. It should be noted, however, that GM was aware of the risk at least as early as 2005 but "reject[ed] a proposal to fix the problem because it would be too costly and take too long[,]" which is akin to the analysis that Ford conducted with respect to the Pinto. *See* Basu, *supra* note 13.

[15] Posner, *supra* note 1.

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.* For a similar analysis involving the infamous Ford Pinto fires, see Dennis A. Gioia, *Pinto Fires and Personal Ethics: A Script Analysis of Missed Opportunities*, 11 J. BUS. ETHICS 379, 383 (1992).

Posner concluded that although "it's close . . . if it cost $50 to repair an ignition switch, then GM acted reasonably by saving this money rather than recalling cars for the sake of a benefit of $40."[20]

III. POSNER'S ECONOMIC ARGUMENT IN DEFENSE OF GM IS FLAWED

Posner's argument with respect to the proper moral theory GM managers should have applied in determining whether to recall the faulty ignition systems is flawed for three main reasons. First, with respect to a known defect, like the one at issue at GM, the analysis should not be based on the amount "the ordinary person" would pay to avoid the risk compared with the cost to the employer to make the repair. GM was not dealing with random events. Instead, Posner is considering a known defect that manifested in personal injuries and deaths. The rate of injury and cost of repair are immaterial when the actions at issue are known ones, as they were in the case of GM's actions concerning the faulty ignition switch. For example, if I were to swing a bat in a public space (even if I were blindfolded) I would not know who I am going to hit, but eventually, I am likely to injure someone. When I do, factors such as my costs of not swinging the bat, the amount of time people are in the area, or the amount of money people would pay to avoid the risk of being hit are irrelevant to the question of whether I am morally justified in swinging the bat. Once GM knew that the ignition switch was defective, and that it could cause the airbags to fail to deploy, Posner's cost-based analysis is, at best, a barometer of the improper behavior—a measure of how bad the action is—but it is irrelevant to the moral questions the company faced because he offers a measure that begins above the threshold line of unethical behavior. As a matter of business ethics, if a company knows that a component is defective, and is on notice that the defect caused injury, it should fix the defect—or not sell the product—not balance the cost of fixing the defect against the amount the average person would pay to avoid the risk so as to see whether it should do so as Posner advocates.

Second, Posner does not claim that GM actually conducted a hypothetical "value of a statistical life" analysis with respect to the GM customers who purchased vehicles with faulty ignition switches; and he recognizes that his calculations exclude the costs of personal injuries, the damage to property, and the possibility that GM knew about the defect earlier than it claims.[21] Similarly, it is odd that Posner accepts 2007 as the date to conduct the risk benefit analysis, when GM appears to have known about the problem much earlier.[22]

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[20] Posner, *supra* note 1.

[21] *Id.*

[22] *See* Basu, *supra* note 13 (providing a detailed timeline of GM's actions).

Third, no one appears to have actually disclosed the risk of death or injury to GM's customers before they purchased their vehicles or actually paid them to avoid the risk. Specifically, it does not appear that GM told potential purchasers that their cars may stall in the middle of an intersection, that their airbags would not deploy, and that GM may have known that a faulty ignition switch would cause injuries or death to some of them and that they, for a price, could avoid the risk by purchasing a product that did not contain the defect.[23]

Relying on Posner's economic theory is akin to holding someone to a hypothetical contract that provides that where the cost to the company of repairing a known defect is less than the amount the consumer would pay to avoid the risk, the manufacturer would have no duty to make the repair. No one would enter into such a foolish bargain. The costs of making the repairs constitute a moral burden for the manufacturer to bear, not the customer. More generally, a problem with hypothetical contracts is that while they may be useful in modeling rules for a society,[24] they are not the same as real contracts, and a person should not be bound to a contract that he or she never entered into because the force of a contract comes from the will of the parties.[25] The buyers could not have manifested assent to the purchase of cars with faulty ignition systems because they were not offered such a contract, they did not accept it, they did not receive consideration for it, and they lacked the necessary facts—which were known by GM—to make an informed decision.[26] Professor Ronald Dworkin reasoned that: "[a] hypothetical contract is not simply a pale form of an actual contract; it is no contract at all . . . . hypothetical contracts do not supply an independent argument for the fairness of enforcing their terms."[27] The fairness of their terms must come from the surrounding events, not from some hypothetical agreement.[28]

Posner does not argue that GM and its customers actually entered into a hypothetical contract that provided that GM would only have to recall a defective part if the costs of doing so were less than the amount a hypothetical customer would pay to avoid the increased risk of driving the

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[23] *Id.*

[24] *See generally* JOHN RAWLS, A THEORY OF JUSTICE (1971).

[25] Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 PHIL. REV. 481, 485 (2008).

