



COLUMBIA UNDERGRADUATE LAW REVIEW

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Religious Exemption from Israel's National Draft and its Impact on Israeli Constitutional Law <i>Ron Mazor</i> -----	1
Eminent Domain and its Effect on the Constitutional Rights of Americans <i>Amy Sue Penniston</i> -----	13
Who is the Author of <i>Harry Potter</i> ? <i>Aaron Liskov</i> -----	19
Theory of Punishment <i>Rommel Clemente</i> -----	27
Legal Theory: Ruth Bader Ginsburg Cutting their own Path: Women and the Law <i>Mary Ann Bonet</i> -----	43

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Religious Exemption from Israel's National Draft and its Impact on Israeli Constitutional Law

Ron Mazor

Abstract

In Israel, exemptions from the compulsory national draft have traditionally been granted to yeshivah students pursuing religious study. However, with military service being a key civic duty for Israeli citizens, as well as a defining element of national identity, the practice of granting exemptions has been repeatedly challenged within the Israeli court system. In turn, the increasing reliance on Israel's court system to resolve matters of both legal and social importance has allowed Israel's judiciary to expand its power and authority. This paper examines the particular impact that the debate over yeshivah exemption has had on the content and the spirit of Israeli law, and attendant ramifications regarding the balance of governmental power within Israel.

Introduction: History of the National Draft, and the First Challenges to Draft Exemption

Since its founding in 1948, the State of Israel has officially been in a continuous state of emergency. The aggressive and belligerent politics of the region have made security and defense a constant concern for the Israeli citizenry, and security issues are deeply embedded into the civic heart and social culture of Israel. At the same time, Israel has never adopted a formal, complete constitution. As Israel has grown and matured, civil and ideological divisions and conflicts have made themselves more and more acute, and the court system of Israel has increasingly taken on the burden of resolving these disputes. Because of the central role that security plays, it often serves as a venue for the expression of other societal conflicts and controversies—notable among them issues of justice and equity. In particular, the debate over the national draft and army service, especially regarding the subject of deferrals and exemptions for religious yeshivah students, has been a rich source for judicial disputes, tying together key constitutional issues regarding equity and non-discrimination in civic duty. Additionally, this topic has impacted the relative and absolute authority of the judicial system, and has had ramifications for the constitutional law, the legislative authority, and the separation of powers within Israel.

In Israel, the national draft is one of the most traditional and defining civic duties of the Israeli citizen. It dates back to the birth of the nation, when the sudden War of Independence meant that victory in battle was a necessary pre-condition for the state's survival and that military service was a necessary burden. Two early laws, the Defence Army of Israel Ordinance (1948)¹ and the Defence Service Law (1949)² established the basis for the Israeli Army and provisions for “compulsory enlistment,”³ and were among the first pieces of legislature approved by Israel's of Israeli-Arabs — who are traditionally excluded from call-ups by the Defence Minister for both security considerations and the moral implications of forcing Arabs to fight coreligionists—and full-time religious yeshivah students, whose exemption was a holdover from concessions made to religious authorities during the early years of the state.⁴

The exemption of yeshivah students would become one of the most contentious issues in Israeli law. In 1970, in HCJ 40/70 *Becker v. Minister of Defence*, the issue would appear for the first time before the Supreme Court of Israel, where it was ruled that “the issue in this case is of a purely political nature”⁵ and that the petitioner did not have legal standing. In 1981, Major Yehuda Ressler filed a similar case, and the petition was similarly denied, both because the court decided that the petitioner did not have standing and because the issue itself was considered to be non-justiciable as a result of its political nature.

HCJ 910/86: A Turning Point in Israeli Law

In 1986, Maj. Ressler again brought the issue before the Supreme Court. Ressler alleged that the decision to traditionally defer full-time yeshivah students “cannot be effected by an act of the Executive, but rather must be effected... by enactment of Knesset”⁶ and that the policy of deferment was additionally “based on extraneous and discriminatory grounds and was totally unreasonable.”⁷ The resulting decision would have decisive ramifications for legal philosophy in Israeli law.

Though the petition was again rejected, the Supreme Court used the case to set important precedent regarding considerations of standing and justiciability. Breaking with some Western legal traditions and with its own legal history, the Supreme Court of Israel, as expressed by the opinion of Justice Aharon Barak, decided that a petitioner could have legal standing even if he lacked a personal interest in the case.⁸ Similarly, Justice Barak’s opinion essentially rejected the notion of non-justiciability regarding legal cases. This defense of *actio popularis* and elimination of non-justiciability flew in the face of past court decisions — where the notion of public standing was consistently rejected, and the principle of non-justiciability was often used to keep the Supreme Court from embroiling itself in political decisions or from blurring the separation of powers.

Previous to Justice Barak’s decision, issues of standing and justiciability had been strictly interpreted. The fear of the Court was that if strict standards regarding legal standing were not kept, “it would be a kind of perversion of the primary and fundamental role of the judiciary, which is to consider and decide contentious matters between two citizens or between a citizen and the government, where the two of them are 'litigants', and one is allegedly aggrieved by the other.”⁹ At the same time, “[t]he court would be flooded with fundamental issues, and so will not be available to engage in its primary function, i.e. doing justice between litigants who claim that their rights have been prejudiced.”¹⁰ Perhaps most dangerous would be the increased likelihood of the court, by mistakenly recognizing those who should not have standing, essentially “act[ing] in the absence of a dispute,”¹¹ or “creat[ing], of its own initiative, a dispute,”¹² handing down judgments in favor of unrelated or uninterested third-parties and thereby aggravating the defendant without cause. Such a scenario would be damaging to the very foundations of the Israeli legal system.

Justice Barak’s decision discounted the necessity of such a strict interpretation. Though he agreed that the issue of standing “is not satisfied with the mere allegation that the law was violated,”¹³ his decision was a lot more open to what constitutes valid harm to a petitioner’s interest. Justice Barak allowed that:

[F]or purposes of acquiring standing under the ‘classic’ approach, the petitioner need not show certainty of harm to an interest of his.

It is sufficient that he show that *prima facie* there is a reasonable chance of such harm,”¹⁴

allowing for a degree of flexibility in defining what constitutes valid harm. Moreover, in some public cases Justice Barak believed standing can be upheld even in the absence of direct harm to the petitioner’s interests, claiming that if a petition is “concerned with a constitutional problem of a public nature, which is directly related to the rule of law, and as to which no one has better standing than the Petitioners.... The aggregation of these circumstances justifies recognition of Petitioners’ right of standing.”¹⁵ This stance demonstrated a significant broadening regarding valid interest, asserting that it is of greater importance to avoid “a ‘vacuum’, wherein, due to lack of standing, the government can *ab initio* act unlawfully,”¹⁶ than to maintain strict rules regarding standing.

As to questions regarding the fear of opening up the Court to invalid petitions, Justice Barak again strengthened the judiciary and asserted that it is the judge’s prerogative, establishing that, though “[t]here is therefore a fear that undeserving petitioners will be heard,” the solution is that:

“[T]he courts must apply the ‘jurist’s expert sense’ to settle questions... Courts have frequently had experience in determining whether a litigant is genuine in his application. A similar determination can be made as to the public petitioner.”¹⁷

Philosophically, by eroding a traditional check of judicial authority and review, Barak placed more faith in the ability of the judiciary to remain objective and fair in its judgment, and less faith in the ability of the legislature and executive powers to act lawfully. Thus, his decision also had ramifications regarding the balance and separation of powers.

Justice Barak took a similar stance in favor of broadening the judge’s prerogative and the judiciary’s power on the issue of justiciability. Earlier judges of the Supreme Court drew strict lines about the subject matter which the Court would deal with, in the interest of maintaining a separation of powers and not superceding the legislature by weighing in on issues of political importance. Issues with such potential were declared non-justiciable by the Court, reflecting an attitude of judicial restraint.

Justice Barak, however, took philosophical issue with this position. He argued that, in essence, no matter before a court of law is ever really non-justiciable. Instead, he posited that “those cases in which the court dismissed petitions for material non-justiciability could have been dismissed on substantive grounds, for lack of a cause of action,”¹⁸ that “the political nature of the action does not affect its normative evaluation,”¹⁹ and that the notion of “non-justiciability” can always be expressed in evaluative, legal terms by using the “reasonableness” test.²⁰ Depending on the situation, “non-justiciability” could be rephrased as either a rejection of a petition because of a lack of a complaint,²¹ or the upholding of the government’s purview and authority to carry out the action under dispute, i.e. declaring the action reasonable and “legal.”²²

Yet, what of the notion of “institutional” non-justiciability? While one might agree that “normative non-justiciability” is in fact impossible and a misnomer, “institutional” non-justiciability begs the question of whether every issue that can be decided by a court *should* be decided by a court. Justice Barak took up this question, as well. It was his opinion that:

“[N]othing in the separation of powers principle justifies rejection of judicial review of governmental acts, whatever their character or content. On the contrary: the separation of powers principle justifies judicial review of government actions even if they are of a political nature, since it ensures that every authority acts lawfully within its own domain, everyby [sic] ensuring the separation of powers.... There is nothing in the democratic regime which holds that the majority is entitled to act contrary to statutes, which it itself enacted, and that political decisions can violate the law.”²³

Yet, is the power to veto any less political than the power to legislate? And, even among those with the best intentions, cannot personal opinions sometimes masquerade as legal opinions? The danger of involving the Court in political and deeply controversial cases lies not in the actual act of judicial review, but in the opening of the door to abuse by the Court and/or the supplanting of the legislature. The fear of reducing the separation of powers and establishing precedent to expand judicial authority stems from these considerations — considerations that Justice Barak seemed quick to discount as “irrational” and not seriously addressed.²⁴

Ultimately, Justice Barak’s legal philosophy consistently seems guided by the principle that judicial oversight is always preferable to a lack of oversight. Justice Barak’s fear often seems to be a situation where there “is the creation of an area in which there is law, but no judge,” for in his view, “the real import of this outcome is that there is neither law nor judge.”²⁵ This fear is a common thread that binds his opinions on both standing and justiciability.²⁶ Most interesting is his belief that “courts in a democratic society should undertake the role of safeguarding the rule of law. This means, *inter alia*, that it must impose the law on governmental authorities, and ensure that the government acts in accordance with the law.”²⁷

These ideas lead him, in his ruling on HCJ 910/86, to advocate for the considerable broadening of the powers and authority of the judiciary in the face of precedent, and to weaken the notion of separation of powers by giving the judiciary wider powers of review — increasing both its relative and absolute authority over the executive and legislative branches. Why the judiciary should be less prone to error or corruptibility than the Knesset or the executive branch, and thus merit greater power, is not immediately clear. However, Justice Barak’s opinions likely reflect the unique circumstances of the Israeli legal and political system, built on the British model of a strong parliament with little oversight, and lacking a constitution to delineate boundaries and rights.

A Theoretical Parallel: Selective Conscientious Exemption vs. Religious Exemption

Ultimately, in the *Ressler* case, it was decided that “the Minister of Defence is authorized to grant deferment of defence service to yeshivah students, and it was not proven that the exercise of his discretion is, under the circumstances, unreasonable.”²⁸

However, the greater issue in the *Ressler* case, the notion of the exemption of yeshivah students, is captivating in its own right. In particular, it brings up issues regarding discrimination and equality in civic duty. It also raises questions regarding the nature of exemption. For instance, how should the exemption of yeshivah students be

classified? The Defence Service Law allows the Defence Minister to exempt individuals “for reasons connected with the requirements of education, security settlement or the national economy or for family or other reasons.”²⁹ Generally, the yeshivah exemption has not been considered an “educational” deferral. Instead, it has fallen under the category of “other reasons.” However, not all “other” reasons have been seen as valid in Israeli law.

Particularly, selective conscientious objectors have consistently been denied their requests for exemption before the Supreme Court. In H CJ 7622/02 *Zonstein v. Judge Advocate General*, such an instance of a petition was explicitly rejected. Among the Court’s reasons was the idea that “it is neither proper nor just to exempt part of the public from a general duty imposed on all others,”³⁰ and that, according to Justice Beinisch, “[e]ven if they are sincere, conscientious and faith-based considerations do not stand alone. Against them stand considerations of preserving the security and peace of Israeli society.”³¹

Most significantly, from a legal philosophy perspective, Justice Barak concluded that selective conscientious objection was not qualitatively different from “full” conscientious objection — which was accepted by the court as a valid reason for deferment — but that even so, selective conscientious objection should still be denied because it:

“would evoke an intense feeling of discrimination ‘between blood and blood.’...it would affect security considerations themselves, since a group of selective objectors would tend to increase in size...[and it] may loosen the ties which hold us together as a nation.”³²

Thus, an instance that would have possessed fully legitimate grounds to warrant a deferral was deemed instead to be worthy of denial, because of the detrimental effect that it would have on society.

