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MORAL MONSTERS AND PATRIOT ACTS
Rights and Duties in the Worst of Times

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The majority of people, regardless of nationality, believes that rights and duties ought to be equally balanced. How to make them so and why they should be so are less than clear—particularly when the balance seesaws and the concepts dilate and constrict during the worst of times. Rights, duties, and their relationship are the broad issues that are examined in 3 enactment areas dealing with bad Samaritans, sexually violent predators, and alleged terrorists. This is where one finds moral monsters and hydraulic pressures increasing. In these areas, where debate, discourse, and traditional checks and balances have faltered or failed, the primacy has swung toward duties. However, some unusual checks and balances have recently emerged through the press and the populace in an attempt to restore balance and debate. Although outcomes have not been settled, some lessons about the processes of creating balance are nonetheless discernible.

Keywords: rights, duties, bad Samaritans, pedophiles, alleged terrorists

I. Horrific and Heinous Acts and the Enactments That Follow in the Worst of Times

Many individuals in many eras have no doubt felt that Dickens's (1986) memorable phrase "the worst of times" (p. 591) captured their perceptions and feelings. In using this phrase, I make no empirical claim that this is objectively so in these current times and proffer no comparative evidence to support such a proposition. Rather, this phrase is used to convey what Justice Holmes (*Northern Securities Co. v. United States*, 1904, p. 197) labeled "a kind of hydraulic pressure"—which, I submit, affects both facts and fundamental concepts.

For example, when acts of rape and murder are witnessed by ordinary citizens who fail to render assistance, some see these as signs of civic duty in decline and worse times yet to come (Finkel, 2005). Also, when pedophiles or sexually violent predators (SVPs) harm children, citizens and their elected representatives unite to oppose the return of these moral monsters (Foucault, 2003) to communities after they have served their prison sentence (Winick & La Fond, 2003). Lastly, when terrorists bring down the Twin Towers while the Pentagon burns, many see these as apocalyptic signs that even worse times are here (Finkel & Moghaddam, 2005a).

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In the wake of horrific and heinous acts, there are powerful sentiments, psychological and political, to act and to enact laws to protect citizens and (the) homeland. Such patriotic acts have been introduced in recent years in the United States. These patriotic acts address bad Samaritans who fail to render assistance to their fellow citizens (discussed in Part III, below), pedophiles and SVPs (discussed in Part IV, below), and suspected terrorists and alleged enemy combatants (discussed in Part V, below). These acts and enactments strongly suggest that the balance point between rights and duties has shifted; duties talk and a duties culture now trump the formerly dominant rights talk and rights culture (e.g., Dworkin, 1978; Finkel & Moghaddam, 2005a; Glendon, 1991; Tyler, 2005). This alleged shift also suggests that well-established understandings of rights and duties have changed because the framing of issues has been skewed; perspectives have been foreshortened; concepts have dilated, constricted, or blurred; and corrective processes (e.g., debate, checks, and balances) have become mute or have failed. Yet is this out-of-balance assessment accurate, or is it more showy than substantive, that is to say, merely a temporary tilt within a dynamic balance? Additionally, if it is a temporary tilt, should one not see, in short order, signs of a countervailing push for rights and rebalance?

Changing Times?

In the wake of the September 11, 2001, attacks, perhaps the rights-giving-way-to-duties (Finkel & Moghaddam, 2005a) phenomenon is, as Chief Justice William Rehnquist (1998, p. 222) put it, merely an illustration that "in time of war the balance between freedom and order must shift 'in favor of order'" (quoted in Stone, 2004). Support for this proposition may be taken from the absence of debate during the enactment process, which may illustrate, perhaps, "the ancient maxim *Inter arma silent leges,* 'In time of war the laws are silent'" (Stone, 2004, p. 9). Enactments and silence may also be taken as signs of broad community support, which executives, legislators, and judges weigh in "avowed or unconscious" ways (Holmes, 1881/1963, p. 1). However, the evidence shows this war–silence–support hypothesis is simplistic because more complex empirical and normative factors are at work. These factors suggest that controversial enactments without debate may result from a misreading of community sentiment, a conceptual confusion over well-established principles, and a breakdown of checks and balances as constitutive duties are dwarfed by instrumental duties.

In Justice Holmes's words (*Northern Securities Co. v. United States,* 1904, p. 197), the worst of times generates an "immediate overwhelming interest which appeals to the feelings and distorts the judgment . . . a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well-settled principles of law will bend," such that "great cases, like hard cases, make bad law." This hydraulic pressure is a psychological phenomenon that produces political, policymaking, and legal effects. This pressure can distort clear concepts and bend established principles, as well as foreshorten perspective such that history's lessons no longer help frame current issues. If this shortsighted effect results, then law and policymakers are likely to ignore what James Madison (Finkelman, 1991) would surely recall: the day during the War of 1812 when foreign invaders set fire to his White House residence and that earlier time when the Federalists in Congress enacted the Alien and Sedition Acts (e.g., An Act

Concerning Aliens, 1798; An Act for the Punishment of Certain Crimes Against the United States [Sedition Act], 1798), which "provided that, in the case of a *declared* war, citizens or subjects of an enemy nation [or any noncitizen] residing in the United States could be detained, confined, or deported at the direction of the president" (Stone, 2004, p. 30).

Nonetheless, despite the evidence supporting a shift-toward-duties claim, there are some who question whether a significant shift has occurred at the principled level of rights and duties. The historian Thomas Haskill (2005), for one, reminded readers that rights and duties generally work in tandem, a principle that the philosopher Feinberg (1969) called *logical correlativity*. If this principle is operative even in dire times, then one ought to see signs, however faint, of rights rising and a balance returning. However, when analyzed closely (Harré, 2005), logical correlativity is more an empirical correlativity than a necessity, and thus, it cannot dismiss facts showing otherwise. For instance, actions once seen as duties are now being referred to as rights, a dilation labeled *replaceability* (Moghaddam & Riley, 2005a). Constriction is evident when interrogation techniques (e.g., waterboarding) previously defined as torture and the definition of prisoners of war established by the Third Geneva Convention (Damrosch, Henkin, Pugh, Schacter, & Smit, 2001) have recently been narrowly reconstrued by some in the executive branch. As reported in a number of editorials in *The Washington Post,* the Vice President ("Vice President for Torture," 2005), the CIA Director ("Director for Torture," 2005), the Secretary of State ("'Policy' Is Not Enough," 2005), and the Attorney General ("Torture and the Constitution," 2005) all have claimed that the acts are not torture and the recipients are not prisoners of war. Whether such constrictions, dilations, and locutions are legitimate or are merely masking fuzzy thinking must be examined.

Or Seesawing Times?

Finally, whether these changing times are changing yet again must be contemplated. I examine fresh signs that show the balance point shifting back toward rights in the three specific areas as a result of a reframing and wider view of duties, in which constitutive duties, not just instrumental duties, are now part of the debate. I show that this redressing swing results, in good part, from some unusual checks and balances brought into play—by the so-called fourth and fifth branches of government: the press and the populace. In this analysis, I broaden the typical definition of the press (e.g., newspapers, TV news, and Internet reporting) to include the scientific and scholarly press and expand upon the indicia (e.g., opinion polls and legislative enactments data) used by the Supreme Court for gauging community sentiment to include empirical evidence from psychological studies and controlled experiments.

In the conclusion (Part VI), I claim that one lesson (i.e., the moral) of this worst-of-times story can be found not within the three branches of government but within the fourth and fifth branches: the press and "the people themselves," to use Kramer's (2004) title. I show, in Stone's (2004, p. 14) words, that it is "not only our presidents, judges, and congressmen, who must preserve the spirit of liberty in times of crisis." That spirit is located within a free press that unearths facts and puts feet to the fire and within citizens' notions of commonsense justice and

fairness (Finkel, 1995, 2001a, 2005). Thus, one eventually comes to see the constitutive beneath the instrumental. I begin at the principled level with the foundational concepts of rights and duties and their relationship.