[26] *See* Ronald Dworkin, *The Original Position*, 40 U. CHI. L. REV. 500, 501 (1973) (discussing how terms of a contract cannot be enforced against a person when there was only "hypothetical agreement" to be bound by that contract).

[27] *Id.*

[28] *Id.* Posner does say that if GM knew about the increased risk earlier, or "if it turns out that more deaths can be traced to the ignition switch defect, then GM looks worse." Posner, *supra* note 1. He also recognized that he "ignored the cost of injuries and damaged property, which would change the cost-benefit analysis." *Id.*

vehicle.[29] Instead, he seems to imply that if rational consumers and manufacturers were to consider the situations in which customers and GM were to negotiate concerning the point when a recall was required, they would necessarily select the very point that efficiency theories identify, and that they should be bound by that hypothetical agreement.[30] However, no one did, and no one would enter into such an agreement.[31] As noted above, to the extent that GM knew of the defective ignition switches, it was not dealing with accidental events. Instead, GM and its customers were dealing with what appears to have been GM's intentional decision to keep the product in the stream of commerce knowing that it injured some people. If no reasonable buyer would enter into such a contract, the hypothetical contract that Posner implicitly proposes would have no

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[29] *Id.*

[30] *Compare* Steven Shavell, *Why Breach of Contract May Not Be Immoral Given the Incompleteness of Contracts*, 107 MICH. L. REV. 1569, 1570 (2009) (arguing that people should be bound by hypothetical contracts because they generally contain what people would reasonably have believed was contained in a more detailed contract), *with* Arthur Kuflik, *Hypothetical Consent*, *in* THE ETHICS OF CONSENT THEORY AND PRACTICE 132–62 (Franklin G. Miller & Alan Wertheimer eds., 2009) (arguing against the enforcement of hypothetical contracts).

[31] In contrast, a report that GM asked its own outside attorney to prepare (dated a month after Posner's article) paints the picture in substantially more haunting terms:

> In the fall of 2002, General Motors ("GM") personnel made a decision that would lead to catastrophic results—a GM engineer chose to use an ignition switch in certain cars that was so far below GM's own specifications that it failed to keep the car powered on in circumstances that drivers could encounter, resulting in moving stalls on the highway as well as loss of power on rough terrain a driver might confront moments before a crash. Problems with the switch's ability to keep the car powered on were known within GM's engineering ranks at the earliest stages of its production, although the circumstances in which the problems would occur were perceived to be rare. . . . The failure of the switch meant that drivers were without airbag protection at the time they needed it most. This failure, combined with others documented below, led to devastating consequences: GM has identified at least 54 frontal-impact crashes, involving the deaths of more than a dozen individuals, in which the airbags did not deploy as a possible result of the faulty ignition switch.
>
> The below-specification switch approved in 2002 made its way into a variety of vehicles, including the Chevrolet Cobalt. Yet GM did not issue a recall for the Cobalt and other cars until 2014, and even then the initial recall was incomplete. GM personnel's inability to address the ignition switch problem for over 11 years is a history of failures.
>
> While GM heard over and over from various quarters—including customers, dealers, the press, and their own employees—that the car's ignition switch led to moving stalls, group after group and committee after committee within GM that reviewed the issue failed to take action or acted too slowly. Although everyone had responsibility to fix the problem, nobody took responsibility. It was an example of what one top executive described as the "GM nod," when everyone nods in agreement to a proposed plan of action, but then leaves the room and does nothing.

VALUKAS, *supra* note 1, at 1–2.

persuasive or moral force.[32]

I further maintain that the concept of integrity, as addressed by Bernard Williams,[33] provides an independent argument against Posner's economic argument. Williams criticizes utilitarianism based on the idea that our personal dreams and desires matter, and that choices cannot be viewed dispassionately for the benefit of all by the individual to whom the decision matters most. This is because who we are as individuals matters when we make decisions.[34] A frequently used hypothetical demonstrates the point. You take a boat out from a volcanic island for the day and on the way back you notice that the volcano is about to erupt. You can save five people on one side of the island or one person on the other side (and there is no time for you to pick up the five and then get the one, nor is there a way for the one to get to the five or the five to get to the one). The problem is that the "one" is your life partner, of whom you are very fond. What is the right thing to do? The point is not that you should save the five or the one, but that the decision maker matters in ethical questions. By its own terms the economic analysis offered by Posner leaves out the decision-makers because it does not offer them the opportunity to pay an additional amount to eliminate the risk and appears to have failed to provide those human beings with sufficient information to exercise their freedom to decline to purchase the GM vehicle based on known risks.