The rulings of the Supreme Court regarding the *Zonstein* case would appear to have direct application to the issue of religious exemption. Since 1986, the number of Israelis claiming exemption has drastically risen, reaching about 11% of those eligible in 2007 (approximately 45,000 citizens)³³ as opposed to 5% in 1992 and a mere 400 individuals in 1948.³⁴ The amount of ire that the issue of yeshivah exemption raises could certainly be considered guilty of “loosen[ing] the ties which hold...” and of “evok[ing] an intense feeling of discrimination,”³⁵ and in the wake of the Gaza Withdrawal, it seems some students who opposed the government’s decision are even using the deferment as a form of selective ideological conscientious objection.³⁶

Exemption from 1986 to the Present: Legal Reversal and the Tal Law

More recent legal developments have shown that the Court has not let these changing facts go unnoticed. At the same time, significant legal developments regarding constitutional law have considerably altered the Israeli legal arena. The “Constitutional Revolution” of the early 1990’s elevated “Basic Law: Human Liberty and Dignity” to the level of a constitutional law, and in doing so, “gave a constitutional, super-legislative status to the prohibition of discrimination....”³⁷ This status was expressed in the famous H CJ 4541/94 *Miller v. Minister of Defence*, and was used, in a different instance of military service expressing greater societal conflicts, to break down the categorical

prohibition against training female pilots or accepting them into flight school.

This strong legislative basis against discrimination, coupled with the increasingly damaging practical realities of allowing yeshivah exemption, would culminate in the landmark reversal handed down in HCJ 3267/97 *Rubinstein v. Minister of Defence*, where it was determined that “[t]he exemptions had created a ‘deep rift in Israeli society and a growing sense of inequality,’ and such matters of principle that are ‘disputed in the general public should be decided by the legislator.’”³⁸

In *Rubinstein*, the Supreme Court had essentially upheld one of Ressler’s original complaints: “that deferment of the enlistment of Yeshivah students is a question which must be decided by legislation, and not by administrative decision of the Minister of Defense,”³⁹ if it was to exist at all. This refocusing of the authority to grant deferrals would set the stage for the current phase of legal dispute regarding religious yeshivah exemption: the creation of the Tal Law.

The Tal Law was enacted by the Knesset in July 2002, and provided a legislative means for the continued exemption of yeshivah students. It established some checks on yeshivah students to make sure that they were not abusing their deferment: for instance, requiring them to abstain from work and remain full-time students. At the age of 22, they would be given a “year of decision” and “three alternatives: returning to their studies, performing a truncated military service and then serving in the reserves, thereby enabling them to stop studying and start working, or performing a year of public service and then going to work without fear of being conscripted.”⁴⁰ This new requirement was intended to remedy the problems of non-integration and discrimination. Yet the leniency of the law, with the option of continued study being among the three “remedies,” the lack of mechanisms for enforcement,⁴¹ and the Knesset’s general intent to allow religious exemption to continue led to criticism that the Tal Law would do nothing but maintain the previously condemned status quo. In fact, in reviewing the efficacy of the Tal Law in 2006, Supreme Court President Aharon Barak found that “[o]nly 3 percent of all yeshiva students chose to try out the “year of decision,” and only a small percentage of those who did have actually joined the army so far.”⁴²

In 2002, HCJ 6427/02 *Movement for Quality Government v. the Knesset*, along with similar petitions from Yehudah Ressler and Shinui, an Israeli political party, would be filed before the Supreme Court, alleging that the Tal Law was unconstitutional on the basis of discrimination. The decision of the Supreme Court, rendered in 2006, would take a position that, almost ironically, seems to amount to “temporary un-justiciability.”

While the Supreme Court agreed that the law “violated the Basic Law: Human Freedom and Dignity,”⁴³ President Barak ultimately ruled:

"Alongside our decision that the petitions are rejected, because at this point in time we cannot determine that the law is unconstitutional, there is reason for concern that the Military Deferment Law [as it is formally named] will become unconstitutional. Indeed, our ruling today is that the Military Deferment Law is not yet unconstitutional, but there is cause for concern that it will become so unless there is a significant improvement in the results it has achieved [so far] in practice."

The reasoning behind not invalidating the law immediately is perhaps similar to a ruling given by the Supreme Court in *HCJ 24/01 Ressler v. Israeli Knesset*, which challenged the constitutionality of temporary legislation that was passed to allow deferrals to

continue after *H CJ 3627/97*. Namely, “the fact that at that time the Knesset was actively engaged in legislative procedures towards a permanent arrangement of the entire issue” left the court inclined to allow the situation to play out.⁴⁴ Similarly, the fact that the “Tal Law” was enacted with the intent to, on paper, reduce the inequality inherent in religious deferrals and thus fulfilled a “worthy purpose” justified the decision to allow time to see if the practical aims could be met.⁴⁵

However, the decision of the Knesset in July 2007 to extend the Tal Law for another five years, without significant proof that the law was increasing in effectiveness, seems to reflect an intent not geared toward reducing inequality, but towards defending the perpetuation of the privileged status of yeshivah students. In the meantime, the effects of “evok[ing] an intense feeling of discrimination ‘between blood and blood’...[and] loosen[ing] the ties,”⁴⁶ that the Supreme Court had wished to avoid, have instead continued. Veterans of the IDF, even those as high up as Fmr. Chief of Staff Lt. Gen. Dan Halutz,⁴⁷ have expressed reservations about committing their own children to the army while so many others are avoiding service. Furthermore, the Israeli newspaper *Yediot Ahronot* recently featured a shocking report, under the headline “We Won't be the Nation's Suckers,” of a deputy battalion commander who had “sent a letter containing his military rank and officer's ID to the Knesset...in protest of the...decision to recommend the Tal Law be extended.”⁴⁸ Yet, until the two-year probationary period that the Court has granted to the Tal Law ends, it seems that the issue will remain as it currently stands.

In conclusion, the legal debates over the national draft and military service have proved a fertile battleground for the examination of principles of equality, justice, and non-discrimination in Israel. In addition, the outcomes and rulings among some of these cases, often under the opinion of Aharon Barak and in particular regarding *H CJ 910/86 Ressler v. Minister of Defence*, *H CJ 4541/94 Miller v. Minister of Defence*, and *H CJ 3267/97 Rubinstein v. Minister of Defence*, have broadened judicial authority, set new precedent for judicial review, and have led to the practical and forceful implementation of constitutional law, creating extremely significant new case law. This increase of the judiciary's power and scope has created the court system that President Barak envisioned, one with the power to “impose the law on governmental authorities, and ensure that the government acts in accordance.”⁴⁹ Still, such an increase has not come without cost. By strengthening the authority of the court system, President Aharon Barak and the Israeli Supreme Court have quite possibly localized too much power in one area of government, decisively weakening the balance of power between government branches in favor of the judiciary. Such a situation has the dangerous potential of weakening respect for the Supreme Court and the rule of law, as the Supreme Court's willingness to embroil itself in political issues and abandonment of notions of non-justiciability has increasingly raised the very nightmare Israel's past Supreme Courts sought to prevent: that of the transformation of Israel's Supreme Court, either in reality or in the eye of the public, into a political body.

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Eminent Domain and its Effect on the Constitutional Rights of Americans

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Abstract

Eminent domain is an issue of increasing concern, especially after the recent Supreme Court ruling of *Kelo v. City of New London*, 545 U.S. 469 (2005). The Supreme Court's decision in *Kelo* has determined that the private property of one individual can be taken by the government in order to be given to another private entity as long as it is assumed to benefit the public in some way, be it for shopping malls or upscale condominiums. Although the government must compensate people for property taken at "fair market value" under the Fifth Amendment, there is no just compensation for emotional loss that may result from the seizure of property that has sentimental value. The new, expanded definition of eminent domain could be most detrimental to low-income and elderly people, as raising property taxes and taking their homes could leave them unable to afford a home anywhere in the area. This could force the city, state, or federal government to subsidize housing and provide leaving assistance, undermining the purpose of an eminent domain project, which is to increase revenue, and not to spend it.

Eminent domain is an issue of increasing concern, especially after the recent Supreme Court ruling of *Kelo v. City of New London*, 545 U.S. 469 (2005), which enabled the City of New London, Connecticut to take the property of a New London resident for the purposes of a private development firm. The private development firm was to construct a project deemed "for the public good," which allowed the government to take property in the name of "eminent domain." The concept of Eminent Domain argues that the government has the legal ability to take the private property of one or more persons in order to use the property for "public use."⁵⁰ Connecticut's statutes allow eminent domain for projects devoted to "any commercial, financial, or retail enterprise."⁵¹

The Supreme Court's decision allows city governments to seize homes or businesses and transfer them to developers if they think the developers *might* generate economic gains with the property. The Court also rejected any requirement that there be controls in place to ensure that the project live up to its promises. According to the majority, requiring any kind of controls would be "second-guess[ing]" the wisdom of the project.

In the past, public use was understood to apply only to public, government-funded projects, such as highways and public schools. However, in recent years, the public use has expanded to include the building of private facilities, such as malls and upscale condominiums, as long as they provide a "public" economic benefit, where there is no objective definition of public.

Kelo v. City of New London has determined that the private property of one individual can be taken by the government in order to be given to another private entity as long as it is assumed to benefit the public in some way. The city of New London, Connecticut wanted to condemn 115 residences in order to build a marina, upscale housing, and a \$300 million research center.⁵² The Supreme Court ruled in favor of the city of New London in a narrow 5-4 ruling. This decision gives local governments more

power and wider interpretation in deciding when a seizure is for "public purposes" by defining economic development as a public purpose. Justice Sandra Day O'Connor wrote a dissenting opinion that stated, "[...] condemnation hangs over all property. Nothing is to prevent the State from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall, or any farm with a factory."⁵³ The other dissenting voters included Chief Justice William H. Rehnquist, Justice Antonin Scalia, and Justice Clarence Thomas, all of whom wrote that the majority had granted a "disproportionate influence and power in the political process, including large corporations and development firms."⁵⁴ The dissenting Justices, who were considered the most conservative on the Supreme Court, did not favor big business in their decision because this issue went deeper than big business—it was about individual liberty and "perceived" right according to the Constitution. Justice John Paul Stevens wrote for the majority, concluding that "public purpose" could include creating jobs, even if that meant taking land and selling it to a private development firm.

In February 2006 the Commonwealth Court in Pennsylvania challenged the Supreme Court's decision in *Kelo v. City of New London* by ruling on *In re 1839 North Eighth Street*, 891 A.2d 820 (Pa. Cmwlth. Ct. 2006) that the Philadelphia Redevelopment Authority violated the separation of church and state by seizing Mary Smith's home for the establishment of a Catholic middle school. The Commonwealth Court found that the seizure of a citizen's home for the purpose of a religious institution was in conflict with the Establishment Clause that prohibits Congress from endorsing a particular religion. The middle school was to be funded by the Hope Partnership, a venture of the Holy Child Jesus and the Sisters of Mercy, which are two Roman Catholic religious orders.⁵⁵

Judge Doris A. Smith-Ribner wrote the majority opinion in favor of the condemnee who appealed in *In re 1839 North Eighth Street*. In the opinion, the majority addressed *Kelo v. City of New London*, and emphasized that even the ruling in that Supreme Court case stressed that property "may not be taken under the pretext of performing a public purpose when the actual purpose is to bestow a private benefit to another."⁵⁶ Additionally, the Pennsylvania Commonwealth Court noted that although the reversal of the *Kelo v. City of New London* decision in this case was based on the Authority's violation of the Establishment Clause, it is impossible to ignore that *Kelo* was based on the Supreme Court's agreement that the economic development plan in that particular case served a public purpose because the plan was designed to benefit the entire city of New London, which satisfied the public use requirement of the Fifth Amendment.⁵⁷

Despite the decision in *Kelo v. City of New London*, the Supreme Court's decision does not prevent states from placing their own restrictions on the power to exercise eminent domain. Many states have already imposed a public use requirements, some of which have been established as a matter of state constitutional law, that are more stringent than the federal standard.⁵⁸ Additional requirements are set forth to restrict the grounds upon which Eminent Domain may be exercised by the State Government.