II. On the Relationship Between Rights and Duties

The prevalent rights-and-duties phrase yokes the two concepts and implies a relationship. This begs the question, What is the nature (i.e., ontology) of that relationship? At one end of a continuum, one can view rights and duties as "two sides of the same coin" (Worchel, 2005, p. 198), minted and melded together by their very nature and logic. This view, however, is difficult to sustain as a universal condition, particularly when one finds so many nonyoked exceptions in the real world, such as societies based solely on duties (e.g., Harré, 2005). The retreat position, logical correlativity, views rights and duties as highly correlated in the empirical world and claims that for almost every right, there is a duty and, for nearly every duty, there is a right. Haskill (2005) used this view in arguing that

> most rights-oriented cultures cannot help being chock-full of duties, for in practice, rights and duties normally develop more or less in tandem, simultaneously doing away with certain constraints in the lives of rights bearers, while introducing new constraints, new duties of forbearance, for instance, into the lives of everyone else. (p. 247)

Still, in his example of a mythical "Nowheresville," where Kantian duties are everywhere and rights are not found, Feinberg (1969) showed that a third position, independence, is a possibility. However, I need not rest the argument for independence on a hypothetical because the moral philosopher Rom Harré (2005) has provided real examples.

Disconnects and Distinctions Between Rights and Duties

Harré (2005, p. 226) argued that the source of duties derives from "relative capacities and powers," whereas the source of rights derives from "relative vulnerabilities." For example, if you are short and unable to reach an item high on a shelf and if I am tall and can reach the item, then I have the capacity to get the item for you, given your vulnerability. Yet should I, ought I, or must I do so, and correspondingly, do you have a right to such assistance that obligates me to do so? The answer appears to be no, for as Harré pointed out, this example illustrates a social or civic duty and not a moral or legal duty. To elevate worldly differences of vulnerability and power to moral rights and duties, "something like a system of virtues or values" (Harré, 2005, p. 228) must be added to the naturalistic distinction. However, this creates a relativity problem because virtues and values differ by culture, context, and climate.

Harré (2005, p. 228) then considered whether there is "a systematic and perhaps even a necessary symmetry or correspondence between duties and rights" and, if so, whether this is "a conceptual truth or an empirical observation." He concluded that "[i]t is certainly psychologically false in real life" (Harré, 2005, p. 228). Through the modern example of environmental laws, Harré exposed (a) duties beyond what laws require, (b) duties where there is no law (i.e., supererogatory duties), and (c) duties where there cannot be rights, thereby rebutting

the tandem, correlativity view. Environmental laws enacted in the past few decades have sought to limit the fouling of the air, water, and land and to protect certain flora and fauna. Yet, before those laws were enacted, some individuals and groups (e.g., the Sierra Club) held themselves to such duties (i.e., which would make these supererogatory duties at that time, illustrating Point b). Moreover, where they believe current laws fall short, some of these individuals and groups still hold themselves to higher duties, illustrating Point a. Still, the question about corresponding rights (Point c) remains.

Consider giant redwood trees and peoples' duty not to harm them (i.e., because people have the power and capability). The question is, Can it be said that redwood trees have a right to be protected? Harré (2005, p. 229) stated that "it sounds very odd to say that these trees have a right to be preserved," although this odd locution does not dispositively nullify the redwoods' rights claim. What actually fells the redwoods' claim is a conceptual objection.

Harré (2005, p. 229) argued that "[o]nly persons can have rights as well as duties," and his conclusion is based on a conceptual distinction that bears on the relationship issue:

> The conceptual structure of duty involves an obligation of a person toward some other vulnerable being, without specifying what the nature of the being might be. Rights, however, are based on obligations that another person or institution might have toward me. Only a being that can act in accordance with a sense of obligation can be the target of a rights demand. It seems as if the concept acknowledges duties without corresponding rights, indeed without any moral connotations at all that devolve onto the target of a duty. All that is required is that the target being has some vulnerability with respect to which a human being has some power of protection or succor. (Harré, 2005, p. 230)

Making clear conceptual distinctions is the domain of analytical philosophers and others who work the normative side of the is–ought divide, and these distinctions are also important for social scientists working the empirical side of the divide (e.g., Finkel, 2005; Finkel & Moghaddam, 2005a). When social scientists blur distinctions, research and theorizing become sloppy (Finkel, 2001a). When executives, legislators, and judges blur important distinctions, however, this can have more serious consequences in terms of the actions, enactments, and adjudications that follow. Still, social scientists may find empirical distinctions worth noting. If logical correlativity (i.e., the tandem notion) is but an empirical correlation (i.e., high and positive), I can show another correlation that is negative (i.e., a seesaw effect, in which as duties wax, rights wane). As I point out below, the negative correlation appears to manifest during the worst of times.

A final distinction, involving primacy, comes from Ronald Dworkin's (1978) *Taking Rights Seriously,* in which he stated that there

> is a difference between the idea that you have a duty not to lie to me because I have a right not to be lied to, and the idea that I have a right that you not lie to me because you have a duty not to tell lies. (p. 171)

In the first proposition, the duty derives from the primary right, whereas, in the second, the right is derivative and the duty is primary.

Empirical Findings Regarding Primacy, Perspective, Context, and Relativity

With Dworkin's (1978) distinction in mind, I suspect that parents trying to inculcate truth-telling in their children hope that their kids come to embrace the duty not to lie as primary, and there is some empirical support for this suspicion. Moghaddam and Riley (2005) found that parents typically focus more on the duties of children, whereas children focus primarily on their rights. Therefore, there are primacy differences by group (i.e., parents vs. children). Louis and Taylor (2005) have noted a broader pattern: In-groups (i.e., those that have greater power) tend to focus on the duties of citizens to obey the laws, whereas out-groups (i.e., the disadvantaged and disenfranchised) predominantly focus on obtaining rights, although there are exceptions (e.g., Spragens, 2005). In Worchel's (2005) work, he demonstrated that individuals and groups have both rights and duties, although from the group perspective, duties are often most salient, whereas from the individual's perspective, rights tend to be primary. In a study of German and Korean adolescents, Hoppe-Graff and Kim (2005) found significant differences between these cultural groups regarding whether they believed their rights and duties were externally granted (or imposed) versus internally granted (or imposed). Thus, empirical findings have shown that primacy may vary (a) in differing societies, (b) within a society depending on perspective (i.e., the individual or the group) and position (i.e., with in-group or out-group status), and (c) within the same family depending on status.

Yet the primacy effect turns out to be neither static nor uniform. When children grow into young adults, they may shift their earlier rights perspective toward duties (Moghaddam & Riley, 2005) and may see the source of these rights and duties in different ways (Hoppe-Graff & Kim, 2005). The nonstatic effect is also evident when an out-group becomes an in-group, as it likely shifts its focus from rights to duties, whereas when an in-group becomes an out-group, it may then clamor for rights (Louis & Taylor, 2005). Depending on the particular issue or context, individuals within a group may highlight duties, whereas the group may shift its primacy to rights (Worchel, 2005).

Even within the same society, primacy is not uniform across issues and context. As Tyler (2005) stated, although Americans may prefer their rights culture,

> Americans do have strong feelings of duty and responsibility of at least one particular type . . . the sense of responsibility and obligation to defer to and accept the decisions of government authorities. . . . I argue that studies suggest that people express the desire to empower government and to allow it to restrict their personal freedoms when they feel that they need to do so to solve social problems and resolve social issues. (p. 138)

In my (Finkel, 2001b, 2005) work testing cases in which rights and duties clash, the major outcome results have been that duties more than hold their own in these cases. The participants' process of adjudicating, which is most relevant here, reveals that they deabstract the claims of the plaintiff and defendant, attach these claims to the concrete unfairnesses in the case, and then contextualize, nuance, and weigh these unfairnesses with certain mitigating factors (e.g., whether the

claims were limited or overreaching, whether the motives propelling the claims were legitimate or impure, and whether distributive justice or injustice would result). Change these latter factors slightly, and participants' decisions seesaw the other way.