IV. ACCORDING TO CLASSICAL LIBERALISM, THE ISSUE OF PRINCIPLE FOR GM IS ONE OF DISCLOSURE AND AVOIDANCE OF FRAUD, WHICH IS INSUFFICIENT

Among the strongest reasons for rejecting Posner's economic arguments in favor of GM comes from "an unexpected friend," Milton Friedman[35] and classical liberalism.[36] Friedman tempered wealth maximization with certain responsibilities. Although he argued that managers have no social responsibility other than to maximize profits for the corporation's owners (who he identified as the shareholders), he did so

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[32] *See* JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 182 (1990) (arguing that it is not the hypothetical contract that binds the parties but rather the strength of the reasons given for them to have actually entered into the agreement at issue); Dworkin, *supra* note 26, at 501 ("[H]ypothetical contracts do not supply an independent argument for the fairness of enforcing their terms.").

[33] *See* J.J.C. SMART & BERNARD WILLIAMS, UTILITARIANISM FOR AND AGAINST 108, 116–17 (1973).

[34] *Id.* at 116–17.

[35] Milton Friedman, of course, was one of the leaders of the free market economics school of thought at the University of Chicago, where Eric Posner is now a Professor.

[36] *See generally* MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962) (discussing the concept of laissez-fair economics).

with a caveat.[37] He cautioned that managers must maximize profits so long as they comply with the law and avoid fraudulent actions.[38] So, Friedman would have also considered whether the actions at issue amounted to "deception or fraud" and asked whether they conformed to the "basic rules of the society, both those embodied in law and those embodied in ethical custom."[39]

By way of analogy, in the context of Friedman's analysis of the Ford Pinto defective fuel tank, Friedman maintained that the question of principle did not involve a cost benefit analysis because such an approach would merely result in a useless debate as to whether the manufacturer picked the right numbers.[40] Instead, he maintained that the question of principle involved whether Ford should have been required to advise Pinto drivers that it made the car $X cheaper and in doing so increased the risk of death or injury by Y%.[41] He reasoned that absent such a warning, the manufacturer could be subject to liability and that such a result "was a desirable part of the market."[42] It follows that, according to Friedman, Ford—and, by analogy, GM—needed to disclose that they made their vehicles cost $X less than they would have cost had they designed the car differently and that the risk of dying or being injured in the vehicles increased Y%.[43]

A warning would have improved GM's moral position, but warnings—and particularly GM's warnings—are inadequate for several reasons. Generally, the idea of warnings alone is problematic because they are likely to be buried, insufficiently detailed, legally impractical for the manufacturer to state, disregarded by the average person, and most fundamentally, they do not address the underlying wrong.[44] Additionally, GM does not appear to have fully disclosed, let alone obtained consent of consumers, or paid them to undertake the increased risk.[45] It is also not

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[37] Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970.

[38] *Id.* It is questionable whether GM followed this directive. *See* Basu, *supra* note 13 (noting that in March 2005, "GM reject[ed] a proposal to fix the problem because it would be too costly and take too long"); *see also id.* (claiming that June 2013 was the date when "[a] deposition by a Cobalt program engineer [said] the company made a 'business decision not to fix this problem,' raising questions of whether GM consciously decided to launch the Cobalt despite knowing of a defect").

[39] Friedman, *supra* note 37. Friedman identifies "freedom as the ultimate goal and the individual as the ultimate entity in the society." FRIEDMAN, *supra* note 36, at 5. This view seems to be the source of his requirement that corporations obey the law and avoid fraud.

[40] *See* pplholdthepower, *Milton Friedman Puts a Young Michael Moore in His Place*, YOUTUBE (Feb. 8, 2013), https://www.youtube.com/watch?v=VdyKAIhLdNs (debating the merits of a cost-benefit analysis).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] Basu, *supra* note 13; Gioia, *supra* note 19, at 387.

[45] Basu, *supra* note 13.

clear whether a non-defective ignition switch would have cost more than a defective one. Indeed, if the costs are the same, Posner's argument may fail by its own terms. That is so because if managers are going to conduct an economic analysis it needs to be performed at the time of purchase, as that is when the consumer is supposedly considering whether to accept the risk. According to Posner, the numbers at issue at that point are the amount the customer would pay to avoid the risk and the difference in cost between a non-defective component and a defective one.[46] If the customer would pay $40 to avoid the risk, and the cost of a non-defective product was no more than the cost of a defective one, then Posner's argument fails on its own terms.

The problems for economic theory as applied to the automobile defect cases run even deeper. The underlying assumption of Adam Smith's invisible hand theory[47] is that everyone has full information and that where everyone has full information the market will operate efficiently.[48] Yet, Posner does not require full disclosure or any disclosure to the consumer.[49] The company is the one that makes the decision for the consumer as to how much risk she should bear based on whether the cost of fixing the defect is more or less than the amount a hypothetical consumer would pay to avoid the risk and the cost of making the repair.[50] In this way, the consumer does not have full information. As such, Posner's economic theory is internally inconsistent.