Currently, states have the ability to pass laws to limit the purposes for which eminent domain can be used, limiting eminent domain to traditional uses, such as in the construction of highways. The controversial Supreme Court ruling in *Kelo v. City of New London* was a catalyst that ignited citizen discontent. Several states have already begun to pass laws limiting eminent domain. In Minnesota, state lawmakers and citizens are demanding that the state limit the government's ability to seize property in

the name of eminent domain.⁵⁹ Jim Meide, who is a citizen of Champlin, Minnesota, is at risk of his property being seized by the city so that condominiums and a restaurant can be built on the site. Law makers have responded to this by debating the issue in the legislature. They also intend to focus on further defining “blight,” which according to an earlier Supreme Court case, is also a justification for eminent domain.⁶⁰

Citizens are also fighting eminent domain policies in their cities by rejecting proposed developments that would take people’s homes through eminent domain. Jim and Joanne Saleet of Lakewood, Ohio refused to sell their home of 38 years, which led the city to propose the use of eminent domain to force the Saleets out of their home in order to make way for new, expensive condominiums.⁶¹ The residents of Lakewood sided with the Saleets however, by voting against the proposed building of the condominiums.

According to the law in most states, it is legal for the government to take the private property of individuals, and give or sell the property to a private developing firm in order to raise property taxes and provide jobs through the building of malls, expensive housing developments, etc. This not only helps improve blighted areas, but gives cities, states, and the federal government more money to fund public works, such as schools and social programs.

The new, expanded definition of Eminent Domain has allowed the federal government to define areas as blighted with guidelines for the sole purpose of justifying the taking of property under Eminent Domain. For example, in Lakewood, Ohio, an area with homes built more than 100 years ago, the city’s definition of a blighted home is one that does not have the following: an attached garage, central air, two bathrooms, or three bedrooms. This definition however describes homes that are livable and safe. Homeowners are now at risk of leasing their homes until the government decides to take it and hand it over to another private owner.

This new definition of Eminent Domain contradicts the precedent, which simply involved taking private property for government-funded entities such as roads, schools, and governmental buildings. The government has thus far refrained from taking one person’s private property in order to gain a profit tied to public use. The public uses malls, but a mall is not as necessary as a highway is. However, based on *Kelo*, the government is now able to determine that a private firm’s use of land is more important than a person’s ownership of land for his or her home.

The government gains tremendous power when it has the ability to take from one private person and give to another private entity without much difficulty. Although the government must compensate people for property taken at “fair market value” under the Fifth Amendment, there is no just compensation for the emotional loss that results from the abduction of a piece of property that has attached sentimental value.

The government’s job is to protect and consider the best interests of its citizens while respecting their rights. It is not fulfilling this obligation by seizing private property for the purpose of a mall. Increased tax revenue from one private entity should not justify the government’s disregard of ethics, rights, and the ownership of private property. The new, expanded definition of eminent domain could be most detrimental to low-income and elderly people, because taking their homes and raising property taxes could leave them unable to afford homes in the area. This undermines the entire purpose of the project, which is to increase revenue, not to spend it. To circumvent this problem, State Governments will need to pass laws requiring developers to give a certain percentage of jobs to local residents. However, at the moment, there is no uniform requirement.

Columbia Undergraduate Law Review

Eminent domain is becoming an area of increasing concern and publicity due to the recent Supreme Court ruling, *Kelo v. City of New London*. State governments are making new laws in response to the ruling, and Eminent Domain will continue to make news. The Supreme Court decision in *Kelo* has significantly undermined the idea of a free enterprise economy that values property rights.

The concept of ownership of private property is embedded in our collective ideal of upward social mobility. Without this perceived right of private ownership of property, the average citizen will lose respect for our institutions and our government. Private property has always been an incentive for respecting our government, and it has been a perceived right since the founding of this country. One can only guess what impact this infringement on a perceived right will have on our country, both now and in the future. Extrapolating to the logical extreme, government will continue to infringe upon such rights until people decide to revolt by not paying their taxes. The new law of the land, perhaps best stated by Steven J. Eagle of the CATO Institute, has “gone from the rule of law, by which government is carefully curtailed to protect our liberties, to the nanny state, in which government subordinates property and other rights in pursuit of ‘social justice’ through majoritarian rule.”⁶²

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⁴ *Kelo v. City of New London*, 545 U.S. 469 at 503 (2005).

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⁶ Scolforo, Mark. Associated Press. *Washington Post*, “Public Agency Faulted in Eminent Domain Case.” Tuesday, February 7, 2006; A06.

⁷ *In re* 1839 North Eighth Street, 891 A.2d 820 at 825 (Pa. Cmwlth. Ct. 2006).

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⁹ Eagle, Steven. *Policy Analysis*, “The Birth of the Property Rights Movement.” No. 255.

¹⁰ Scheck, Tom. Minnesota Public Radio, “Supreme Court ruling prompts eminent domain reform push in Minnesota.” January 5, 2006.

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Who Is the Author of *Harry Potter*?

Aaron Liskov

Abstract

Since the commercialization of the printed word, the law has extended to authors varying degrees of ownership over their own work. With new pressure on this ownership emerging from the Internet, our basic assumptions about authorship need to be rethought. The history of such assumptions offers crucial commentary on the debate in its contemporary form - a lawsuit between an author and one of her biggest fans.

The *Harry Potter Lexicon* is an encyclopedia by Steve Vander Ark about the *Harry Potter* book series. J.K. Rowling, author of the *Harry Potter* novels, sued Mr. Vander Ark for copyright infringement because all of the encyclopedia's information comes from her novels. Historically, societies have resolved such a dispute differently and the extensive control authors claim in our own society is a recent invention. The paper traces the history of the dispute over authorship in Rowling's lawsuit and applies this history more broadly to contemporary arguments about intellectual property.

In comments about her current lawsuit against RDR Books for printing *The Harry Potter Lexicon*, J.K. Rowling called the lexicon enterprise a "wholesale theft of 17 years of my hard work" (qtd. in Lee). *The Harry Potter Lexicon* was first published on the Internet and was recently chosen for print publication by RDR. Prior to the lawsuit, Rowling utilized the *Lexicon* and said, "this is such a great site that I have been known to sneak into an internet café while out writing and check a fact rather than go into a bookshop and buy a copy of *Harry Potter*," (qtd. in Patry). In the first remark, the *Lexicon* is a "theft" of her hard work. However, in the other remark, the *Lexicon* is useful, leading Rowling to commit a theft of her own work. Paradoxically, she asserts ownership over the content in *Harry Potter* and then relinquishes it. Here is an example of an entry in *The Harry Potter Lexicon*:

Reducio (re-DOO-see-oh)

Reverse: Engorgio

"reducen" Middle Eng. diminish, from "reducer"

Old Fr. Bring back to the source, from "reducere" L. bring, lead

Causes an Engorged object to return to its normal size.

*The fake Moody, who had enlarged a spider with an Engorgement Charm, used this to return it to its normal size (GF14)

Harry, who had enlarged a spider with an Engorgement Charm, tried to use this to return it to its normal size, but it didn't work. (Lexicon).

At first, this information may seem entirely unoriginal. The separate attempts of fake Moody and Harry to return the spider to normal size and the definition of *reducio* already appear in the novels that Rowling wrote. While the etymology of certain words are not interpretive or critical additions, and merely explain ideas that already exist in

the novels. This unoriginal aspect of the *Lexicon* entry explains Rowling's characterization of the *Lexicon* as a "theft."

But what is original about the *Lexicon*? While the *Lexicon* directly extracts information from *Harry Potter*, the way that it presents this information is unique. In the novels, the location of the concept "reducio" is driven by the needs of the narrative, whereas The *Lexicon* places "reducio" in its alphabetical relationship to the other concepts from *Harry Potter*. Secondly, other content in the entry is determined by its relationship to the concept "reducio." The *Lexicon*'s appeal is that it allows more convenient access to conceptual information independent of its narrative role, much like an index in academic works. As a fantasy writer concerned with imagining entirely new worlds, Rowling may have found this structure particularly useful. A similarly structured encyclopedia, – *The Encyclopedia of Arda: An Interactive Guide to the Works of J.R.R Tolkien*, exists for the similarly imaginative *The Lord of the Rings* series As legal counsel for *The Lexicon* argued:

The organizational value is paramount. The *Harry Potter* novels are spread across seven books, hundreds of chapters, thousands of pages, somewhere around a million words. Characters appear and disappear literally and figuratively show up several books later. Other characters appear consistently throughout the story. But so much happens to them, your Honor, it is hard to keep track (qtd. in Transcript).

Rowling's compliment to the site is just as plausible as her criticism of it. The content itself might not be original, but the organization is.

Out of arguments over whether the *Lexicon* is useful or original comes a larger question about the rights of an author. The case of a writer imagining new worlds strongly suggests notions of originality and creativity in *Harry Potter*. This explains Rowling's antipathy to a work that, in its explicit repetitiveness, actually highlights her role as the initial producer of the information it presents. Nevertheless, as Rowling admits, the *Lexicon* serves a purpose that, in certain cases, makes it more useful than the original works themselves.

The lawsuit against *The Lexicon* will not resolve this conflict. In copyright law that serves to measure the originality of a work, this theoretical tension only amounts to the definition of authorship set by past precedents. Consider a similar case that determined the originality of a trivia game based on facts from the television series *Seinfeld*. If one applied that decision to the *the Lexicon* case, the question of authenticity would essentially reduce to

Whether the allegedly infringing work "merely supersedes" the original work "or instead adds something new, with a further purpose or different character, altering the first with new . . . meaning [] or message," in other words "whether and to what extent the new work is 'transformative.'" (Castle Rock).

This judicial opinion's precise adherence to precedent speaks to the way current legal debates depend on narrow assumptions about what authorship means. In

its comparative approach, copyright law does not challenge the originality and rights of the first author and simply presupposes that she spontaneously generates unique content. Indeed, the Lexicon's debatable originality challenges this view of Rowling as the sole author of any *Harry Potter* content.

Here the discussion must turn to the history behind the celebration of individual authors in copyright law. Rowling's claim of sole ownership traces back to a transformation in attitudes toward authorship that began the 18th century. The contemporary disputes over *The Harry Potter Lexicon* fits squarely in a dialogue about authorship that has unfolded over many centuries. The justifications for contemporary legal theories of authorship become clearer by viewing Rowling in light of those theorists who initially attributed art and ideas to individual talent. Moreover, the history of these different perspectives of authorship can bring new insights to the debate about the ownership rights of Rowling and other artists.

Carla Hesse's "The Rise of Intellectual Property, 7000 B.C. –A.D. 2000" and Martha Woodmansee's "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" show that the notion of an author with exclusive ownership over her content is new and has evolved historically. In contrast to the view of ideas as the property of their communicator, Hesse notes how, in antiquity, an alternative view prevailed in which "the poet spoke the words of the gods, not his own creations. Knowledge, and the ability to make it manifest to man, was assumed to be a gift" (Hesse). Hesse contends that this denial of the author's role in originating content penetrated all major pre-modern civilizations. The Greeks attributed originality to the muses; the Chinese credited the ancients; Islam, which traces all ideas back to the Koran, chose not to apply punishment for stealing, in terms of book theft; and Judeo-Christians held in the Old and New Testaments that knowledge is a divine gift (Hesse). These beliefs refuse to acknowledge exclusive ownership of content and paint the human author as the intermediary for more universal sources. According to Woodmansee, these are not merely antiquated theories that disappeared with the ancients; similar concepts of authorship lasted through the Renaissance.

At the outset of the eighteenth century it was not generally thought that the author of a poem or any other piece of writing possessed rights with regard to these products of his intellectual labor. Writing was considered a mere vehicle of received ideas which were already in the public domain, and, as such a vehicle, it too, by extension or by analogy, was considered part of the public domain (Woodmansee 434).

This theory of authorship is anathema to Rowling's claim on the witness stand that "these things have no existence except in my words, so he is taking my creation" (qtd. in Transcript). No matter how inventive the content of *Harry Potter* may be, the ancient Greeks would reduce Rowling to an intermediary who received *Harry Potter* from muses just as Homer claims to transmit the song of the muses. Even in 17th century Europe, the *Harry Potter* universe would merely contribute to and draw from ideas which freely circulated in the public domain.