III. Seesawing Evidence for Good and Bad Samaritans

At the outset, a differentiation must be made between old and new good Samaritan statutes, which, confusingly, share the same title but have different foci and aims. The old statutes were aimed at protecting good Samaritans from civil liability damages for rendering aid to an injured person in an emergency situation. By shielding nongrossly negligent good Samaritans from tort damages, these laws sought to encourage doctors, for example, to stop and render roadside assistance. In contrast, the new laws focus on bad Samaritans, those who could have done something to aid victims but did not. These laws transform a moral duty into a legal duty and are aimed at promoting procivic action. For clarity, I refer to these new laws as bad Samaritan statutes. Although many other countries have such laws, they were alien to the common-law tradition in the United States until heinous headline cases came to the forefront of media attention. To provide context, consider a time before these headline cases came to the forefront.

Changing Times?

Formerly, when citizens intervened to aid victims of violent crimes, they were dubbed good Samaritans for taking moral action and performing a civic duty when no law required them to do so. They could have chosen not to act (i.e., a right to liberty and to be left alone) without legal sanction or penalty because this right would trump the nonexistent legal duty to act.

The attack, rape, and murder of Kitty Genovese in a middle-class neighborhood of Queens, New York, on March 13, 1964, was a 35-minute horror show during which 38 witnesses heard her screams but none came forward to intervene (Rosenthal, 1964/1999). News of this tragic event began to alter public sentiment. Changes in the laws of a number of states followed, illustrating a shift in the legal balancing point between rights and duties. Another front-page story furthered the impetus for change. On March 6, 1983, a 22-year-old mother of two tried to leave Big Dan's Tavern in New Bedford, Massachusetts, only to be dragged onto a pool table by a group of male patrons and savagely raped. The attack made the front page because other patrons began cheering and encouraging her attackers. The press dubbed the incident *spectator rape.* These horrific headline cases prompted the states of Rhode Island (R.I. Gen. Laws § 11-56-1, 2006), Vermont (Duty to Aid the Endangered Act, Vt. Stat. Ann. tit. 12, § 519, 2005), Wisconsin (Wis. Stat. § 940.34(2)(a), (d), 2005), and Minnesota (Minn. Stat. § 604.A.01, 1994 [repealed by Minn. Stat. § 604.05, 2005]) to enact laws imposing a duty to rescue or report (Ciociola, 2003). Three other states, Ohio (Ohio Rev. Code Ann. § 2921.22, 2006), Washington (Wash. Rev. Code § 9.69.100, 2005), and Florida (Fla. Stat. ch. 794.027, 2005), enacted slightly more restrictive versions of these bad Samaritan laws (Biggs, 1997).

Yet another headline story occurred on May 25, 1998, at the Primmadonna Resort in Nevada. David Cash saw his high school friend Jeremy Strohmeyer

following 7-year-old Sherrice Iverson into the women's bathroom. Cash followed his friend into the bathroom and witnessed Jeremy assaulting Sherrice, but when Cash tapped Strohmeyer on the head and Jeremy still did not stop his attack, Cash simply left the bathroom and waited for his friend, making no effort to call the authorities. Strohmeyer sexually assaulted and killed Sherrice Iverson, although under existing Nevada law, Cash had done no wrong. Cash's failure led University of California, Berkeley, students to seek his expulsion from the university for violating the moral/civic duty to act despite the fact that he had violated no law (Hammer, 1998).

Hydraulic pressures to fill the void with legal responses to such action or inaction were clearly building. Cash's inaction led to California's unanimous decision to pass the Sherrice Iverson Child Victim Protection Act in 2000, which mandated a duty to report child abuse and neglect. Other states, such as Massachusetts (Mass. Gen. Laws ch. 12, §§ 111c, 112, 2000), New Jersey (N.J. Stat. Ann. § 2A-62A-1, 2000), Nevada (Nev. Rev. Stat. § 41-506, 2000), and New York (N.Y. Pub. Health Law § 3013, 2000), passed similar laws. At the federal level, the Sherrice Iverson Act (now the Children's Safety Act) was passed unanimously by the House of Representatives in 2005.

These horror stories and the hydraulic pressures that followed produced all too quick and all too negative conclusions about the facts. The pressures also had a narrowing effect on psychology's great constant—that there will be variance—by reducing a complex story to a black-and-white (bad vs. good Samaritan) version. For example, a number of media and social commentators were quick to conclude that these modern anecdotal stories of horrors without civic-minded actions reflected a decline in civic duty (Finkel, 2001b, 2005; Finkel & Moghaddam, 2005a), a conclusion that appeared to be supported by Alexis de Tocqueville's opinion from an earlier time:

> The second thing I envy this people is the ease with which they do without government. Each man here regards himself as interested in public security and in the functioning of the laws. Instead of counting on the police, he counts only on himself. It results that, on the whole, public force is everywhere without ever showing itself. It's really an incredible thing, I assure you, to see how this people keeps itself in order through the single conviction that its only safeguard against itself lies in itself. (Pierson, 1938, p. 161)

Problematic Conclusions About More Danger and Less Civic Duty

Here, though, I must pause . . . to raise skepticism and some methodological points about the young Frenchman's conclusions—given they were drawn from anecdotes. Although he traveled about this country, he did not stay that long, and his limited observations were not sampled randomly or systematically. Also, one cannot be sure that this ostensibly objective observer's conclusions were not colored by the contrast with what he saw in France. Finally, given his small sample size, his generalization of a people "everywhere" with a "single conviction" might well have been inflated by failure to see instances where civic duty was absent or where alleged civic duty turned into vigilante justice.

I raise these skeptical points about de Tocqueville's conclusions because the same points can be raised about the conclusions that quickly emerged from the

three modern headline examples. First, one cannot be sure that these are representative instances of a decline of duties, for they may be but outlier instances. Second, the accessibility bias may be primed in modern times as well, leading to heuristic and exaggerated conclusions. Third, stories of people coming to the aid of others are missed in the assessment because they appear only in the back pages or because they never make it into print at all. Thus, methodological sampling problems may undermine the validity and generalizability of conclusions drawn from anecdotal reports, in turn generating skeptical empirical, normative, and public policy questions about (a) where the rights–duties balance point is now (or was in 1831), (b) whether the alleged tilt is real and pathologically severe enough to warrant legal redressing, and (c) whether legal medicine (as opposed to civic education or social shaming) will make the citizenry and country better or worse.

Legislative enactments occur within a political process, and polls of the community's sentiment have played a growing role in that process (Finkel, 1995). Recently, *The Washington Post* reported (Dewar, 1992, p. A23) that Congress has become a "hyper weather vane," spinning feverishly in response to every poll that comes along, as Senator Richard G. Lugar (R-Ind.) described it. "'We're too much in touch,' says Senator Warren B. Rudman (R-N.H.)" (Dewar, 1992, p. A23). When polls are poorly done or pick up inflamed and volatile sentiment prompted by high-profile cases (Finkel, 1995; Finkel, Maloney, Valbuena, & Groscup, 1996), then the politicians' interpretation of the polls may be inaccurate. If legislators are convinced by polling's science and its substantive results that the public wants this legislation, then the debate may fall short, checks may not be issued, and the rights–duties balance may, in fact, tilt.

Perceptions about violent crime and danger, whether held by ordinary citizens or politicians religiously reading opinion polls, are often enough to generate what Justice Holmes (*Northern Securities Co. v. United States,* 1904, p. 197) referred to as an overwhelming hydraulic pressure that "makes what previously was clear seem doubtful, and before which even well-settled principles of law will bend." The etiological question that directly affects the legal and public policy response is whether community sentiment and felt pressures are valid-enough indicia to warrant limiting citizens' "guts-held" rights and adding a new duty to their shoulders. As noted above, a dozen or more states have enacted laws imposing some sort of duty (e.g., to report or actively intervene) on citizens witnessing violent crimes or suspecting abuse against children. These enactments have not been vetoed by the executive branch or overturned by courts. Their legislative debate was limited, as many normative, constitutive, empirical, and prudential questions were either not asked or not answered through critical analysis or with substantive facts. All of this would be unsurprising to Justice Holmes, who well knew that hard cases could create bad law.

Unusual Checks and Balances: When Principled and Empirical Arguments Enter the Debate

The press, as previously defined in the broadened sense, can critically examine the actions, enactments, decisions, and sentiments of Congress, the executive branch, the judiciary, and the citizenry. Although the scholarly and scientific press is slower to bring normative analyses and empirical facts to light, it nonetheless

may belatedly bring substantive balance to a debate insufficiently considered and to assessments of the therapeutic or antitherapeutic consequences that follow such enactments, as these slowly emerging conceptual analyses and empirical facts generally grow in number, validity, and solidity.