V. SEEKING A SOLUTION

For a moral theory to avoid monstrous results, its rules must yield results consistent with our moral intuitions of justice.[51] Although deontological principles may sometimes lack the clarity of an economic formula, sometimes one must think after applying company scripts.[52] For Dennis Gioia, the Ford recall manager before the recall of the Pinto and the catastrophic deaths of four teenage girls, the focus, in retrospect, is based

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[46] Posner, *supra* note 1.

[47] ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 456 (R.H. Campbell et al. eds., 1976).

[48] *See id.* at 23, 130 (describing how merchant prices relate to information, and comparing information to success overall in the market).

[49] Posner, *supra* note 1.

[50] *Id.*

[51] *See generally* Richard Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1990). Friedman did not advocate disclosure because he favored consumers over shareholders (he did not), but rather because he believed in maximizing individual freedom. Because Posner's economic analysis would allow GM to withhold facts material to consumers' decisions to purchase the product based on considerations of efficiency, the corporation rejects the ability of individuals to make free choices and thereby violates the principles that underlie classical liberalism. *Id.*

[52] Gioia, *supra* note 19, at 387.

on other principles.[53] He believes that he should have recalled the vehicle despite the economic analyses on the ground that some things are just wrong.[54] It follows that to the extent that GM knew that its ignition switches were defective and likely to cause some injuries as a result of the defect, it had a responsibility to correct the defect. Posner's economic analysis is irrelevant to the question of whether we want to live in a society where companies can knowingly place defective products in the stream of commerce with the knowledge that people are likely to and are actually being harmed as a result—even if the percentage of people hurt out of the total number of customers is small.[55] The following example highlights the point, albeit somewhat dramatically. To someone forced to play Russian Roulette, rates and chances of death are irrelevant to the question of whether it was wrong for others to force them to play. Death in the game is certain for at least one person; the questions of who and when are unknown but are nearly irrelevant to the question of whether the directors of the game should remove the bullet (or, in the case of GM, the defective product).

As Gioia recognizes, he must live with the likelihood that his decision (and the decisions of others at Ford) to follow a cost benefit analysis caused the death of innocent people the manufacturer had a duty to protect.[56] It follows that the issue is not about assessment of economic risks. The question is about the autonomy and rights of human beings to not be subjected to risks manufacturers know to exist. Therefore, to determine if GM had a duty to fix the faulty ignition switches, we should not rely upon economic rules that risk human life and injury based on a comparison of costs and benefits. Instead, we must consider the facts of each case and determine what the company knew, when it knew it, and what it did with the information that it had.

VI. CONCLUSION

To the extent that GM knowingly left cars with defective ignition switches that it knew could cause cars to stall and air bags to fail to deploy in the stream of commerce, GM's actions were morally wrong. GM cannot be excused from those moral wrongs based upon the vast number of

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[53] *Id* at 380, 382. Gioia critically analyzed Ford's cost benefit analysis with respect to its decision whether to recall the Pinto. *Id.* at 383–84. The Pinto, of course, had a defect in its design that made it more likely that its fuel tank would rupture causing the car to explode when hit from behind. *Id.* at 381.

[54] *Id.* at 382.

[55] Richard Posner sought to distinguish utilitarianism and other moral theories and defend wealth maximization as a basis for making legal decisions on the grounds that it avoids some monstrous results of utilitarianism. *See generally* Posner, *Utilitarianism, Economics, and Legal Theory*, *supra* note 51.

[56] Gioia, *supra* note 19, at 382.

vehicles it manufactures and the low risk of harm to individual drivers. It may be that the chances of winning a lottery are low, but people play because they know someone is going to win. Posner essentially argues that the chances of your car being the one with the faulty ignition switch that malfunctions at a time and place that you cannot safely get off the road may be too low for GM to care about. But I maintain that where GM knows of the defect and that human beings have been injured as a result of it, GM must care. To the extent that concern for profits or application of Posner's economic theories might permit a manufacturer not to care, it may maximize profits, but it cannot be said to be acting morally.

In short, Posner's implicit proposition that there should be no consideration of happiness, human flourishing, right and wrong, or fairness or justice (other than a cost benefit analysis) in connection with an evaluation of ethical issues in business—like GM's question of whether to recall defective ignition systems—is inconsistent with the moral intuitions of most people. Certainly, it is far from clear that the "good life"[57] is better approached from the perspective of wealth than from happiness or personal autonomy. Richard Cory had all the money a man could want.[58]

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[57] R. SOLOMON, MORALITY AND THE GOOD LIFE: AN INTRODUCTION TO ETHICS THROUGH CLASSICAL SOURCES 1–10 (2009).