The transition of the author's role from vehicle for to creator of original work occurred only in the late 18th century. Hesse places this shift in the context of a rising demand for books among an emergent middle class. Since the growing demand for

Columbia Undergraduate Law Review

reading required more writers to produce more books, minimizing the importance of authors became more difficult. This new demand for print publication, “especially for modern secular literature... tempted an increasing number... to aspire to become writers... of a new sort oriented more toward the commercial potential of their contemporary readership than toward eternal glory” (Hesse). Writing for “eternal glory” meant manifesting divine inspiration and substituting God for one’s original role in the creation of ideas.

The new commercial orientation now gave authors a proprietary interest in their labors. With this change in the economy of authorship came attempts at a philosophical theory of original human authorship. In 1782, Gotthold Lessing compared literary content to the singularity of offspring to justify an author’s proprietary control over his work.

What? The writer is to be blamed for trying to make the offspring of his imagination as profitable as he can? Just because he works with his noblest faculties he isn't supposed to enjoy the satisfaction that the roughest handyman is able to procure? (qtd. in Hesse).

According to Lessing, ideas are not fundamentally different in their economic nature from any physical goods. His characterization of ideas as “offspring of his imagination” gives an author an individual responsibility for the content of his work. This attitude summarizes the changing definition of authorship in the eighteenth century as a shift in responsibility for artistic inspiration from external to internal (424).

Rowling gives voice to these philosophical and economic changes in the 18th century in her lawsuit. Her commercial success evokes the economic factors that Hesse emphasizes in the individualistic views of the 18th century. A series that sold 325 million copies before the final book’s publication resonates with the high public demand for literature in the 18th century (CNN). Indeed, Rowling has admitted her commercial orientation. On the witness stand, she asserted that proprietary control over her work was a precondition for her labors.

I worked exceptionally hard, and I made sacrifices for my work. And if, when I had been literally choosing between food and typewriter ribbon, I had been told I did not own these words, these words were not mine, they could be taken, lifted by anyone and resold under a different author's name, so-called author's name, I would have found that quite devastating (qtd. in Transcript).

The same concerns informed attitudes in the 18th century. Like Rowling, Lessing lamented a writer’s unstable diet, recommending his brother to “give up your plan to live by the pen...it’s the only way to avoid starving sooner or later.” The parallel shows that the same economic justification for a different notion of authorship in the 18th century underlies Rowling’s defense of her rights as an author in the 21st century.

Furthermore, Rowling’s defense of an author’s compensation situates her in a larger contemporary debate about the importance of copyright laws to the artistic process. With technological advances like the internet that allow for greater unlicensed distribution of media content, a debate has emerged over whether to abandon the current

conception of copyright for a more liberal regime of content distribution that would make content freely accessible in the public domain. In his article, “The Tyranny of Copyright,” Robert Boynton examines advocates of this more liberal view, the “Copy Left,” as well as advocates of the existing system of buying and selling content over which the individual author exercises a proprietary interest. The latter advocates share Rowling’s belief in the importance of compensating authors to sustain the creation of new content. According to Boynton, “aligned against the Copy Left are those who ... view the culture as a market in which everything of value should be owned by someone or other.” Just as Rowling would find the lack of compensation for her authorship “devastating,” proponents of copyright enforcement view the material incentive for individual authors as a prerequisite for the creation of new content. Echoing Hesse, Boynton links the growing restrictiveness of United States copyright laws to economic changes that made ideas more profitable. Rowling was part of the world in which, according to Boynton, “ideas took on greater importance, and the demand increased for stronger copyright laws.”

Not only does Rowling share 18th century writers’ economic motives for asserting ownership over their output, but she also echoes their philosophical view of authorship. A predominant feature of the 18th century conception of individual authorship was the metaphorical comparison of ideas to unique life forms. Lessing calls writing the “offspring of the imagination.” His contemporary Edward Young thought that writing “may be said to be of a vegetable nature; it rises spontaneously from the vital root of genius” (qtd. In Woodmansee). Another contemporary, Herder, called it “the imprint of a living soul” (qtd. In Woodmansee). Woodmansee argues that this comparison between content and living forms was crucial to the evolution of individual authorship. It was the expansion of “Young’s metaphor for the process of genial creativity...that enabled Fichte...to ‘prove’ the author’s peculiar ownership of his work” (Woodmansee, 446). Rowling’s defense of her authorship in the hearings is rife with this metaphor. She repeatedly characterizes her work as a hypothetical child to establish her “peculiar ownership.” Consider this exchange during Rowling’s direct examination:

Q. Do you care, Ms. Rowling, about how your *Harry Potter* characters are presented?

A. Very, very deeply, yes....

Q. Could you explain what you mean?

A. I mean that these characters meant so much to me, and continue to mean so much to me over such a long period of time. It’s very difficult in fact for someone who is not a writer to understand what it means to the creator. I think the very closest you could come is to say to someone how do you feel about your child. You know, these books, they saved me not just in the very obvious material sense, although they did do that, they provided security for my daughter that I never thought I would be able to provide her. (Transcript)

This answer resonates directly with the rhetoric of Young, Herder, and Lessing. Her idea that her work compares to how “you feel about your child” echoes Lessing’s conceptualization of writing as “offspring.” A comparison between her writing and children is a theme of the testimony. The writing provides for her children, it takes time

away from her children, and it resembles her feelings towards her children. Finally, in the same way that this metaphor connecting writing to living beings facilitated the argument for individual authorship in the 18th century, Rowling uses this metaphorical comparison between writing and life to claim the uniqueness of her role as an author – “it is very difficult in fact for someone who is not a writer to understand what it means to the creator” (Transcript).

The fact that this attitude is a historical invention casts doubt on an important premise used by Rowling and other advocates for strict copyright laws. These advocates depend on Rowling’s individualistic view of authorship. According to Boynton, they rest on a “romantic notion of authorship” where the author is a “the lone garret-dwelling poet, creating masterpieces out of thin air.” The tenuous aspect of this assumption is that it presumes to be a timeless definition of authorship that is, has been, and always will be fundamental to every act of authorship. For Rowling, the metaphorical equation between writing and childbearing is as trans-historical as the nature of childbearing itself. History answers that this view of the author is a timely reaction to economic changes in the 18th century. If this view of authorship is not as timeless as authors’ rights enthusiasts would like, then such changing circumstances as the development of the Internet might reasonably alter the status of authors once again.

Similarly, the prior existence of other models of authorship lends momentum to views that downplay the proprietary rights of the author. Critics of the Copy Left argue that the financial incentive for authorship provided by a copyright is the best way to facilitate creativity. Paul Goldstein, an advocate for stricter copyright laws, argues that allowing content to be marketed encourages writers to produce the most effective material. By contrast, his problem with the Copy Left “is that it... doesn’t reveal what kind of culture gets used and what kind doesn’t” (qtd. in Boynton). History weakens this premise because rich intellectual culture and creativity thrived under models of authorship where content was not marketed and the author lacked ownership of his content. Past traditions of authorship may provide empirical support for models that would offer fewer material incentives for creativity.

An important qualification is that history will not decide what conception of authorship is correct. It cannot be empirically determined whether pre-modern writers, as copyright advocates might claim, were really creative geniuses or if modern writers, as the ancients believe, merely transmit ideas from deeper and more universal sources. However, the conception that governments select can guide how society and its laws treat authorship to ensure that the creation of content thrives no matter which model of authorship is correct in a universal sense.

In September, the Federal District Court decided that *The Harry Potter Lexicon* could no longer be printed because it has a “substantial similarity” to the novels (Itzkoff). The decision demonstrates that one view of authorship, among many others, currently prevails. With the history of this view and present developments in mind, who knows how long this conception will remain the status quo.

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Aaron Liskov

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Theory of Punishment

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Abstract

The justification for legal punishment has traditionally been based on either retributive or utilitarian (consequentialist) theories. However, there is a third alternative that has arisen in recent years: the “virtue ethics” theory of punishment.

This article will demonstrate that the virtue ethics theory of punishment combines the retrospective aspects of the retributive theory with the prospective aspects of the utilitarian theory, thereby producing a kind of composite theory of punishment. The theory presents a cohesive unification of two schools of thought and draws its strength from the ability to provide theoretical support to common intuitions regarding punishment.

The virtue ethics theory of punishment is prospective: that is to say, it justifies the institution of punishment through its claims that criminal laws should embody normative behavioral standards, and that punishment according to these laws encourages individuals to conform to these standards. Still, punishment allows criminals the opportunity for reform through use of the prison system. On the other hand, the virtue ethics theory may be regarded as retrospective to the extent that the general justificatory principle for the punishment of particular crimes lies in the notion that the criminal deserves punishment for committing acts that manifest a failure of practical reason. This theory of punishment, when properly understood, can help to explain legal punishment practices as well as present a defensible position in the argument over the theoretical justification for punishment.

Introduction

The traditional justifications for legal punishment have rested on either retributive or utilitarian (consequentialist) grounds.¹ The retributive theorist maintains that criminals should be punished simply because their acts have *merited* punishment. For the utilitarian, criminals should be punished in order to be physically incapacitated from committing further crimes as well as to *discourage* others from committing those same crimes in the future. However, there is a third alternative that has risen to the fore in recent years: the “virtue ethics” theory of punishment.²

I will demonstrate that the virtue ethics theory of punishment combines the retrospective aspects of the retributive theory with the prospective aspects of the utilitarian theory, thereby producing a composite theory of punishment. The theory presents a successful marriage of retributive and utilitarian ideology and draws its strength from the ability to provide theoretical support to common intuitions regarding punishment.

Drawing on the conceptual distinction made by John Rawls with respect to justifying the institution of punishment from particular instances of it,³ one will see that the virtue ethics theory of punishment is prospective in the sense that it justifies the institution of punishment: criminal laws reflect conventional standards of conduct, and punishment forces those subject to it to recognize the moral legitimacy of the law and to act according to its precepts. Still, the institution of punishment provides criminals with

an opportunity for reform through the use of the prison system. It is retrospective to the extent that the general justificatory principle for the punishment of particular crimes lies in the notion that the criminal deserves punishment for committing acts that manifest a failure of practical reason. The virtue ethics theory of punishment, when properly understood, can help to explain legal punishment practices, as well as to present a defensible position for the theoretical justification for punishment.⁴

This paper will be broken down into the following five parts: Part I will provide a brief overview and analysis of the retributive theory, while Part II will do the same for the utilitarian theory. Part III will develop the concept of ‘practical rationality’ in relation to concepts relevant to moral responsibility and present the virtue ethics theory in relation to punishment. Part IV will provide positive arguments in favor of a virtue ethics theory of punishment, and finally, Part V will address some possible objections to the theory.

Part I: The Retributive Theory of Punishment

The primary factor distinguishing retributive and utilitarian theories of punishment is the idea that the former ultimately grounds the normative force (or reason) for society’s punishing criminals solely on past actions or behavior (and thus is retrospective in nature), while the latter grounds the normative force for punishment solely on how such punishment affects future events and consequences (and thus is prospective in nature).

The basic thrust behind the retributive theory lies in its intuitive appeal. It is expressed, for example, in the ancient phrase ‘an eye for an eye,’ which captures the idea of moral deserts. According to this theory, if someone steals, rapes, or murders, then it should follow that society has a legitimate power to punish that person simply based on his or her violation of the law. This individual, then, morally deserves to be punished. It presupposes the common notion that humans have a capacity for deliberation, and that the failure to properly reason before committing crimes implies one is culpable for the action. Moreover, the theory gives a firm foundation to the principle of proportionality, which holds that criminals should be punished in proportion to the gravity of their crimes. Based on this principle, common thieves may deserve five to ten years in prison, child rapists ten to fifteen years, and mass-murderers capital punishment or life in prison. This principle has entered into societal convention to such an extent that many often take it for granted that just societies must uphold it in order to qualify as just.⁵ The retributive theory can explain the rationale behind this principle, since the theory holds that punishment should be proportionate to the moral offensiveness of the crime.

Nevertheless, the theory has been largely marginalized in academic circles. Some critics claim that it constitutes no more than vengeance, espousing the axiom that ‘two wrongs don’t make a right.’ While philosophers like Immanuel Kant may have likened society’s punishing individuals to God’s punishing them, it seems that the legitimate authority to punish people in society spans farther than mere retrospective factors and should include prospective factors like incapacitation, deterrence, reform, and social control as well. Therefore, even if the retributive theorist can circumvent the vengeance criticism (although this is certainly in dispute), he or she still fails to provide an adequate account for the prospective factors mentioned—retribution may be good enough for God, but life on earth with imperfect societies composed of imperfect people means pure retribution simply will not do.