Within the scholarly press, numerous law review articles in which many authors have labeled these as bad Samaritan laws whose time should not have come have now been published. These scholars have cited American legal and political history favoring liberty, autonomy, and individualism over social values, as well as the long-standing trend of not imposing liability and punishments for nonfeasance or commission by omission, as reasons for their opposition. Put affirmatively, the law punishes for wrongful actions rather than nonactions (Dressler, 2000), and whether someone chooses to act as a good Samaritan has historically been viewed as a moral matter of conscience, not something that ought to be mandated by law (Kaplan, 2000). There is a big difference between laws prohibiting persons from doing X, thereby leaving them free to perform many other actions, and laws requiring persons to do Y, thereby prohibiting doing anything but Y. Dressler (2000) warned that the positive–negative distinction is critical for the law and that this demands great caution about creating laws compelling people to act for the benefit others.

Deciding What Is Legally Fair or Foul When Psychological Factors Are at Play

The final episode of the hit TV series *Seinfeld* (David, Henry, & Ackerman, 1998) only hinted at the psychological and pragmatic problems of these bad Samaritan laws. In that episode, George, Jerry, Kramer, and Elaine are walking down a street in Latham, Massachusetts, where they witness a carjacking and a mugging, which they find odd but somewhat amusing. When a policeman approaches and informs them that they are under arrest, they protest, "But we haven't done anything," to which the officer retorts, "That's just it." Now consider real life and what has to be seen or heard to trigger the duty. Psychologists would point out that the triggers for acting rest on subjective perceptions and judgments that a violent crime is occurring, that someone is in serious danger of harm, and that this is indeed an emergency situation that warrants action by the witness. However, those making these psychological judgments may do so from uncertain facts, as the classic Latané and Darley (1970) experiments revealed, and prosecuting those who fail to act based on mistaken perceptions is problematic. Even the more benign duty to report, rather than to take direct action, can be compromised by the diffusion-of-responsibility effect (Latané & Darley, 1970) or threatened when reporting may put the good Samaritan in danger of being attacked. Under these new laws, citizens must make a risk assessment on the spot, one that may be in error. The duty to report suspected child abuse or neglect under the Sherrice Iverson acts also involves perceptions and judgments that could be erroneous. These may ruin reputations, harm the child, and add new burdens to overburdened protective services and family courts. They may even leave the good Samaritan on the defendant's end of a lawsuit, such as when a plaintiff claims that the Samaritan's action was the proximate cause of harm to an individual and/or a family.

Consequential Arguments and Questions

One problem with relying solely on utilitarian arguments (in which a solution that benefits the many is acceptable if it infringes only the rights of the few) for supporting these new duties is that these arguments remain untested predictions. To illustrate, Wisconsin has one of the harshest penalties for violating the duty, under which the violator could be sentenced to up to 30 days in jail and fined $500 (Groninger, 1999). However, this is a very small penalty by criminal law standards and one not likely to deter most bad Samaritans.

A second, related problem with consequential arguments is that they rest on the simplistic assumption that bad Samaritans are an undifferentiated group without variability. Volokh (1999), to the contrary, took a more nuanced view, dividing bad Samaritans into four types. For the *hopelessly bad Samaritan,* one who is callous or loyal to the criminal, legal coercion would have no effect, whereas coercion may affect the *legally swayable Samaritan.* Anticooperative effects, however, are likely to appear when one examines the *delayed Samaritan* (who initially fails but who later reports information of the crime) and the *passive Samaritan* (who never calls the authorities but would answer questions about the crime if the police knocked on his or her door). Law enforcement wants the information that the delayed or passive Samaritan is willing belatedly to give, but this information is less likely to result under these new laws because delay or initial silence becomes a punishable offense. Thus, these duty laws are likely to produce more anticooperative effects, argued Volokh, which is akin to the antitherapeutic effects of certain laws that therapeutic jurisprudence identifies (Wexler & Winick, 1991).

A third problem with the consequential position involves punishing bad Samaritans. Here, prosecutorial discretion is likely to lead to selective prosecutions of bad Samaritans who appear, like David Cash, to show callous indifference or other character flaws (Hammer, 1998; Kelly, 1998; Vance, 1999). Assuming that laws generally work poorly when they are aimed at moral monsters rather than at clearly wrongful actions (Dressler, 2000), the consequences may redound badly for the law, as well as for the community.

In sum, if future empirical assessments show that the assumed consequential upsides are considerably less than their advocates predict and if the downsides are much larger than the advocates foresee, then the utilitarian argument deflates. Of course, one does not know what future empirical evidence will reveal. However, it does appear now that consequentialists maximize the upside prediction, which rests on the dubious assumption that bad Samaritans are an invariant group, likely to be swayable, and do not balance their prediction against the weighty normative arguments against adding this duty (Dressler, 2000; Vance, 1999).

Punishing a Bad Samaritan While a Good Samaritan's Good Deed Gets Punished

In my work (Finkel, 2001b), I have tested numerous cases involving a clash of rights and duties in which the participants, acting as judges, have had to render a decision (for the plaintiff or the defendant) and give their reasons for their decision, which were subsequently categorized. Two cases are particularly revealing. The headline case (called "Student Group [*P*] v. Cash [*D*]"; Finkel,

2001b, p. 555) turned out to be the closest case in terms of verdict and endorsement of rights versus duties: Fifty-two percent supported the defendant, Cash, and 48% supported the plaintiff, Student Group; 20% favored Cash's right trumping the university's duty to expel him, whereas 27% favored the university's duty trumping Cash's right. What was not contentious were the participants' feelings about Cash: Both groups condemned Cash's moral nonaction, and both groups wanted him punished in some way (Finkel, 2005). The difference was that the plaintiff participants wanted to expel him from the university, whereas the defendant participants favored the social–communal punishment of shunning him.

The second case came from a back-page report ("Stayton [*P*] v. Cincinnati [*D*]"; Finkel, 2001b, p. 555) that involved the city of Cincinnati's anti–good Samaritan statute that led to the prosecution of 62-year-old Sylvia Stayton. The city claimed that her acts—feeding two parking meters so strangers' cars would not get ticketed—interfered with a legitimate government interest in deterring and punishing offenders who park but do not pay (Seigle, 1996). This case looks like a ludicrous and surreal reversal of the *Seinfeld* case. Although the case was an easy one to decide (88% favored the plaintiff), the participants' reasons (i.e., 35% cited Stayton's rights as trumping the city's duty) revealed that it was not easy to analyze because, beneath her rights claim, there was a more powerful explanatory factor: a supererogatory duty for which there was no corresponding right. As I put it elsewhere,

> speaking of her act as her right explains nothing and discriminates her from no one. Every person on the street had such a right, but only Stayton acted. Thus, "rights talk" fails to explain the motivation for the act, as a good dramatist would demand; only duty works in this story . . . to explain why she did what she did. (Finkel, 2005, p. 170)

In this case, independence rather than correlativity's tandem occurs. For instance, when I park my car, I have a duty to put money in the meter, but I have no corresponding rights claim that others have a duty to fill my meter for me. Furthermore, the city's claim that this was an exercise of an officer's right (Orren, 2000) to ticket, as well as the officer's duty to ticket, seems to land back on replaceability, where right and duty are used interchangeably.

Yet there is a difference. Although police officers have a legal right (i.e., a potential) to ticket, this does not answer the question of whether the officer must issue a ticket, as duty seems to require. A few participants realized that the officer's rights also included the right to use discretion and that this officer failed to exercise good discretion (which could have taken the form of not grabbing and handcuffing Mrs. Stayton, which was what he did, but merely cautioning her). This officer, to these participants, failed to appropriately exercise his duty (i.e., in not thinking through his rights and duties options and then deciding what act best fit the circumstances). This deeper analysis (Finkel, 2005) reveals that the replaceability euphemism obscures a distinction that provides clarity.