[58] EDWIN ARLINGTON ROBINSON, COLLECTED POEMS (1922) (highlighting that considerations other than economic ones matter most Edwin Arlington Robinson wrote *Richard Cory*).

> *Whenever Richard Cory went down town,*
> *We people on the pavement looked at him:*
> *He was a gentleman from sole to crown,*
> *Clean favored and imperially slim.*
>
> *And he was always quietly arrayed,*
> *And he was always human when he talked,*
> *But still he fluttered pulses when he said,*
> *"Good-morning," and he glittered when he walked.*
>
> *And he was rich—yes, richer than a king—*
> *And admirably schooled in every grace:*
> *In fine, we thought that he was everything*
> *To make us wish that we were in his place.*
>
> *So on we worked, and waited for the light,*
> *And went without the meat and cursed the bread;*
> *And Richard Cory, one calm summer night,*
> *Went home and put a bullet through his head.*

Id.

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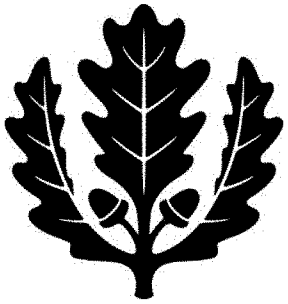
Book Review

The Government Attorney's Client: An Examination of John Rizzo's *Company Man: Thirty Years of Controversy and Crisis in the C.I.A.*

MALCOLM H. WILKERSON

This Review critiques John Rizzo's memoir detailing his thirty-year career as a lawyer in the Central Intelligence Agency, culminating in his service as acting General Counsel. One of the key architects of the CIA's Enhanced Interrogation Technique program, Rizzo articulates multiple policy rationales for the program, but, ultimately, his policy basis falls flat. More importantly, although likely not his intention, Rizzo's work serves as a cautionary tale for government attorneys, illustrating the dangers that they face in too closely associating with an agency's employees, instead of the true client—the government agency.

BOOK REVIEW CONTENTS



The Government Attorney's Client: An Examination of John Rizzo's *Company Man: Thirty Years of Controversy and Crisis in the C.I.A.*

MALCOLM H. WILKERSON*

Despite what Hollywood might have you believe . . . you don't call in the tough guys; you call in the lawyers.[1]

I. INTRODUCTION

In his memoir, *Company Man*,[2] John Rizzo, a long-time Central Intelligence Agency (CIA) lawyer who served as acting General Counsel from 2009 to 2011, provides a key insider's perspective concerning the most vexing legal dilemmas faced by the CIA over the last thirty years. Rizzo should know; he was a key legal advisor for the Iran-Contra hearings, the "dirty asset" flap, and, most importantly, every major post-9/11 CIA action, which is the heart of his book.[3] During his service as acting General Counsel, Rizzo facilitated the legal review of the Enhanced Interrogation Technique (EIT) program, which authorized the brutal interrogation of CIA detainees who were held in secret CIA prisons around the world[4]—earning him the dubious accolade of "The Torture Advocate" from his critics.[5] Ultimately, Rizzo's connection to the EIT program and the destruction of EIT videotapes led to his retirement from the CIA following a humiliating Senate confirmation hearing and Rizzo's decision to withdraw his nomination to be the CIA's General Counsel.[6] The memoir is a worthwhile read, but not for the reasons why Rizzo wrote it. To be sure, Rizzo's discussion of the EIT program is noteworthy, although Rizzo gives short shrift to the legal basis for that program. But more importantly, Rizzo's memoir is a cautionary tale for every government attorney, a reminder that those lawyers always need to remember who their client

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[1] GEORGE TENET, AT THE CENTER OF THE STORM: THE CIA DURING AMERICA'S TIME OF CRISIS 18 (2009).

[2] JOHN RIZZO, COMPANY MAN: THIRTY YEARS OF CONTROVERSY AND CRISIS IN THE CIA (2014).

[3] *Id.* at 31, 301.

[4] *Id.* at 21, 216, 218, 276.

[5] *Id.* at 216.

[6] *Id.* at 21, 249–58, 275.

really is.

II. THE ENHANCED INTERROGATION TECHNIQUE PROGRAM

Despite more than thirty years in the CIA, Rizzo will likely be remembered for the EIT program. According to Rizzo, the EIT program started in the hours after the 9/11 attack, when Rizzo was considering the CIA's authority to detain persons who were involved in terrorist acts.[7] The following year, the CIA captured Al-Qaeda's lead logistical planner, Abu Zubaydah. CIA experts were convinced that "if there were more attacks on the Al-Qaeda agenda, Zubaydah was the guy who would know about them."[8] But Zubayadah had proven unresponsive to traditional interrogation techniques, even taunting his questioners about knowing "far more about ongoing Al-Qaeda plots than he was ever going to tell."[9] In response, CIA "shrinks" "recommended 'chang[ing] the equation' with Zubaydah."[10] This new "equation" was the EIT program, which was based on the United States military's Search, Escape, Resistance, and Evasion training in which service members are taught how to resist enemy interrogations.[11] This inverse Search, Escape, Resistance, and Evasion program allowed interrogators to apply, among other techniques, insult slaps, cramped confinement, sleep deprivation, and the now infamous waterboarding—which simulated drowning—to detainees.[12]