Herbert Morris's spirited account of the retributive theory presents the theory in what is perhaps its best light. Morris's theory presupposes a social contract theory of legitimate government: individuals living in a society "benefit" from the protection of their individual autonomy, as secured by rights to non-interference from others. Additionally, they benefit from living in a society that respects the rule of law, a society of order and stability.⁶ These rights therefore come with reciprocal duties on the part of all members to respect the legal rules that make such a social arrangement possible. Each individual, thus, "burdens" him or herself insofar as exercising self-restraint in following the law. Criminals deserve punishment because they break the law and fail to act in accordance with the burdens of self-restraint followed by others. So Morris concludes, "Justice—that is punishing such individuals—restores the equilibrium of benefits and burdens by taking from the individual what he owes, that is, exacting the debt."⁷ Morris's theory is retributive since the rationale for punishment depends on retrospective factors; namely, taking advantage of legal rules that others have been compelled to follow. Morris effectively bypasses the criticism regarding vengeance by implicitly making the common-sense distinction between pro-active actions and reactive actions, rightfully punishing those who take the initial steps in acting wrongfully while exonerating society from reacting to (and punishing) those who commit crimes. In addition, Morris's theory has the additional virtue of providing an appealing rationale (and thus a sufficient condition) for why criminals deserve punishment: that they violated the laws of society and therefore took advantage of others who have exercised the burden of self-restraint.

While not going into too much detail over the flaws of the theory, a few deserve mention. First, Morris's theory misidentifies the reason why certain actions (like theft, burglary, or murder) should be considered crimes. Rather than concentrating on the unfair advantage that criminals gain by neglecting their social obligation of self-restraint, one ought to focus on the actual *harm* done to victims. Murder qualifies as a crime not because it is unfair to people who abide by the social constraint of not committing murder, but rather because it inflicts harm on the victim. Second, the theory seems to rest on flawed psychological assumptions. It presupposes that everyone is subject to equal benefits and burdens just from living in a society, and that punishment, when needed, restores the social equilibrium. Many people, though, do not feel the burden of restraining themselves from committing violent crimes like murder and rape. The philosopher C.L. Ten therefore admonishes that it would not make sense to say that criminals who engage in such activities take an unfair advantage of other's burden of self-restraint.⁸ These difficulties must be overcome for Morris's retributive theory to be tenable.

Part II: The Utilitarian Theory of Punishment

The utilitarian theory of punishment places the normative value of punishment on prospective factors such as incapacitating the criminal from committing further crimes or deterring others from committing crimes themselves—all in the hope of creating greater social control and order. The ultimate purpose of punishment is to harm criminals to the minimum extent necessary in order to protect society from experiencing greater harm in the future.⁹ Perhaps such a theory gets its appeal from the notion that it is not within the government's legitimate scope of power to punish people simply because they morally deserve to be punished. Instead, government should focus more on furthering public safety, welfare, and order by modifying people's choices and getting

them to respect the law. If one were to take a grander perspective on the issue, one would find that the institution of punishment was not created in hopes of punishing people for the sake of moral deserts—for that would amount to mere vengeance—but in order to prevent harms to innocent people and to society at large. In this way, the utilitarian theory can boast itself as more humane.

The utilitarian theory, however, does not come without its problems. For one, the theory does not protect against the case in which punishing those who happen to be innocent (using them as scapegoats) would either generate greater utility to the society or sufficiently deter others from committing crimes.¹⁰ The retributive theory outlaws punishing of the innocent because only those who morally deserve it, that is the guilty, should be punished. To address this challenge, the utilitarian may appeal to a distinction between act utilitarianism and rule utilitarianism. Whereas act utilitarianism holds that people should maximize utility for each act, rule utilitarianism holds that people should establish rules that will produce maximum utility and that those rules should be universally followed, even if a violation of them would create more utility in particular instances. The rule utilitarian may therefore argue that society would maximize utility by adopting moral rules that prevent the punishment of the innocent—*prima facie*.

Nonetheless, some have discovered an argument that effectively demolishes rule utilitarianism by finding that it inevitably collapses into act utilitarianism.¹¹ Imagine any moral rule that a rule utilitarian should accept and call this Rule A. Now imagine that Rule A has an exception, whereby allowing the exception will produce more utility than following Rule A unconditionally. Consequently, the rule utilitarian should accept Rule A', which comprises the original Rule A as well as the built-in exception. Now imagine that there were another exception to Rule A', and for the same reason as before the rule utilitarian should revise Rule A' to Rule A'' in order to allow for the exception and thus produce even greater social utility. Such a pattern could be repeated until rule utilitarianism collapsed into act utilitarianism. Consequently, it appears the utilitarian theory of punishment substantiates the criticism that it justifies punishing innocent people as scapegoats in certain circumstances.

Part III: The Virtue Ethics Theory of Punishment

The capacity for practical rationality is the necessary condition for moral responsibility. Aristotle believed that everything had a certain function and that the particular function of human beings was using practical reason to develop states of character in accordance with the virtues and then following those dictates.¹² Reason does not serve as a 'slave to the passions,' but it rules over them by *motivating* individuals to adopt certain desirable values. Practical reason operates at the level of motivations and desires.¹³ One cultivates the proper motivations and desires through conditioning and developing habits of mind that contribute toward the adoption of desirable character traits.¹⁴ Sound practical reason does not necessarily coincide with morality because one can act in accordance with moral principle, yet still desire to act otherwise. On the other hand, people who exercise sound practical reason recognize moral principles, act in accordance with those principles, and possess motivations and desires to do so—they do the right things for the right reasons while lacking the motivation to do otherwise.

Perhaps this notion of practical rationality can be understood according to T.M. Scanlon's idea of 'critically reflective, rational self-governance.' Moral agents must possess an ability to pass judgments upon their actions and intentions (critical reflection), consider and weigh the reasons for their actions (rationality), and act

according to this deliberative process (self-governance).¹⁵ Since it seems that the self-governance condition makes the test for moral agency too strict (as one who has already critically reflected and used her reason should still qualify for moral agency even if the person suffers from a weak will in moving reason to action), the capacity for critical reflection and rationality should qualify people as moral agents and thus qualify them for moral praise or blame. The virtue ethics theory thus centers on using practical reason to deliberate over the proper values one ought to adopt as well as on the proper means by which one may live by them. This does not imply that one possess a formal decision procedure for determining how to act because right action depends on circumstances, which tend to vary (sometimes very subtly) from situation to situation.¹⁶ As in chess, the most prudent moves vary significantly across situations because of the enormous number of possible combinatorial arrangements of the pieces. While common rules of thumb may help one in playing the game, the best moves ultimately depend on adapting to the particular circumstances involved.

Just as individuals use their practical reason to recognize the goodness of health and thus desire to live a healthy life, they can also use their practical reason to recognize just and justly enacted (or at least morally permissible) laws and thus desire to live in a community in which such laws must be followed. The general justificatory principle of the virtue ethics theory of punishment with respect to particular crimes is that criminals must be punished only when they have transgressed the law and failed to use their practical reason to act in accordance with it. Although Jean Hampton's moral education theory of punishment can be seen as one form of the virtue ethics theory of punishment, the view presented here differs because it places more emphasis on retribution rather than on reform.¹⁷ The criminal deserves punishment for committing a certain action, which manifests a failure to properly exercise practical reason.

The virtue ethics theory of punishment, therefore, shares many similarities with the retributive theory of punishment insofar as it grounds the reason for the punishment of criminals as a consequence of their actions. However, this view differs from a purely retributive theory because the justification for punishment does not lie *simply* in the criminal's deserving it, but rather this view recognizes the additional goal of attempting to reform the criminal. Judges will not adjudicate cases by stating that the formal reason for a sentence is that 'the criminal failed to use her practical reason in a proper manner and thus deserves X years in prison.' Rather, judges will state that the formal reason for the sentence is that 'the criminal *acted* in violation of the law and thus deserves to be punished with X years in prison.' The rationale, though, rests in the criminal's failed use of practical reason in recognizing the moral legitimacy of the law and acting in accordance with it, where this failure was *manifested through* the criminal's action. This failure can be thought of as the *mens rea* condition necessary for punishment. Only the failure to adapt one's practical reason to appreciate the law constitutes as grounds for punishment, since one can maintain that only certain actions should be considered criminal as these actions signify such gross violations of moral principles.

The reason for using the prison system for punishment, as opposed to other forms (shaming, corporal, execution, or others), lies in the common recognition that prison provides criminals the time, environment, and opportunity in which to morally reform themselves through means such as religion, education, general reflection, work, and so on.¹⁸ Criminal practice, therefore, already acknowledges a virtue ethics theory by punishing criminals for committing actions that constitute crimes and by punishing through means of prison time, which yields an environment for moral reform.

Another issue, distinct from that concerning the rationale for punishing criminals for particular actions, is the rationale for the institution of punishment in general. It is the difference between asking the question, ‘why are people punished?’ and, ‘why does this particular person deserve to be punished?’ For the virtue ethics theory of punishment, the answer to the second question lies in the idea that criminals transgress criminal laws that embody certain normative rules and norms of conduct that individuals living in a community ought to recognize and follow. While utilitarian theorists think that social control through means of incapacitation or deterrence is the only legitimate rationale for punishment, virtue ethics theorists also recognize the additional, legitimate goal of using punishment in *trying* to produce salutary effects on the practical rationality of the criminal as well as that of society. It is often thought that social institutions like family, school, and church help shape people’s characters by helping to form their disposition, motivations, desires, and values. This notion is crucial to understanding why many consider it important that children grow up in a nurturing social environment, where they can develop self-reflection, empathy, and other virtues.

The social institution of criminal law and punishment can help *internalize* certain desirable character traits as well. Since the criminal law expresses certain moral norms to live by, punishing individuals for failing to exercise practical reason in recognizing these norms and living according to them constitutes grounds for punishment. Instead of using punishment to instill fear in people to discourage them from committing crimes, the virtue ethics theory sees punishment as a way of stimulating these individuals to exercise their practical rationality in order to critically reflect, deliberate, and act upon social norms.¹⁹ While many criminals already undoubtedly recognize the wrongness of their actions, society enacts criminal laws and punishes people for violating them not only because these people have failed to recognize the legitimacy of the law and failed to act accordingly, but also because punishment serves the function of communicating the message to criminals, in an intense and stark manner, that certain norms of conduct recognized by the community should be followed and respected—punishment effectively denounces these transgressions. Punishment through prison sentences gives criminals the opportunity for reflection, with the ultimate goal of reform.

In a broader sense, the enactment of criminal laws and the imposition of punishment both reflects moral norms of conduct and stimulates *everyone* living in society to recognize the law’s authority and thus live their lives with recognition and respect for the law. Kyron Huigens, one of the strongest advocates of the virtue ethics theory of punishment, eloquently states the point:

Our characters, desires, and motivations, are formed by the rational debate, deliberation, decision, and reflection involved in the choice and execution of criminal law norms. The criminal law causes us to refrain from wrongdoing by the rational governance of our ends, and not by the crude means-end reasoning that is usually denoted by the word “deterrence.”²⁰

Both criminal law and punishment effectively stand as commandments on society’s wall, stating that certain actions and behaviors shall be prohibited and that everyone living in society should recognize and respect this fact. Rather than having individuals refrain from committing crimes in the fear of the consequences once caught, criminal laws and punishment *encourage* individuals to shape their characters in such ways to

prevent them from ever conceiving of committing such actions—the *ideal* is to encourage right actions grounded in right reasons and motivations for action. This does not mean that punishment for the purpose of social control goes unrecognized in the virtue ethics theory of punishment. Indeed, a just society should maintain a reasonable degree of public safety and control for members both to live and to live according to virtue and the dictates of reason. While social control should be a factor in the punishment scheme, one should recognize that the *theoretical* understanding of criminal law and punishment should contain the idea that these two institutions *inherently encourage* that certain manners of conduct be followed by all members of society.²¹

According to the virtue ethics theory of punishment, the general justificatory principle for the institution of punishment lies in the idea of establishing criminal laws that embody certain moral norms of conduct, and punishment serves the purpose of conditioning people to recognize the moral legitimacy of the law and to act accordingly. Punishment should also be directed toward reform, which is why criminals are punished with prison terms rather than through corporal means (flogging, disfigurement, public humiliation, and so forth) and why certain prisons provide resources for exploring religion and education. The criminal deserves punishment for *committing acts* that manifest a failure of practical reason but should also be given an opportunity for reform.