Conclusion

In terms of checks and balances, the legislators passing these bad Samaritan laws did not hit the brakes, the executives did not veto, and the appellate courts

have not overturned this legislation. Rather, the three branches sent one another blank checks, providing little balance to the debate. The fear of rising violence was no doubt a background factor, but the foreground fear factor—that civic duties were waning and indifferent moral monsters were waxing—was the weightier one, bolstered by the assumption that the community supported these enactments. Yet these fears and assumptions, resting on infirm facts, provided force and a channelized direction to an enactment process that failed to consider fully and to debate such outcome enactments. The problem was magnified while the picture of bad Samaritans was stripped of variance, and the framing removed context, other options, and contrary evidence and analysis. A complex issue was reduced to a simplism.

In this area, it was the normative and scientific presses that belatedly brought facts and overlooked reasons to a debate that had never happened. From the empirical work, sharp questions arose about hasty conclusions regarding (a) changing times, (b) imbalances between rights and duties, (c) strength of community sentiment, and (d) the invariance of bad Samaritans, whereas the scholarly analyses brought out overlooked reasons about long-term negatives for the law.

In terms of future research, it would be interesting to examine whether punishments such as Wisconsin's do in fact change citizens' perceptions and actions in the directions proponents hope or whether antitherapeutic jurisprudence results. It would also be interesting to have findings on whether discretionary prosecutions of certain nonactors, such as the *Seinfeld* quartet or good Samaritan Stayton, do have the effects that proponents envision or whether the results turn out to be contrary. Finally, if a defendant prosecuted and convicted under such a statute is deterred from nonaction in the future (specific deterrence) and the general public is also deterred (general deterrence), then is it the legal punishment that produces the deterrence, or is it the public shaming of the defendant? If it is the latter, then there are other means of effecting shame and elevating civic conscience (e.g., Drinan, 2001; Etzioni, 1993; Spragens, 1999) that deserve examination and comparative testing, rather than using the law as a public policy instrument to create a new crime and a new duty—arising from no action.

IV. Moral Monsters: Nightmarish Acts and Fears Prompt Enactments of Containment

People's fears intensify greatly in the case of pedophiles and SVPs, as compared with bad Samaritans: With the latter, people still see themselves, but with the former, people see the moral monster. These moral monsters have been demonized, stigmatized, and viewed as an undifferentiated group, invariant in their desires and behaviors. This invariant portrayal, however, contradicts what has always been found in psychological research, where variance is a surety on scatter plots; it also contradicts what is found within all psychiatric disorder categories, where variance is a constant. Despite this variance, citizens, politicians, and related TV shows (e.g., *Law & Order: Special Victims Unit*; Wolf, 1999) frequently claim that these moral monsters have the highest recidivism rates, recidivate more frequently, cannot control their impulses, and cannot change—even though a now large body of empirical findings has shown these claims to be myths (e.g., Freeman-Longo, 1996; Hanson, 1998, 2003; Hanson &

Bussière, 1998; Herbert, 2002; Kersting, 2003; Petrosino & Petrosino, 1999; Prentky, Lee, Knight, & Cerce, 1997; Winick & La Fond, 2003; Zevitz & Farkas, 2000).

With much of the much ado turning out to be myth, what legitimate factors produce such great fear and loathing? It cannot be that these criminals violate the law and the most vulnerable of citizens; other types of criminals do that also. Foucault (2003, p. 56) has argued that the pedophiles and SVPs, more than other types of criminals, violate "the laws of nature." This especially heinous violation not only inflates beliefs about the perpetrators' likelihood of reoffending and imperviousness to treatment, it calls into question their character and, most of all, their place within society's midst.

Yet there is a second factor that ratchets up the fear. These criminals, like some Hollywood monsters, frighten people because they are difficult to detect. These nightmarish wolves may live next door or in one's own home, and they may hide in sheep's clothing or in sacred habits. There is also a third factor. They frighten people because their numbers seem to be growing, if headline horror stories and TV dramas reflect true prevalence rates.

More Enactments but a Similar Pattern

Once again, enactments have resulted at federal and state levels but much more than in the bad Samaritan area, and these enactments impose more severe restrictions on rights. As one example, all the states and the federal government have passed some form of registry and community notification law, which Freeman-Longo (1996, p. 95) entitled "feel good legislation," providing the public with what Herbert (2002, p. 327) called "the scarlet letter of protection." As another example, many states have enacted pedophile and SVP commitment laws that may lead to the loss of liberty . . . possibly forever. Some states have enacted laws allowing for chemical castration as a treatment (R. D. Miller, 2003). Despite these differences from the bad Samaritan area, the process reveals a familiar pattern. For example, when Congress amended the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (1994) to create a federal version of Megan's law (N.J. Stat. Ann. § 2C:7-1 et seq., 1994; Megan's Law, Pub. L. No. 104-145, 1998), there was little discussion and no debate, culminating in a unanimous final vote (Garfinkle, 2003).

One difference in this area, though, is that the Supreme Court has rendered opinions on community notification and involuntary commitment statutes. In cases challenging notification statutes in Louisiana (*Olivieri v. State,* 2002), Alaska (*Smith v. Doe,* 2003), and Connecticut (*Connecticut Dep't of Pub. Safety v. Doe,* 2003), the Supreme Court has held that these laws do not violate ex post facto, double jeopardy, and due process rights. For example, in *Kansas v. Hendricks* (1997) and *Kansas v. Crane* (2002), the Court affirmed that commitment after serving a prison sentence—but before perpetrating or even attempting another criminal act—does not violate the individual's right against double jeopardy. The Court held that these rights-restricting punishments (e.g., loss of privacy, involuntary commitment, loss of liberty) were not really punishments because treatment and the protection of society were their aims and because the process was civil rather than criminal.

In the involuntary commitment practice, there is another key player to note, along with a significant issue: Ordering the commitment of such an individual is almost certain once the medico-psychological expert has labeled him or her with the appropriate mental disorder and concluded that he or she cannot control his or her impulses, thereby classifying the individual as mentally disordered and as a future danger to others. Unfortunately, these assessments involve diagnostic categories that "remain dubious" in terms of reliability and validity and involve predictive tests that register low to no validity (H. A. Miller, Amenta, & Conroy, 2005, p. 37). This means that this sort of expert testimony would not, and should not, pass the *Daubert* test (*Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 1993) unless the judge and then the Supreme Court conveniently turn a deaf ear and blind eye to the contradiction.

The Volitional Prong, Its Amputation, . . . and Its Return

The so-called irresistible impulse has had a problematic history in Anglo American insanity law for more than a century, with British and American jurisdictions parting company: British law rejected this prong, believing that whether a defendant could not resist or simply failed to resist was an impossible twilight-versus-dusk distinction, whereas some American jurisdictions added the volitional prong, as did the American Law Institute (1962). The volitional prong presents empirical and normative difficulties. For example, reviews (Grisso, 2003; Melton, Petrila, Poythress, & Slobogin, 1997: Nicholson, 1999; Wrightsman & Fulero, 2005) of the prevailing forensic assessment instruments have found that despite improved reliability, there is no valid test to measure whether or not an individual can or cannot control his or her impulses. Normatively, the problem has been that when experts proffer qualitative conclusions that these defendants cannot control their impulses, they are, in effect, impermissibly answering the ultimate opinion question that falls within the jury's province while their answers seem to violate the legal standards for admitting expert testimony.

After the decision in *United States v. Hinckley* (1982), various Senate and House committees took up the insanity defense with the expressed aim of "limiting the insanity defense" (Subcommittee on Criminal Law, Committee on the Judiciary, United States Senate, 1983), and the volitional prong became the fall guy—blamed by many for Hinckley's not-guilty-by-reason-of-insanity verdict. When the American Psychiatric Association (1983) and the American Bar Association (1983) recommended the elimination of the prong, Congress performed the amputation in its Insanity Defense Reform Act of 1984 and barred experts from giving ultimate opinion testimony. The monster limb had died . . . or at least had seemed to.