Rizzo never personally watched any live applications of EITs to detainees because he thought that he "might react too viscerally" and wanted to maintain "objectivity."[13] But despite his lack of "personal knowledge," Rizzo makes strenuous efforts to justify EIT, citing a multitude of reasons: the pervasive fear of another attack, the high potential cost in human lives for failure, and of course, the program's success in gathering intelligence. In an interview, Rizzo characterized the climate after the 9/11 attacks as: "[T]he country was in a state of fear and dread that the next attack was coming. We had the anthrax letters, the shoe bomber. If anyone was knowledgeable about the attack, it was . . . Zubaydah. He was stonewalling, and we were running out of time."[14] Indeed, by emphasizing that the CIA had in its custody *the* person "who would likely know" about the next attack, Rizzo raised the specter of a

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[7] *Id.* at 172–73.

[8] *Id.* at 181–82.

[9] *Id.* at 183.

[10] *Id.* at 183.

[11] *Id.* at 183–85.

[12] *Id.* at 184–85.

[13] Mary Carole McCauley, *"Company Man" Walks a Fine Line; CIA's Former Chief Lawyer Discusses Use of Waterboarding and Other "EITs" in the Post-9/11 Era*, BALT. SUN, Jan. 19, 2014, at E5.

[14] *Id.*

ticking time-bomb scenario.[15] Given the potential for mass casualties in a second attack, Rizzo feared objecting to the program because he thought that he would feel personally responsible for any civilian deaths resulting from a second attack.[16]

Ultimately though, Rizzo's primary justification for the program rests upon his claim that it worked. Indeed, Rizzo asserted that after eighty-three applications of waterboarding Abu Zubaydah provided information "that led to the capture of two other Al Qaeda 'big fish.'"[17] Notably, in an interview after his book's publication Rizzo went much further in tying the program to larger successes: "We achieved two results with this program. There has been no second attack on American soil and bin Laden was killed."[18]

Despite his best efforts, Rizzo's policy rationales are unpersuasive. As an initial matter, the ticking time-bomb scenario implied by Rizzo is truly a rare event, unlike popular portrayals in the media and fiction.[19] Indeed, in one interview Rizzo confirmed that he could not remember any such scenario during his tenure, which calls into question whether there really was such a pressing, overwhelming need to apply EITs to detainees: "Now was there ever a ticking time-bomb scenario? I don't remember a particular [case of]: 'Tomorrow, LAX [airport] is going to blow up.'"[20]

But more importantly, Rizzo completely ignores the critical issue of attribution. Run concurrently with the EITs was also a non-abusive interrogation program, and it is nearly impossible to attribute any intelligence gathered to one program or another.[21] The CIA Inspector General's declassified report on the EIT program found that in at least one detainee's case, "[b]ecause of the litany of techniques used by different interrogators over a relatively short period of time, it is difficult to identify exactly why [the detainee] became more willing to provide information."[22] Further, there is considerable evidence against Rizzo's post hoc justification that the EITs were necessary because they "worked." A Senate

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[15] RIZZO, *supra* note 2, at 186.

[16] *Id.* at 187.

[17] *Id.* at 193.

[18] Holger Stark, *"I Could Have Stopped Them": Ex-CIA Lawyer Defends Waterboarding Decision*, SPIEGEL ONLINE INT'L (Aug. 20, 2014, 2:27 PM), http://www.spiegel.de/international/world/former-cia-lawyer-rizzo-defends-waterboarding-decision-a-986087.html.

[19] Ruth Blakeley, *Dirty Hands, Clean Conscience? The CIA Inspector General's Investigation of "Enhanced Interrogation Techniques" in the War on Terror and the Torture Debate*, 10 J. HUM. RTS. 544, 558 (2011).

[20] James Rosen, *CIA's Former Top Lawyer Fires Back at Senate Report, Criticizes Feinstein*, MCCLATCHY DC (Apr. 16, 2014), http://www.mcclatchydc.com/2014/04/16/224636/cias-former-top-lawyer-fires-back.html.

[21] Blakeley, *supra* note 19, at 549–50.

[22] CIA INSPECTOR GEN., 2003-7123-1G, COUNTERTERRORISM DETENTION AND INTERROGATION ACTIVITIES (SEPTEMBER 2001–OCTOBER 2003) 90–91 (2004).