Part IV: The Advantages of the Virtue Ethics Theory of Punishment

The virtue ethics theory of punishment stands superior to the retributive and utilitarian theories for the following reasons. First, the virtue ethics theory draws on the retributive theory's intuitive appeal of moral deserts. Criminal laws present a set of moral generalizations that prohibit certain actions and behavior and thus impose normative demands upon the members of society. On a virtue ethics theory analysis, criminals deserve punishment because they have failed to properly exercise their practical reason insofar as recognizing the authority of the law and acting accordingly.²² The virtue ethics theory of punishment has more appeal than the retributive theory because the latter cannot adequately explain commonly held intuitions regarding the rehabilitation and reform aspects implicit in the use of the prison system. According to the retributive theorist, punishment concerns only criminal deserts, which makes it hard for the theory to account for the ideas of rehabilitation and reform.

Second, the virtue ethics theory draws on the utilitarian theory's intuitive appeal of prospective factors in relation to punishment. While it recognizes the legitimate goal of social control through detaining criminals and deterring others from committing crimes, the virtue ethics theory of punishment also places weight on moral reform implicit in the idea of a prison system. The theory thus provides theoretical support to commonly held intuitions regarding the use of such a system. Yet by punishing only those who have violated the criminal law and thus have failed to properly use their practical reason, the virtue ethics theory does not succumb to the 'punishing the innocent' criticism.

Third, the virtue ethics theory can better explain legal excuses, illuminating why circumstances particular to the case should matter in determining fault, or culpability, with respect to crimes. Huigens notes that the proper use of practical reason requires that one remain sensitive to the circumstances and context under which one operates.²³ Consequently, the virtue ethics theory can explain why the circumstances surrounding certain unlawful actions should sometimes lead to a defendant's being excused for certain crimes, which could lead to exoneration or a reduction in the

criminal sentence. It could have been the case that any reasonable observer would judge the defendant as having properly exercised her practical rationality in understanding the circumstances related to the crime and adjusted her actions accordingly. Consider the example of the famous 19th century cannibalism at sea case in England concerning the ship, ‘*The Mignonette*.’²⁴ Although the sailors formally broke the law in murdering one of the other sailors in order to survive while stranded at sea, the judge in the case eventually recognized that the dire circumstances of the situation warranted a large reduction in sentencing, since it seems that those convicted did not fail to use their practical reason in understanding the circumstances and in acting accordingly. Consequently, the judge realized that they should not have been held criminally culpable in the full sense of that term. Although this case may be extreme, it illustrates the point that culpability depends on circumstances surrounding the crime; circumstances dictate the proper course of action one should take, and the means of figuring this out depends on practical reason.

Fourth, the virtue ethics theory can best explain legal exemptions, especially conditions like insanity. The reason insanity does not warrant punishment lies in the idea that the insane lack the capacity for critical reflection and rational deliberation—they lack the capacity for practical reason. They can neither pass judgments upon the goodness of their actions nor consider and weigh reasons for their acting. While the retributive theorist may claim that the insane are legally exempt from punishment because they do not morally deserve it, the virtue ethics theory gives content to that notion by explaining that they should be exempt from blame and punishment precisely because the insane lack the capacity for practical rationality. This presumes that being held in psychiatric wards does not constitute ‘punishment,’ since punishment is intended as an *intentional* infliction of pain or unpleasantness on criminals, while psychiatric wards are intended purely for a kind of quarantine and rehabilitation.

Consequently, the virtue ethics theory provides an account that combines the best elements of both the retributive and utilitarian theories. It draws on retrospective factors by punishing people for committing acts that manifest a failure to exercise practical reason. It draws on prospective factors by drawing on the goal of social order while recognizing that the purpose of punishment also lies in reforming the criminal, which can be seen in the use of the prison system. Finally, it explains the ultimate rationales for legal excuses and exemptions.

Part V: Addressing Some Concerns About the Theory

The virtue ethics theory of punishment, as it has thus far been presented raises a few questions and concerns. Libertarians may take issue with what seems to be an underlying paternalistic tone; one may call this the ‘criticism from paternalism.’ The government does not have a duty to facilitate the development of practical reason in criminals, or others for that matter, in society. The government instead has the duty merely to detain criminals in order to prevent them from harming others.²⁵ From the libertarian perspective, even the utilitarian idea of deterrence might come under threat. However, this analytical framework fails to appreciate that criminal laws represent normative commands to act and behave in certain ways, which means that individuals who transgress these normative commands have neglected them. This *authorizes* government to punish individuals on the basis of transgressing the law and of providing conditions for reform, while encouraging others to use their practical reason properly.

Along the same lines as the criticism from paternalism, there are those who may level the charge that resources should not be allocated for the purpose of morally educating criminals to encourage them to properly use their practical reason. Since taxpayers must ultimately bear the burden of paying for penitentiaries, prison guards, and the general costs of operating the criminal justice system, taxpayer funds should instead go toward non-criminal related interests—perhaps schools, universities, welfare programs, tax cuts, and so on. While such issues will clearly hinge more on practicality than on principle, some may nevertheless take the objection further and say that even scarce resources should never be directed toward helping reform criminal offenders.

This objection, however, fails to take a legitimate reason for punishment into consideration. To the extent that prisons are intended to provide a means for reform, the current practice of using prisons recognizes that attempts at reform constitute a legitimate rationale for punishment (but only a necessary condition in the virtue ethics theory analysis), and hence a legitimate expenditure of public funds—this does not entail that government necessarily succeed in reforming the criminal but simply that it *intends* to achieve such reform. Moreover, the objection mischaracterizes the virtue ethics position, since the theory stipulates that government ought to punish those who transgress laws and thus fail to properly use their practical reason because they deserve it, while also maintaining the principle of reform. The transgression of the law in conjunction with the reform principle therefore constitutes the sufficient condition for punishing criminals according to a virtue ethics theory of punishment.

Others may criticize the theory because they doubt whether incarceration can really reform a criminal's practical rationality; one may call this the 'skeptical critique.' Some people simply do not care about their intentions or attitudes in relation to their actions. They have the capacity for critical reflection and deliberation, but they forego any struggle in coming to a rational justification for their actions—they are reform-able but have no interest in being reformed.²⁶ It seems that this objection naturally brings about a crucial distinction between the intention to reform and actual reform. Whereas the objection presented would greatly undermine the virtue ethics theory of punishment if it required that criminals *in fact* reform their exercise of practical reason. Given that this is an imperfect world composed of fallible individuals and flawed justice systems, the virtue ethics theorist can justify her theory by making it clear that the rationale for punishment lies in the mere idea of *intending* to reform, rather than actually reforming the criminal's capacity for practical reason. Resources are scarce, so accommodations to this fact must be made—to think otherwise would be utopian.

Finally, critics may allege that the virtue ethics theory of punishment will lead to indeterminate sentencing policies. This rests in the notion that it would be impractical to properly tailor sentences to the degree in which criminals would need to reform their practical reason. It seems plausible that different criminals require different amounts of time for proper reform, if they can ever be reformed at all. In pushing the theory to its logical conclusion, this critic tries to demonstrate that the virtue ethics theory is ultimately impractical because it cannot lead to any semblance of a standardized sentencing policy. Without any kind of standardized policy, judges, who cannot help but be fallible, are left with enormous discretion in criminal sentencing. Moreover, lawyers or criminals would engage in what would amount to a puppet show by deceiving the judge (or perhaps a parole board once in prison) that the criminal has mended her ways and changed her life, when in fact this is not the case. Through such manipulation, the judge or parole board may incorrectly reduce the criminal sentence before the criminal properly receives just deserts for failing to follow the law (and thus failing in the use of

practical reason) or properly reforms herself in such way that she now recognizes, respects, and follows the law.

This criticism can be addressed in two parts. First, an advocate for the virtue ethics theory of punishment could try to solve this puzzle by arguing that the primary reason for punishing criminals is that they deserve punishment for acting in violation of the criminal law, thus manifesting a failure of practical reason. The principle of reform would only be a secondary reason for punishment, since pragmatic considerations should be taken into account. Such a maneuver would ultimately imply that criminals should be punished in proportion to the gravity of their offense, regardless of the actual reform of the criminal. It would also mean that the time for reform, in the sense of staying in prison, would therefore be limited to the gravity of the offense, and it would place the virtue ethics theory of punishment in no different a position regarding the issue of indeterminate sentences as the retributive theory. Moreover, such a move would still constitute a virtue ethics position for two reasons. It takes into account both the punishment desert, resulting from committing an action that manifests a failure of practical reason and the principle of reform, and it would proportion the prison sentence to the gravity of the crime, where the gravity of the crime would roughly correlate with the degree of failure of practical reason.

Second, the virtue ethics theory differs little from the retributive or deterrence theories with respect to the indeterminacy involved in sentencing. Adam Kolber's subjective experience theory of punishment applies here. Kolber makes the point that retributive and utilitarian justifications for punishment must take into account the *subjective experience* of the punishment on the criminal, ultimately concluding that punishments should be calibrated according to the subjective experiences of such punishment upon them—he takes the theories from their first principles all the way down to their logical implications. Consider once again the retributive theory of punishment. The basic thrust of this view lies in the idea that criminals should be punished for what they have done and that through punishment criminals receive their 'just deserts.' Kolber's subjective experience theory easily fits with such a justificatory scheme, as it is apparent that receiving one's 'just deserts' relies inextricably with the subjective experience one feels through punishment. Since different people have different sensitivity and anxiety levels to the harm or unpleasantness involved in the prison experience, the retributive theory should take this into account when serving moral deserts.²⁷ Therefore, in its ideal form, the retributive theory should lead to indeterminate sentencing policies.²⁸

On the other hand, consider again the utilitarian theory of punishment. Under this view, the ultimate reason for punishing criminals lies in trying to achieve the best outcomes for society. The reason for punishment does not lie in giving to criminals what they deserve so much as detaining them or deterring others from committing like acts. Those thinking about committing crime factor in the subjective experience of punishment when deciding how to act. By properly fitting the subjective experience of punishment with the crime (and since potential wrongdoers will take this fact into consideration), the imposition of a calibrated system of punishment will help in deterring people from committing crimes.²⁹ Different people require different amounts of unpleasant subjective experiences when contemplating the idea of spending time in prison in order to be sufficiently deterred from committing the crimes in question. Therefore, just like the retributive theory, the utilitarian theory should lead to indeterminate sentencing policies as well.

These two theories have enjoyed widespread appeal as legitimate justifications for punishment and have been able to circumvent criticisms concerning indeterminate sentencing policy. The actual practice of punishment requires that pure theory be left at the door to a certain extent, which explains why these two particular theories still seem to present legitimate rationales for punishment. In the end, the virtue ethics theory fares rather comparably to these other two theories regarding the concern over indeterminate sentencing policy, especially when one considers the first response to the criticism.

Concluding Remarks

The purpose of this paper was to develop a sensible and coherent account of a virtue ethics theory of punishment. It was shown that the virtue ethics theory combines the best elements of both the retributive and utilitarian theories. According to the virtue ethics theory of punishment, the general justificatory principle for the institution of punishment on the whole lies in the idea of establishing criminal laws that embody certain moral norms of conduct, and punishment serves the purpose of conditioning people to recognize the moral legitimacy of the law and to act accordingly. Punishment should also be directed toward reform, which is why criminals are punished with prison terms rather than through corporal means and why certain prisons provide resources for exploring religion and education. On the other hand, the justification for the punishment of particular crimes lies in the idea that the criminal deserves punishment for *committing acts* that manifest a failure of practical reason while also recognizing that punishment should give the criminal an opportunity for reform. The virtue ethics theory also explains the ultimate rationales for legal excuses and exemptions by taking into account the notion of practical reason, which plays a central role in these crucial issues. In any event, this paper should be seen as a broad overview and starting-off point, since more work clearly must be done in order to further develop this theoretical view.

Endnotes

¹ See HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* 5 (Oxford University Press 1968) for a definition of “legal punishment.” Punishment should be understood as a term that inherently possesses normative value, possessing the qualities of legitimacy and authority. It thus stands in contradistinction from mere vengeance or retaliation. With this in mind, Hart offered the following five-part definition of punishment:

- i. It must involve pain or other consequences normally considered unpleasant.
- ii. It must be for an offense against legal rules.
- iii. It must be of an actual or supposed offender for his offence.
- iv. It must be intentionally administered by human beings other than the offender.
- v. It must be imposed and administered by an authority constituted by a legal system against which the offense is committed.