The sigh of relief was cut short, however, because the Supreme Court threw the law and the experts back into the control conundrum by reattaching the limb in its *Kansas v. Hendricks* (1997) and *Kansas v. Crane* (2002) decisions. The Court repeatedly stated "the necessity of linking some mental abnormality or personality disorder with an offender's lack of ability to control dangerous sexual behavior" (H. A. Miller et al., 2005, p. 40). So, the presumed-dead limb was given new life, and the monster was back.

A New Quasi-Criminal/Quasi-Civil Process

Foucault (2003) argued that the two processes (and discourses) used historically to remove the unwanted from society (exclusion and inclusion) have now conjoined in a third process. This process involves a medico-psychological examination of "less his act than his life," and expert opinion "makes it possible to transfer . . . punishment from the offense defined by the law to criminality evaluated from a psychologico-moral point of view" (Foucault, 2003, p. xxiii). Had pedophiles been imprisoned for another type of crime, they would be released after doing their time even though empirical recidivism rates show other crime categories having higher recidivism rates than those of pedophilia (e.g., Bureau of Justice Statistics, 2002; Freeman-Longo, 1996; Hodgson & Kelley, 2002; Marshall & Pithers, 1994; Petrosino & Petrosino, 1999; Zevitz & Farkas, 2000). Under civil law's involuntary commitment statutes, the Supreme Court has ruled (e.g., *Foucha v. Louisiana,* 1992) that a state may not commit someone merely for having a mental disorder; it must also show that the person is immediately likely to inflict serious harm on self or others, but this latter factor is what appears to be missing for the SVP who has just finished his or her prison sentence.

This third process appears to produce what is missing, although the way it operates creates new questions. Within this third realm, Foucault (2003, p. 21) argued, the question of responsibility for one's act "can no longer be posed, or simply cannot arise," for when the evidence of future dangerousness consists of childish acts from the individual's past (e.g., "He used to cut off the heads of cabbages"), then "the subject is responsible for everything and nothing." This sort of diagnosis affirms fears and exerts hydraulic pressure on legislators while making cloudy what was clear.

Political Enactments Without Checks and Balances

In regard to registration and community notification enactments, there are consistencies: They have been passed in all 50 states and the federal jurisdiction, the executives have signed them into law, and the Supreme Court, when it has taken such a case, has given its constitutional approval. However, in regard to the specifics of these statutes, there is considerable variability in terms of (a) which crimes and disorders require the individual to register (i.e., is rape or rape–murder included?), (b) what information must be provided (i.e., does the individual have to supply a DNA sample?), (c) how long the individual must remain on the registry (i.e., is it for 10 years or for life?), (d) how notification to the community is provided (i.e., is it via posted flyers, the Internet with restrictions on who may see the information, or the Internet without restrictions?), and (e) whether an individualized assessment as to the relative likelihood of reoffending must be made (i.e., variant statutes vs. invariant statutes). By focusing on the contrasts between invariant and variant statutes, one can more clearly see (a) what is problematic about the reasons and facts that have been invoked to support them, (b) their antitherapeutic consequences (e.g., Winick & La Fond, 2003), and (c) where and why the usual checks and balances failed.

About half the states have adopted a version of New Jersey's three-tiered scheme, in which a registry board makes an individualized assessment of the offender's criminal record, mental health, and drug history, as well as the nature

of the crime committed, and then classifies the offender into either Level 1, 2, or 3. A Level 1 offender, considered to have a low likelihood of reoffending, is not subject to community notification requirements; a Level 2 offender is judged moderately likely to reoffend and is subject to community institution (e.g., schools, day care facilities, churches) notification; and a Level 3 offender, judged highly likely to reoffend, is subject to communitywide notification (Petrosino & Petrosino, 1999, pp. 144–145). Individualized assessments, it should be noted, are necessary in civil commitment cases, in which a mental disorder diagnosis and the prediction of dangerousness are required. Also worth noting is that individualized assessment is consistent with what the Supreme Court insisted on for the worst convicted criminals who face capital punishment in death penalty states (e.g., *Woodson v. North Carolina,* 1976).

Yet the invariant states, such as Alaska and Connecticut, take the position that all within this crime/disorder category are equally dangerous because, as the state of Alaska argued in *Smith v. Doe* (2003), all have high recidivism rates. These nondiscriminating statutes are procedurally at odds with related civil and criminal procedures and with the quasi procedure established by *Kansas v. Hendricks* (1997) and *Kansas v. Crane* (2002), whereas the factual assumptions (i.e., a uniform group highly likely to reoffend) supporting them are at odds with the recidivism findings from empirical investigations (e.g., Presser & Gunnison, 1999; Schultz, 2000).

These statutes typically mandate the individual to be on the registry for 10 years or for life. This lengthy period implies, without substantive evidence, that the desires, impulses, and behaviors of individuals within this group either are not likely to change or cannot change despite empirical findings showing that some can and do change with certain treatment approaches (e.g., Marshall & Pithers, 1994; Zevitz & Farkas, 2000). Furthermore, when the ex post facto, double jeopardy, and procedural and substantive due process issues have been given short shrift because states such as Alaska have declared their statutes to be civil and remedial rather than criminal and punitive (even though Alaska's statute can be found in its criminal code; see Alaska Sess. Laws ch. 41, §12(a), 1994), the Supreme Court seems to have been overly reliant on the face validity of the intent test while ignoring the obvious violations of the *Mendoza-Martinez* effects test (*Kennedy v. Mendoza-Martinez,* 1963). In the processes of enactment and adjudication, one is hard pressed to find a genuinely deep or balanced debate; rather, what one finds are rights being pushed aside by the rising pressure of instrumental duties, euphemisms, and myths.

The myths, euphemisms, and instrumental duties claim appeared in the case of Brian Manuel (Glod, 2003), the first person tabbed by the commonwealth of Virginia's Attorney General, Jerry Kilgore, for commitment under the state's 1999 Sexually Violent Predators Act (SVPA).

> Manuel, who had been a youth pastor, was convicted of aggravated sexual battery in 1997 for molesting a 7-year-old boy for whom he was babysitting. According to court records, Manuel was putting the boy to bed when he pulled down the child's pants and rubbed his buttocks. (Glod, 2003, p. B5)

Although Manuel "sought sex offender treatment in prison," the "Senior Assistant Attorney General Pamela A. Sargent said Manuel's history of sexual crimes and

his admitted 'fantasizing about molesting children' *prove* [italics added] that he would be a danger to the community if he were released" (Glod, 2003, p. B5). "We're not talking about regular criminals who will grow out of their criminal behavior," said Kilgore's spokesman, "We're talking about a special category. No matter how old they get or how long they've been in prison, they cannot be cured" (Glod, 2003, p. B5). Aiding and abetting these myths was "Donna Moore, a psychologist who examined Manuel, [who] testified yesterday that one test showed he has a 'high risk' of offending again" (Glod, 2003, p. B5) although, as previously noted, there is no valid test within the expert's arsenal to predict this.

Finally, lawmakers and adjudicators have turned a blind eye to the consequential effects of these statutes, preferring the magical feel-good wish that enacting makes intended results come true. Put another way, legislators and judges have not seriously asked or empirically answered the question of whether these laws deter individuals from reoffending or make reoffending more likely. Put another way, there has been a failure to assess adequately and consider the stigmatizing effects that the rights-bearing offender and his or her family suffer from information widely disseminated to the community through Internet postings. Put still another way, legislators have failed to assess whether these laws bring peace of mind and greater security to neighborhoods or actually promote unlawful unrest and vigilante justice.