Intelligence Committee report found that after reviewing thousands of CIA files, the EIT program "produced very little intelligence of value," that the EIT program "did not effectively assist . . . in acquiring intelligence," and that the "CIA inaccurately characterized the effectiveness of the enhanced interrogation techniques to justify their use."[23]

Despite Rizzo's claim of catching "big fish" from the EIT program—or even the more sensational claim of the program leading directly to Osama bin Laden—there are substantial reasons to doubt the strength of Rizzo's claims. Indeed one legal commentator has suggested that the abolishment of EIT-type measures by the U.S. military in 2005 created a "natural, double-blind experiment" with two interrogation programs run by two different agencies against two "wings of al-Qaeda."[24] This legal commentator argued that the non-abusive interrogation employed by the U.S. military in Iraq produced "hard evidence" that intelligence could be successfully gathered without resorting to harsh measures.[25]

Even assuming, *arguendo*, that the EIT program was successful in extracting intelligence from detainees, Rizzo fails to address these non-abusive alternatives to the program.[26] In 2009, President Obama abolished the EIT program "because we could have gotten this information in other ways, in ways that are consistent with our values."[27] It seems unlikely that Rizzo knows something about the program and its effectiveness that the President did not. President Obama considered other alternatives equally effective as—and possibly even superior to—the EIT program. Rizzo also failed to consider historical examples from World War II, when neither the United States nor the United Kingdom resorted to harsh interrogation techniques despite a desperate fight for national survival.[28] When Rizzo's claim that the EITs were necessary to prevent an attack—as a result of which bodies would be found "lying on the streets"[29]—is considered against the President's decision, the "natural" experiment, and historical examples, it is clear that Rizzo's policy claims are fairly weak.

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[23] Brad Knickerbocker, *Senate Report: Interrogation Methods "Far Worse" than CIA Acknowledged*, CHRISTIAN SCI. MONITOR (Apr. 12, 2014), http://www.csmonitor.com/USA/DC-Decoder/2014/0412/Senate-report-Interrogation-methods-far-worse-than-CIA-acknowledged.

[24] Philip Zelikow, *Codes of Conduct for a Twilight War*, 49 HOUS. L. REV. 1, 34 (2012).

[25] *Id.*

[26] *See id.* at 5 (claiming that government attorneys ignored the question of what "'should' be done" and instead focused on what could be done).

[27] *News Conference by the President*, WHITE HOUSE (Apr. 30, 2009, 8:01 PM), http://www.whitehouse.gov/the-press-office/news-conference-president-4292009.

[28] Zelikow, *supra* note 24, at 28.

[29] RIZZO, *supra* note 2, at 187.

III. THE CLIENT

But it is Rizzo's final argument in favor of the EITs that raises the issue that makes this book valuable for government attorneys. Ultimately, Rizzo considers the most important reason for why the EIT program was "necessary and [the] right thing to do" was because "every . . . . career CIA employee who was involved in it believed in it wholeheartedly and unswervingly."[30] But Rizzo's client was not "every . . . . career CIA employee"; his client was the CIA itself and, by extension, the United States Government.

To be fair, client identification is a common problem for lawyers working in the federal government.[31] While all federal civil servants, including CIA lawyers, are required by law to swear an oath to support and defend the United States Constitution,[32] it is unclear, as one legal commentator summarized, if the oath extends to the executive branch, all three branches of the federal government, the constitutional system, or the public interest.[33] Determining to whom a lawyer owes his or her loyalty is of critical importance because it sets the lawyer's role—oversight, facilitation of client interest, or both—and resolves any conflict of interest between a client and the employee's oath.[34]

But in an intelligence agency, the proper identification of the client takes on a particular urgency. Unlike the Department of Agriculture, for example, an intelligence agency has the "power to cover up their activities with a classifier's stamp."[35] But because of that secrecy, an intelligence agency's lawyer's role takes on an added importance, as that lawyer's advice may well be the only legal check on the agency's actions.[36] As Harvard Law Professor Jack Goldsmith put it, one "obvious danger in this secret environment is that the lawyers will identify too closely with their client's missions and not provide sufficiently detached legal advice."[37]

Rizzo makes no bones about it; he considered "everyone in the CIA as

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[30] *Id.* at 209–10.

[31] Elisa Ugarte, *The Government Lawyer and the Common Good*, 40 S. TEX. L. REV. 269, 270 (1999).

[32] *See, e.g.*, U.S. CONST. art. VI, cl. 3 ("The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support [the] Constitution . . . ."); 5 U.S.C. § 3331 (2012) ("An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take [an] oath . . . .").

[33] A. John Radsan, Sed Quis Custodiet Ipsos Custodes: *The CIA's Office of General Counsel?*, 2 J. NAT'L SECURITY L. & POL'Y 201, 208 (2008).