Therefore, punishment, in order to be punishment, must relate to individuals living in a society, and must cause some type of suffering in the offender. Moreover, if one accepts that treatment of the criminally insane does not involve pain or other consequences considered unpleasant, then their treatment in psychiatric wards does not constitute “punishment” according to this definition. One also should note that this definition does

not necessarily apply to the concept of punishment regarding the relationship between parents and children, school-teachers and children, and so on.

² See Laurence Solum, *Natural Justice*, 51 Am. J. Juris. 76 (2006). Solum observes that “virtue politics” and “virtue jurisprudence” have experienced a recent thrust in normative legal theory discussions. According to Solum, a complete account of virtue jurisprudence would have to include a virtue-centered account on the nature of judging, the ends of legislation, and the nature of law. In his article, Solum gives such an account of judging. However, one should add that virtue jurisprudence needs an account of punishment as well.

³ See John Rawls, *The Practice of Punishment*, in CRIME AND PUNISHMENT: PHILOSOPHIC EXPLORATIONS, ed. by Michael J. Gorr & Sterling Harwood 336 (Jones and Bartlett Publisher, Inc. 1995).

⁴ For the purposes of this paper, the “legal punishment practices” referred to are based on Western traditions and therefore do not consider the punishment practices associated with Eastern traditions.

⁵ The common adage, “The punishment must fit the crime,” perfectly expresses this idea.

⁶ Herbert Morris, *Punishment and Fairness*, in CRIME AND PUNISHMENT: PHILOSOPHIC EXPLORATIONS, ed. by Michael J. Gorr & Sterling Harwood 322 (Jones and Bartlett Publisher, Inc. 1995).

⁷ *Ibid*, 323.

⁸ See C.L. Ten, *Is Punishment Fair?*, in CRIME AND PUNISHMENT: PHILOSOPHIC EXPLORATIONS, ed. by Michael J. Gorr & Sterling Harwood 330 (Jones and Bartlett Publisher, Inc. 1995).

⁹ Punishment would thus operate on a kind of cost-benefit analysis.

¹⁰ See David Dolinko, *Restorative Justice and the Justification of Punishment*, Utah L. Rev. 324, 325 (2003). Dolinko quotes C.L. Ten’s criticism of the utilitarian (consequentialist) theory of punishment:

[Utilitarians] are committed to punishing the innocent if by so doing the best consequences are produced. For example, suppose that a particularly horrific crime has been committed by a member of one racial or religious group against a member of a different group, and unless an innocent member of the first group is framed for the crime, the people in the second group will...attack other innocent members of the first group. Swift punishment is needed to restore the harmonious relationship between the two groups, but the guilty person cannot be found, whereas it is quite easy to fabricate evidence against an innocent person.

¹¹ See Edward F. McClennen, *The Rationality of Being Guided by Rules*, in THE OXFORD HANDBOOK OF RATIONALITY, ed. by Alfred R Mele & Pier Rawling 223, 224 (Oxford University Press 2004). See footnote 2 of the essay.

¹² See Richard Kraut, *Aristotle's Ethics*, The Stanford Encyclopedia of Philosophy (Spring 2008 Edition), available at <http://plato.stanford.edu/archives/spr2008/entries/aristotle-ethics/>.

¹³ See Gary Watson, *Free Agency*, in OXFORD READINGS IN PHILOSOPHY: FREE WILL, ed. by Gary Watson 339 (Oxford University Press, 2nd ed. 2003). Watson distinguishes between two conceptions of reason: that held by David Hume and that held by Plato. Hume depicts reason as merely an inference-producing mechanism that can draw conclusions from concepts, ideas, and evidence. Reason thus serves an instrumental purpose, as it does not supply motivations for believing or acting. Plato holds the opposite position. Plato would say that when one decides that health is desirable (valuable) to have for its own sake, one deliberates and reasons to such a conclusion. The motivation to be healthy does not necessarily arise from one's appetites and passions but such a motivation *can* arise through reason. Of course, on the Platonic account, reason can still serve the instrumental purpose of discovering the most effective means of satisfying that value.

¹⁴ Kyron Huigens, *Solving the Apprendi Puzzle*, 90 Geo. L. J. 445 (2002).

¹⁵ T.M. Scanlon, *The Significance of Choice*, in OXFORD READINGS IN PHILOSOPHY: FREE WILL, ed. by Gary Watson 368 (Oxford University Press, 2nd ed. 2003).

¹⁶ The lack of a formal decision procedure demarcates Aristotle's ethical theory from Kant's insofar as the latter relies on the decision procedure laid down by the Categorical Imperative. It also demarcates his theory from the utilitarians and their utilitarian calculus. See Solum 73, 74. Solum quotes Richard Kraut making the point:

So far from offering a decision procedure, Aristotle insists that this is something that no ethical theory can do. His theory elucidates the nature of virtue, but what must be done on any particular occasion by a virtuous agent depends on the circumstances, and these vary so much from one occasion to another that there is no possibility of stating a series of rules, however complicated, that collectively solve every practical problem. This feature of ethical theory is not unique; Aristotle thinks it applies to many crafts, such as medicine and navigation (1104a7-10). He says that the virtuous person "sees the truth in each case, being as it were a standard and measure of them" (1113a32-3); but this appeal to the good person's vision should not be taken to mean that he has an inarticulate and incommunicable insight into the truth. Aristotle thinks of the good person as someone who is good at deliberation, and he describes deliberation as a process of rational inquiry. The intermediate point that the good person tries to find is "determined by logos ("reason," "account") and in the way that the person of practical reason would determine it" (1107a1-2). To say that such a person "sees" what to do is

simply a way of registering the point that the good person's reasoning does succeed in discovering what is best in each situation. He is "as it were a standard and measure" in the sense that his views should be regarded as authoritative by other members of the community. A standard or measure is something that settles disputes; and because good people are so skilled at discovering the mean in difficult cases, their advice must be sought and heeded.

¹⁷ See Jean Hampton, *The Moral Education Theory of Punishment*, in CRIME AND PUNISHMENT: PHILOSOPHIC EXPLORATIONS, ed. by Michael J. Gorr & Sterling Harwood (Jones and Bartlett Publisher, Inc. 1995).

¹⁸ See Gena Barbieri, *Prisons*, in A COMPARATIVE PERSPECTIVE ON MODERN SOCIAL PROBLEMS, ed. by Rita J. Simon 43 (Lexington Books 2001). Barbieri traces the historical origin of this change: "It was in the sixteenth century that the goals for a prison began to include rehabilitation as well as extended incarceration. The workhouse or house of correction was developed based on the theory that regular work and practice in an industry would be rehabilitative."

¹⁹ See generally Alasdair MacIntyre, AFTER VIRTUE (University of Notre Dame Press, 3rd ed. 2007). MacIntyre observed that one can compare the process of acquiring virtues to developing a love for chess. When one is young and inexperienced, one typically would have to be coaxed into playing the game through external forces (parents, rewards, and so on). However, with time the child may come to see the game in a different light, appreciating the strategies, tactics, study, and intellect involved in mastering it. By analogy, potential criminals may need the sanctions imposed by the criminal law in order to refrain from committing crimes. But over time, they may come to appreciate the justice of such laws and act accordingly.

²⁰ Kyron Huigens, *Dignity and Desert in Punishment Theory*, 27 Harv. J. L. & Pub. Pol. 48 (2003).

²¹ It is not clear *prima facie* why a society cannot strive to uphold the legal punishment principles of retribution, social control, and reform at the same time. Just as liberal societies uphold the values of liberty and equality (constantly seeking a balance between them), societies based on the virtue ethics theory of punishment could work in a similar way. In fact, the virtue ethics theory's ability to accommodate these values should be seen as an advantage.

²² Yet if the law were unjust, then transgressors may not actually deserve punishment, as they used their practical rationality to deliberate upon the justice of the law and acted in a way that justice dictates.

²³ Kyron Huigens, *Solving the Apprendi Puzzle*, 90 Geo. L. J. 447 (2002). Huigens here seems to rely on the lack of a formal decision procedure related to Aristotle's virtue ethics theory.

²⁴ See *R. v. Dudley and Stephens* ([1884] 14 QBD 273 DC). Also, See Lon Fuller, *The Case of the Speluncean Explorers*, in PHILOSOPHY OF LAW (Wadsworth, 7th ed.

2004). In this famous law review article, Fuller draws up a hypothetical case that resembles the fact pattern of the cannibalism at sea case. Fuller has hypothetical justices adjudicate the matter and give differing opinions about the defendants' guilt and punishment.

²⁵ More specifically, under a classical libertarian view based on the political philosophy of John Locke, the ultimate reason an action is punishable is because it violates a victim's rights. These rights ultimately emanate from the natural rights preserved from the state of nature and are protected through the particular laws sanctioned by the government once individuals socially contract to live in civil society. The focus on rights is what grounds such a view in classical liberal theory. See John Locke, *Second Treatise of Government*, in CLASSICS OF MODERN POLITICAL THEORY: MACHIAVELLI TO MILL (Oxford University Press 1997). For a reconstruction of Locke's political philosophy according to a more libertarian, night-watchman-state interpretation, see Rommel Clemente, *What Natural Law Theory and Legal Positivism have to Say about the Constitutional Right of Privacy and the Griswold Opinion: Arguments against Justice Douglas's Arguments*, 1 Wash. Und. L. Rev. (Spring 2007).

²⁶ See Randall McGowen, *The Well-Ordered Prison: England, 1780-1865*, in THE OXFORD HISTORY OF THE PRISON: THE PRACTICE OF PUNISHMENT IN WESTERN SOCIETY, ed. by Norval Morris & David J. Rothman 88, 89 (Oxford University Press 1997). McGowen recounts the influence of the Quakers during the early nineteenth century in bringing more humane prison conditions and a prisoner reform mentality to the English prison system. Nevertheless, Whig elements denounced such aspirations, commenting that prisons should provide its inhabitants a dreadful and unpleasant experience and thereby deter others from committing crimes.

²⁷ The anxiety level may depend on claustrophobia; whether there are racial divisions and racism in the prison; whether one is seen as physically intimidating or weak by other inmates; the sensitivity one feels to no longer being free to do as one wishes; and the sensitivity one feels to being branded as a criminal and locked up in a prison cage.

²⁸ Adam J. Kolber, *The Subjective Experience Theory of Punishment* 15 (San Diego Legal Studies Paper No. 08-016, 2008; Col. L. Rev. 2009), available at <http://ssrn.com/abstract=1090337>. Although Kolber draws the distinction between subjective experiential suffering and objective loss-of-liberty retributive theories, he thinks the subjective experience theory of punishment does not apply to the latter either. In addition, he ultimately does not think that the latter can provide a defensible theory of punishment to begin with. Imagine someone who is locked up in a house but remains completely ignorant to this fact. She has no desire to leave the house, but if she wanted to leave she would not be able to do so. Such a person would suffer from a loss-of-liberty, but can that person really be said to be punished?

²⁹ Ibid, 27, 28.

Legal Theory: Ruth Bader Ginsburg Cutting their own Path: Women and the Law

Mary Ann Bonet

Abstract

Supreme Court Justice and longtime advocate of sex equality, Ruth Bader Ginsburg has consistently been a proponent of the Equal Rights Amendment (ERA). Noting that the 14th Amendment was constructed specifically with rights of men in mind, and therefore only provides protection for women, Ginsburg saw the ERA as a way to unequivocally grant women equal rights in America. With the introduction of women in the workplace, the worlds of men and women collided and women began to carve new roles for themselves in society. Ginsburg recognized that with these developments came new legal challenges and these obstacles became the primary focus of her writing. Consequently, this paper aims to analyze several of Associate Justice Ginsburg's law review articles from various points in her career in order to tease out the nuances of her discourse on sex equality.