Almost all of the issues linked to the registry and notification laws have recurred for the more rights-restrictive enactments that permit involuntary commitment after the person has served a prison sentence; the inconsistency is that these commitment statutes do require an individualized assessment, which contradicts the notification laws in the invariant states. In this commitment realm, the issue of predicting dangerousness emerged in an interesting way in the Supreme Court's *Kansas v. Crane* decision (2002): The two dissenters (Justices Scalia and Thomas) believed that the majority opinion's language "that makes it difficult, if not impossible, for the person to control his dangerous behavior" (Scalia, J., dissenting, p. 4) not only made the decision worse but could not pass the laugh test. Scalia stated the problem in ways that researchers on jury instructions should appreciate:

> How *is* one to frame for a jury the degree of "inability to control" which, in the particular case, "the nature of the psychiatric diagnosis, and the severity of the mental abnormality" require? Will it be a percentage ("Ladies and gentlemen of the jury, you may commit Mr. Crane under the SVPA only if you find, beyond a reasonable doubt, that he is 42% unable to control his penchant for sexual violence")? Or a frequency ratio ("Ladies and gentlemen of the jury, you may commit Mr. Crane under SVPA only if you find, beyond a reasonable doubt, that he is unable to control his penchant for sexual violence 3 times out of 10")? Or merely an adverb ("Ladies and gentlemen of the jury, you may commit Mr. Crane under the SVPA only if you find, beyond a reasonable doubt, that he is appreciably—or moderately, or substantially, or almost totally—unable to control his penchant for sexual violence")? None of these seems to me satisfactory. (*Kansas v. Crane,* 2002, pp. 9–10)

Scalia correctly identified the volitional limb prediction problem that forensic experts, jurors, and judges are now forced to face. However, it is ironic (if not a

Freudian slip) that Scalia slipped into the criminal law's beyond-a-reasonable-doubt standard in his jury instruction examples—rather than using the clear-and-convincing standard employed in civil law commitment, which the Court claimed this decision to be.

Unusual Normative and Empirical Checks and Balances

Community notification and involuntary commitment involve a rights-versus-duties clash, yet during the enactment process, not even a skirmish was reported. If there was opposition, it was muted. Reservations were likely cancelled by opinion polls showing community sentiment overwhelmingly in favor of these enactments despite the fact that criminal laws and civil involuntary commitment procedures were long ago in place. Nonetheless, the pressure of perceived sentiment toward the duty to protect so weighted down the primacy seesaw that the moral monster's individual rights were lifted . . . from him or her.

However, critical questions remain. Although the pols were certainly prodded by the polls, how accurate was their reading? Where were the challenges to the myths that such individuals have the highest recidivism rates, cannot be treated, and represent an invariant danger? Who challenged the feel-good sentiments with sound reasons not to commit automatically—because the people, society, and its foundational laws would be weakened? In this topical area, as in the last, I turn to the fourth and fifth branches of government, for the scholarly and scientific press tells a different story, as do participants' decisions and reasons in these types of cases.

Although the print media have written a number of stories (e.g., Hsu, 2001) and editorials about the legitimacy and effects of community notification and involuntary commitment, it was predominantly the scholarly and scientific press, through law reviews and empirical articles, that took a serious look at what are complex psychological, empirical, normative, and constitutional issues (e.g., Slobogin, 1996). Additionally, these articles examined the validity of the factual assumptions that propelled the enactments (e.g., Freeman-Longo, 1996; Hafemeister, 2001; Hanson, 2003; Petrosino & Petrosino, 1999; Winick & La Fond, 2003; Zevitz & Farkas, 2000), the limits of forensic assessment (e.g., Grisso & Vincent, 2005), and the consequential and therapeutic jurisprudence effects that followed (e.g., Winick, 1998). Although this growing literature has yet to counter the prevailing myths, time favors facts over fictions.

As for the assumption that community sentiment overwhelmingly favors such enactments, I (Finkel, 2001b, 2005) put this assertion to an empirical test through four hypothetical cases in which a double jeopardy claim was raised. Two of the hypothetical cases—*Hudson v. United States* (Biskupic, 1997) and *McDougal v. United States* (Walsh, 1999)—did not involve pedophiles or SVPs, and two—*Released* S*ex Offender v. State* and *Hendricks v. Kansas,* involving the involuntary commitment of an SVP)—did. I (Finkel, 2001b, p. 531) found that in *Hudson,* 61% of participants favored the defendant but that in *McDougal,* 60% of participants favored the plaintiff, and the difference related to two factors. First, participants saw overreaching and impure motives on the part of the United States in *McDougal,* but not in *Hudson.* Second, in *Hudson,* most saw the government as charging these defendants with different crimes, whereas in *McDougal,* the

majority saw the crimes as being the same. Although the participants viewed both these cases as a clash of rights versus duties, they came down on different sides: The government's duty claim trumped Hudson's rights claim, whereas McDougal's rights claim trumped the government's duty claim. The devil was in the details, as the old saw has it, for different case specifics swung the primacy and the decision. Yet what would participants do when sex offenders were the plaintiffs?

The two double jeopardy cases involving sex offenders were also decided differently: Seventy-one percent favored plaintiff Hendricks in the automatic commitment case, whereas 65% favored the defendant (the state) in the notification case involving circulating flyers and putting signs on the person's lawn. One cited reason for the difference was the greater deprivation of liberty evident in *Hendricks v. Kansas,* as participants endorsed the idea that right should trump duty more strongly than the reverse, whereas these reasons were endorsed equally in the notification case. A second reason was that the state's motives and utilitarian claims were seen as more legitimate in *Released Sex Offender v. State,* but not in *Hendricks.* A third reason was that in *Hendricks,* the state's duty claim was seen as an impermissible overreach, creating double jeopardy, whereas the state's actions in the notification case, limited to setting the conditions of release and not punishing again for the same crime, appeared legitimate.

The 71% figure supporting Hendricks's rights is disparate from opinion polls that presume to reflect community sentiment and different from the Supreme Court's 5–4 decision (56%; *Kansas v. Hendricks,* 1997) supporting Kansas's duty claim. In comparing the participants' moral analysis with the Court's legal analysis, it was the participants who cited constitutive factors more frequently, with the justices citing instrumental factors more frequently. Put another way, it was the participants who cited the deeper and long-term effects on fundamental principles, as opposed to short-term pragmatic effects. When citizens are given specific cases with specific facts, rather than being asked to react to undifferentiated labels of pedophile or SVP on some opinion poll, one does not find invariance but careful discriminations. These findings give reason to pause and question the alleged uniformity and strength of community sentiment, particularly when, in the worst of times, hydraulic pressures heighten fears, constrict vision, and lead to simplistic solutions supported by suspect polling data—but not by deeper commonsense justice (Finkel, 1995).

Conclusion

Perhaps, as empirical facts mount and scholarly analyses accumulate, both will find their way into the popular press and into *amicus curiae* briefs (e.g., Brief of the American Civil Liberties Union, the Alaska Civil Liberties Union, and the National Association of Criminal Defense Lawyers *Amici Curiae* in Support of Respondents, 2003, and Brief of the Office of the Public Defender for the State of New Jersey, the Association of Criminal Defense Lawyers of New Jersey, and the American Civil Liberties Union of New Jersey *Amici Curiae* in Support of Respondents, 2003, in *Smith v. Doe,* 2003), and a more balanced analysis of the issues will result. If it does, then one may yet see legislators and executives more seriously questioning these quasi-criminal/quasi-civil enactments and polling

percentages indicative of community support. One may yet see judges more closely scrutinizing the validity of the experts' assessment instruments, the science behind their irresistible impulse conclusions, and the place of such testimony in the courts. Perhaps, then, with checks and balances restored, society may weather the worst of times and return to a more deliberate discourse about rights and duties.

V. Enemy Combatants and Patriotic Acts

Of the three topical areas, bad Samaritans engender the least fear, and the laws concerning them contain fewer rights restrictions while imposing affirmative duties that citizens in 21 countries already bear without undue burden. Terrorists, on the other hand, trigger the greatest fear, which is significantly different from that caused by SVP moral monsters, I submit. For example, in reaction to fears of pedophiles and SVPs, people may draw their children close for their protection, but who draws people close and protects them from terrorists? Moreover, for released pedophiles and SVPs, one may obtain information about (a) whether they live in one's neighborhoods or next door, (b) whether they work in one's infant's day-care facility or in one's child's school, and (c) whether they volunteer in scouts, little league, or church programs. In contrast, one gets no reassuring information about terrorists, for color-coated information seems to aggravate citizens and increase their apprehension. Then, there is a categorizing difference: Mental health professionals can diagnose pedophiles and SVPs within certain mental disorder categories, and such a label can provide a false but oddly comforting understanding that they are disordered. Yet, to the contrary, terrorists' fervent belief in a cause they are willing to kill and die for finds no place within the diagnostic manual. Although mental health professionals may understand this distinction, to many citizens, it seems to imply that terrorists, despite committing unconscionable violence, are normal. Terrorists thus become the other in extremis and, by killing innocents without conscience, cause many citizens to see them as alien to standard moral and legal values . . . to the point of forfeiting basic rights.