[34] *See generally* Ugarte, *supra* note 31, at 269–70 (arguing that the public good is the most important concern for a government lawyer).

[35] Radsan, *supra* note 33, at 210.

[36] JACK GOLDSMITH, POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11 93 (2012).

[37] *Id.*

a 'client.'"[38] Rizzo viewed his role as "an attorney for all agency personnel" and saw his job as "protect[ing] them from jeopardy for doing their jobs."[39] This viewpoint led to Rizzo's reputation at the CIA as a "legal enabler . . . [who] found a way legally for the agency to do what it wanted to do."[40] Determined "to secure the maximum possible legal protection" for CIA employees, this led to Rizzo's bold move to request an "advance declination of prosecution"—in effect immunity from prosecution—from the Department of Justice for any CIA employee who was involved in the EIT program.[41] The Department of Justice, unsurprisingly, denied this unprecedented request.[42]

Rizzo was wrong. An agency lawyer represents the agency, not its employees.[43] But even when his career was in jeopardy, Rizzo refused at his Senate confirmation hearing to change his legal support for the EIT program based largely on the impact of such a change to the CIA employees.[44] In so doing, Rizzo focused on all of the CIA employees who detrimentally relied on his legal advice, and he refused, in his words, to commit a "craven betrayal" by backpedaling on his contention that the program was lawful.[45]

In his own words, Rizzo was "enthralled" with the CIA, with its "*esprit de corps*" in the "exclusive, selective, secret club," as well as the "pretty heady stuff" he was tasked to do, including "knowing the president of the United States would be personally reading my words and putting his signature on the bottom of the page (no autopens allowed)."[46] In closing his book, Rizzo signs off by stating that the CIA was so special and unique to Rizzo that he could never envision having another employer in retirement, just as Joe DiMaggio never remarried after divorcing Marilyn Monroe.[47] Indeed, Rizzo even decided whether to vote for a political candidate based solely on his perception of their support for the CIA.[48]

These are not the words of an objective, detached attorney who is focused on the best interests of his organizational client. They reflect Rizzo's deep personal attachment to the employees of the CIA, and more importantly, Rizzo's deep loyalty to those undoubtedly courageous public servants who were faced with a moment of unprecedented danger to the

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[38] RIZZO, *supra* note 2, at 46.

[39] *Id.* at 47.

[40] Greg Miller, *John Rizzo: The Most Influential Career Lawyer in CIA History*, L.A. TIMES (Jun. 29, 2009), http://articles.latimes.com/2009/jun/29/nation/na-cia-lawyer29.

[41] RIZZO, *supra* note 2, at 192.

[42] *Id.*

[43] MODEL RULES OF PROF'L CONDUCT, R. 1.13 (2014).

[44] RIZZO, *supra* note 2, at 265–67.

[45] *Id.*

[46] *Id.* at 45, 55, 75.

[47] *Id.* at 291.

[48] *Id.* at 166, 240–41.

United States. Loyalty is commendable, but an agency's attorney must ultimately be loyal to that attorney's agency. Indeed, considering the damage to the United States' global reputation and heavy costs, both "monetary and non-monetary" cited in the Senate Intelligence Committee's report,[49] Rizzo comes across as a lawyer zealously advocating for others, possibly to the detriment of his real client's actual interests.[50]

IV. CONCLUSION

Rizzo finally achieved his goal of providing "durable legal cover"[51] for CIA employees who were involved in the EIT program, but the cost for Rizzo was his career and his nomination to be the CIA's General Counsel. In 2009, President Obama announced that it would not be "appropriate" to prosecute CIA officers who acted within the bounds of legal authority,[52] and in 2012, the Attorney General followed suit stating that no one involved in the EIT program had committed a crime that was "sufficient" for prosecution.[53] Whether the EIT program was in the best interests of the United States Government and its Central Intelligence Agency, readers will have to decide that for themselves.

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[49] *See* S. SELECT COMM. ON INTELLIGENCE, REP. OF THE CIA'S DETENTION AND INTERROGATION PROGRAM 16 (declassified revision Dec. 3, 2014) (quoting SENATE REPORT ON CIA'S DETENTION AND INTERROGATION PROGRAM).

[50] Rosen, *supra* note 20.

[51] Interview by Renee Montagne with John Rizzo, Former General Counsel, CIA, NPR (Jan. 7, 2014), *available at* http://www.npr.org/2014/01/07/260155065/cia-lawyer-waterboarding-wasnt-torture-then-and-isnt-torture-now.

[52] President Obama & King Abdullah of Jordan Joint Remarks (Apr. 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-President-Obama-and-King-Abdullah-of-Jordan-in-joint-press-availability.

[53] RIZZO, *supra* note 2, at 293.