Near the end of the second wave of feminism in 1978, the *Harvard Women's Law Journal* declared that, "in the field of sex discrimination, the name Ruth Bader Ginsburg is a household name."¹ In a country that is governed by a document that was never meant to include women, former Columbia law professor and current Supreme Court Justice Ruth Bader Ginsburg has spent the majority of her life advocating for sex equality under the law. As the founder of the Women's Rights Project at the American Civil Liberties Union and the author of the first casebook on sex discrimination, Ginsburg is distinguished from the other members of the court not only by her sex but also by her activism for specific causes.² One of nine women in her class at Harvard Law School, she was well acquainted with the obstacles that women encountered in the American legal profession, and it was not until she witnessed the fully integrated Swedish legal system that she realized there could, and should, be an alternative.³ Her ardent activism in the 1970s for the Equal Rights Amendment made her a common fixture in law review journals as she argued that the amendment's "clear and clean" stance on equality would eliminate the confusion that arises from the extension of rights through the 14th Amendment.⁴ While her career keeps evolving, the one thing that remains constant for Ginsburg is that the concept of equality must be universally and liberally applied in the form of equal opportunity. By revisiting several of Ginsburg's law review articles, three of which were published in the 1970s in support of the ERA and one of which was published twenty years later as a reflection on constitutional adjudication, one can trace her consistent praise of equal opportunity through an analysis of her commentary on women's relationship with the law.

Ginsburg addresses the predicament that faces the American woman by continuously stressing the complications that arise when a country is governed by a document that fails to address the needs and rights of half of its constituents. Numerically a majority but socially marginalized, women are consistently overlooked in the Constitution, and it appears to be a deliberate oversight on the part of the founding fathers. Given that the same man who penned the words "all men are created equal" in the Declaration of Independence would later also say that "to prevent deprivation of

morals and ambiguity of issues, [women] should not mix promiscuously in the public meetings of men,” implies that the framers did not consider women to be on equal footing with men.⁵ The one concession that the Constitution unequivocally grants women is the right to vote, which was extended through the 19th Amendment only after years of lobbying. This breakthrough is reminiscent of the legal gains made by former slaves, whose rights were extended through the trio of Reconstruction amendments following the Civil War. However, unlike former slaves, women’s right to equal protection under the law was never explicitly delineated in the Constitution. The 14th amendment was originally crafted with the intent of protecting the rights of former slaves, specifically men, and this is reaffirmed by the wording of its clauses. Ginsburg notes that the amendment marks the first time that “male” is mentioned in the Constitution and that the “threefold use of the word...always in conjunction with the term ‘citizen’” questions its applicability to other groups.⁶ One can infer that her qualms arise from the fact that if one takes into consideration the historical context of the 14th Amendment, a strict constructionist could justify restricting its application to women. Yet in lieu of the Equal Rights Amendment, women are unfortunately left with no other recourse and must rebuff sex discrimination through this nebulous clause. Given its relatively weak legitimacy, Ginsburg considers the Constitution to be, on the whole, “an empty cupboard for sex equality claims” since it provides women with essentially nothing more than the right to vote.⁷

Thus, the effectiveness of the equal protection clause is stunted by its ambiguity, and this has given sexism the opportunity to take root within the legal system. Her claim is buoyed by the opinions of Johnston and Knapp, two law professors who believed that as of 1971, the court had largely “failed to bring to sex discrimination cases those judicial virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues...[Sexism]...is just as easily discernible in contemporary judicial opinions as racism ever was.”⁸ Ginsburg agrees with Johnston and Knapp on both counts. While both sexism and racism point to discrimination against socially marginalized groups, the way that the legal system has handled the issues of sex and race discrimination have followed widely divergent paths. Ginsburg cites *Brown v. Board of Education* as a prime example of how these differences can be traced back to our constitutional design; she argues that “it is one thing to find dynamism supporting *Brown v. Board of Education*...in an amendment centrally addressed in the framers’ minds to race discrimination. It is more difficult to elaborate bold doctrine regarding sex discrimination when even a starting point is impossible to anchor to the constitutional fathers’ design.”⁹ Furthermore, the Constitution’s muddled take on sex equality gives judges legal leeway to hand down equally muddled decisions regarding the topic, which only perpetuates the ambiguity.

Consequently, Ginsburg not only believes that the Constitution glosses over women’s rights but that it also enables our body of law to legally incorporate “traditional sex-role allocations.”¹⁰ This accommodation problematically justifies the “differential treatment of the sexes” by saying that it “operates benignly in women’s favor” by protecting and shielding them from societal dangers.¹¹ This mindset regarding a woman’s place in the world was still fairly prevalent at the time at which Ginsburg was writing and is reflected in the opinions of the country’s justices. Echoing Blackstone’s “benign preference,” Justice Potter Stewart in 1973 declared that the woman is in the unique position to “attack laws that unreasonably discriminate against her while preserving those that favor her.”¹² Her ambiguous legal status allows a woman to pick

her battles and be appeased with those that cushion the hardships of the workplace, such as the controversial *Muller v. Oregon* decision.

Yet Ginsburg rejects Stewart's "best of both worlds" argument; the fact that such a proposition was suggested points to exactly why the Equal Rights Amendment is needed. The worlds of men and women, once defined by the marketplace and the hearth respectively, have collided.¹³ Having "repealed the 'motherhood draft,'" women are no longer bound by their reproductive duties and are propelled into the workforce as developments in society have "curtailed population goals and [reduced the amount] of necessary home-centered activity" that used to be conducted by females.¹⁴ As a result, they are implicitly changing the dynamic of their roles as females since this integration allows women to extend their domain beyond the realm of the home. While this offers new opportunities, it also presents new challenges; legal roadblocks begin to crop up as women adjust to their new position and demand to be considered equal to every other member of the work force. These societal tensions were played out in the courtroom, as evidenced by the decisions handed down in *Reed v. Reed*, *Frontiero v. Richardson*, *Kahn v. Shevin*, *Taylor v. Louisiana*, *Weinberger v. Wiesenfeld*, and *Stanton v. Stanton*. The aforementioned cases responded to the blurring of these two worlds by "[questioning] the law's treatment of women and men who did not fit the stereotype... and the fairness of gender pigeon-holing in lieu of neutral, functional description."¹⁵ These defendants reject the "privileges" and "favors" that Justice Stewart believes the legal system offers women and instead demand to stand on equal footing. While the Court's decisions take these exigencies into account, their responses have been "uneven, insecure, and marked by sharply divided opinion" and are undermined by their inability to present a united front.¹⁶ This in particular frustrates Ginsburg, who finds some of their decisions to be "laconic," since she fails to see the Court establishing a truly definitive stance on the issue of sex discrimination.¹⁷

Yet these legal ambiguities and obstacles should not cause despair, Ginsburg seems to reassure her audience. The very documents that have worked against women have the potential to help them for their history is the "story of the extension (through amendment, judicial interpretation, and practice) of constitutional rights and protections to once ignored or excluded people" as the times deem it appropriate and the zeitgeist of the country shifts.¹⁸ The changing times have put the issue of sex equality on the Court's radar, and these times demand an amendment that provides clarification and makes its stance "clear and clean" by asserting that gender "should not be a factor in determining the legal rights of men or women."¹⁹ This is highly preferable to the route offered by the 14th Amendment, which requires a "boldly dynamic interpretation" to reach a much hazier conclusion, and this process additionally requires one to "[radically depart] from the original understanding."²⁰ The ERA reshapes the political and social arena so that all are "judged on the basis of individual merit and not on the basis of an unalterable trait of birth that bears no necessary relationship to need or ability."²¹ Unlike the 14th Amendment, the ERA sets forth its propositions with precision and clarity to create a truly egalitarian landscape.

Ginsburg's support for the ERA appears to stem largely from a desire for women to be free from the roles that society has carved out for them. Never unafraid of exploring the unknown, Ginsburg herself deviated from the expected societal path by graduating at the top of her class in a field where women were severely underrepresented. Equality is about having the freedom to dictate the terms of one's life and to be able to cut one's own path. Women are not looking for cushions or extra support, simply the chance to govern their own lives and to do as they please, not as they

should.²² Traditional sex roles should simply not be forced upon anyone by the constraints of the law; rather, they should be “a pattern individuals should feel free to adopt or reject, without government coercion.”²³ Yet this should not be interpreted as a renunciation of this division of labor; it actually “enhances that role by making it plain that it was chosen, not thrust on [the female] without regard to her preference.”²⁴ The amendment marks a return to the prized American ideal of liberty and the idea that one’s choice is not bound by legal constraints, nor should it be hindered by societal norms or impositions. The ideals that Ginsburg is calling upon to support her argument are not revolutionary: embodied in the Declaration of Independence, they essentially constitute the core of America’s beliefs. So why do we face these complicated legal embroilments? Fear, according to Ginsburg. The public is afraid to break the pattern, shatter the mold, and ultimately lacks the courage to move into the realm of the unfamiliar simply because it “cannot fully forecast what an equal opportunity society would be like.”²⁵ Yet Ginsburg urges one to take this leap of faith, for this public resistance simply falls in with the precedent set by the founding fathers, who were equally hesitant to incorporate women into the political realm nearly 200 years ago. Ginsburg’s articles read as a call to action and demand for the public to abandon their reservations in the name of progress and human rights.

Yet for all of her lobbying, Ginsburg is also willing to admit that the ERA is not completely necessary for these revisions to occur. However, its ratification would denote a “constitutional commitment” to these changes and this formal recognition would mark an ‘indispensable step toward defense and fulfillment of [a] human right.’²⁶ Refusing to stand for token measures, the ERA demands real change from all three branches of the government and, most importantly, provides an “unassailable basis for applying the bedrock principle: all men and all women are guaranteed by the Constitution equal justice under law.”²⁷ Its ratification would simultaneously mobilize and legitimize the cause: it would galvanize the legislature by putting the issue on the government’s radar while also making it known that sex equality is a national priority that is to be taken seriously.

In spite of Ginsburg’s efforts, the Equal Rights Amendment failed to be ratified by the requisite number of states before its extended deadline in 1982. However, things do not appear to have turned out as disastrously as expected. As she conceded, the ERA is not necessary for these revisions to the law to occur, and Ginsburg believes that since the 1970s, the Court has successfully engaged the attention of the branches of government. By pressuring the “legislative and executive branch [to reexamine] sex-based classifications, the Court helped ensure that laws and regulations would ‘catch up with a changed world.’”²⁸ The Court’s responsiveness reflects the influential interplay of law and society and shows how the spirit of the times can act as an impetus for change.

While lobbying for the ERA may have been the focus of Ginsburg’s writing during the 1970s and early 1980s, her articles hint at the underlying aim of her work: to push for a government that grants individuals the freedom to develop their “full potential as human individuals.”²⁹ Yet the government can only regulate actions, not the slant of a nation’s ethos. However, by ruling against actions, it can punish the manifestations of this sexist mentality. Laws thus are passed with the intent of chipping away at what Ginsburg calls the “problem of growing up female:” that “from the nursery on, an attitude is instilled insidiously” that skews the perception of one’s sex and intended gender roles.³⁰ Its effects are reflected in graffiti scribbled in a college library during the 1950s:

Mary Ann Bonet

Study hard.-
Get good grades.
Get your degree.
Get married.
Have three horrid kids.
Die, and be buried.³¹

In spite of earning a college education, and thus having the workforce at her feet, the author feels that because of her sex, the trajectory of her life has been decided since birth. Yet just as society can influence law, so we can hope that the law can influence society and lead us to the ultimate end of “role delineation by gender” so that either sex, male or female, can be assured that no door will be shut in their face simply because of their sex.³²

Endnotes

¹ Ginsburg, Ruth Bader. “The Equal Rights Amendment is the Way.” *Harvard Journal of Law & Gender* 1(1978) 19.

² Ibid, 19.

³ Ibid., 20.

⁴ Ginsburg, Ruth Bader. “Gender and the Constitution.” *University of Cincinnati Law Review* 44 (1975) 23.

⁵ Ginsburg, Ruth Bader. “Constitutional Adjudication in the United States as a means of Advancing the Equal Stature of Men and Women under the Law.” *Hofstra Law Review*. 26 (1997) 265.

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⁷ Ginsburg, Ruth Bader. “Sex Equality under the Fourteenth and Equal Rights Amendment.” *Washington U.L.Q.* 161 (1979) 164.

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Columbia Undergraduate Law Review

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- ²⁹ Ginsburg, Ruth Bader. "Gender and the Constitution." *University of Cincinnati Law Review* 44 (1979) 2.

³⁰ Ginsburg, Ruth Bader. "Gender and the Constitution." *University of Cincinnati Law Review* 44 (1975) 29.

³¹ *Ibid.*, 29.

³² Ginsburg, Ruth Bader. "Gender and the Constitution." *University of Cincinnati Law Review* 44 (1975) 29.

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