Executive and Legislative Responses

That an attack on U.S. soil and citizens brought a rapid response from President Bush was no surprise. The President's powers, as defined by the Constitution, give the executive office certain authorities (rights) to defend the country and its citizens, and the President has sworn an oath (a duty) to defend and protect. Nor was it any great surprise, following the President's declared war on terrorism, that Congress quickly and almost unanimously passed the USA PATRIOT Act (2001) and

> a resolution—the Authorization for Use of Military Force (AUMF)—empowering the President to "use all necessary and appropriate force" against "nations, organizations, or persons" that he determines "planned, authorized, committed, or aided" in the September 11, 2001, al Qaeda terrorist attacks . . . (*Hamdi et al. v. Rumsfeld*, 2004, p. 1),

enactments that seemed like an update of the Alien and Sedition Acts of 1802.

What did surprise some were (a) the executive branch's apparent overreach

beyond what the Constitution and common law permit; (b) Congress's failure to read these bills (Baird, 2004), to debate the restrictions of rights and expansions of duties, and to use its constitutional authority to check and balance; and (c) the timorousness of judges and courts over confronting the executive branch's claims that its enemy combatant designation justifying holding these individuals indefinitely was beyond legal review. It took almost 3 years before the Supreme Court finally reached decisions in three terrorist-related cases (*Hamdi et al. v. Rumsfeld,* 2004; *Rasul et al. v. Bush et al.,* 2004; *Rumsfeld v. Padilla et al.,* 2004). Justices Scalia and Stevens, in particular, reacted with ire to the executive branch's overreach and Congress's failure to protect due process and the great writ of habeas corpus in their *Hamdi* dissent. This long delay, during which there were no expedited reviews of claims challenging the executive branch's reading of the established meanings of rights and duties, requires analysis, but first, some of the opinions in these cases are examined.

The Supreme Court Finally Responds

The most significant case is *Hamdi et al. v. Rumsfeld* (2004), in which four opinions were filed and the combined majority held that

> although Congress authorized the detention of combatants in the narrow circumstances alleged in this case, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker. (*Hamdi et al. v. Rumsfeld,* 2004, p. 2)

Justice O'Connor's plurality opinion flatly rejected

> The Government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts in such circumstances. Indeed, the position that the courts must forgo any examination of the individual case and focus exclusively on the legality of the broader detention scheme cannot be mandated by any reasonable view of separation of powers, as this approach serves only to *condense* power into a single branch of government. We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens. (*Hamdi et al. v. Rumsfeld,* 2004, p. 29)

When the Supreme Court did enter the debate, a substantive check was issued, and in *Rasul et al. v. Bush et al.* (2004), the Court extended its holding to foreign nationals (2 Australians and 12 Kuwaitis) captured during hostilities, nationals of countries not at war with the United States who denied engaging in acts of aggression and who had "never been afforded access to any tribunal, much less charged with and convicted of wrongdoing" (p. 2).

Yet it was Justice Scalia's dissent in *Hamdi et al. v. Rumsfeld* (2004) that pointed the finger directly at the failures within the three branches of government to debate, check, and balance. Scalia blamed the plurality opinion of the Court for saying too little and doing too much, all of which "distorted the Suspension Clause . . . by transmogrifying the Great Writ—disposing of the present habeas petition by remanding for the District Court to 'engag[e] in a factfinding process that is both prudent and incremental'" (*Hamdi et al. v. Rumsfeld,* 2004, p. 24). The Constitution carefully prescribes the "circumstances and conditions under which

the writ can be withheld" (*Hamdi et al. v. Rumsfeld,* 2004, p. 23), and on this point, Scalia pointedly blamed Congress, the executive branch, and the Court:

> There is a certain harmony of approach in the plurality's making up for Congress's failure to invoke the Suspension Clause and its making up for the Executive's failure to apply what it says are needed procedures—an approach that reflects what might be called a Mr. Fix-it Mentality. The plurality seems to view it as its mission to Make Everything Come Out Right, rather than merely to decree the consequences, as far as individual rights are concerned, of the other two branches' actions and omissions. Has the Legislature failed to suspend the writ in the current dire emergency? Well, we will remedy that failure by prescribing the reasonable conditions that a suspension should have included. And has the Executive failed to live up to those reasonable conditions? Well, we will ourselves make that failure good, so that this dangerous fellow (if he is dangerous) need not be set free. The problem with this approach is not only that it steps out of the courts' modest and limited role in a democratic society; but that by repeatedly doing what it thinks the political branches ought to do it encourages their lassitude and saps the vitality of government by the people. (*Hamdi et al. v. Rumsfeld,* 2004, pp. 24–25)

In Justice Stevens's dissenting opinion in *Rumsfeld v. Padilla* (2004, p. 2), he took issue with the majority's avoidance of the basic issue by answering "the jurisdictional question in the negative" (i.e., whether Padilla brought his case before the right court and designated the correct defendant) and by hiding behind a bright line that did not exist. As Stevens wrote,

> At stake in this case is nothing less than the essence of a free society. Even more important than the method of selecting the people's rulers and their successors is the character of the constraints imposed on the Executive by the rule of law. Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber. Access to counsel for the purpose of protecting the citizen from official mistakes and mistreatment is the hallmark of due process. . . . For if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny. (Stevens, J., dissenting, pp. 11–12, *Rumsfeld v. Padilla,* 2004)

Debate, Checks, and Balances . . . From Unusual Sources

What voices did speak up early on regarding the contentious issues of suspected terrorists and the need for safety? Here, the role of the press and the populace is highlighted, as well as the likely effects these voices had on creating debate and prodding checks and balances.

For example, in 2002, *The Washington Post* ran a series of editorials (Finkel & Moghaddam, 2005a) alleging that Padilla's and Hamdi's rights under the First, Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments had been violated (e.g., "Alleged but Not Proven," 2002; "The Case Against Mr. Hamdi," 2002; "Civics Lessons for Prosecutors," 2002; "Dying Behind Closed Doors," 2002; "The I-Said-So Test," 2002; "Still No Lawyers," 2002). These editorials were critical not only of the avoidance shown by judges and courts but also of the inaction of Congress and the overreaching action by the executive branch by which—under claims of duties involving safety to citizens and country and a duty to support the

President's war-on-terrorism effort—rights were being violated. The press, including the international press (e.g., "Guantána-NO," Friedman, 2005; "The Truth About Abu Ghraib," 2005), has run critical stories about alleged abuse and/or torture of suspected terrorists in Iraqi prisons and at Guantanamo, violations of the Geneva Convention and the damage this is doing to the standing and influence of the United States abroad (even among allies), executive branch denials that are contradicted by the facts, and congressional stonewalling of investigations. There have been stories and editorials about the highly invasive tactics of rendition, which violates individual rights and the sovereignty of other countries as well. The press exposed the rights infringements of the USA PATRIOT Act (2001) and discussed new and problematic provisions in the administration's proposed renewal and expansion of the act.

There are numerous examples of the populace raising its voice. First, when the rights infringements codified by the USA PATRIOT Act (2001) were read and grasped, more than 150 jurisdictions around the country "symbolically nullified parts of [it]" (Finkel & Moghaddam, 2005b, p. xiv; Nieves, 2003) as elected officials and legal officers refused compliance with its offensive invasions of privacy and search and seizure. Disobedience of the law by citizens (and law officers) in these jurisdictions sent a powerful message to their poll-reading legislators in Congress. Second, there has been a growing chorus of criticisms by citizens regarding provisions in this to-be-renewed Patriot Act, which again has sent a message to Congress (and the executive branch) that community sentiment is far from uniformly supportive of these duty enactments. Third, more citizens have been objecting to and going to court over national security letters (NSLs) they have received under a provision of the Patriot Act—defying the act's prohibition on revealing the very fact that they have received such letters and the possible 1-year prison sentence that might result from violating that prohibition. As Wiener (2004, p. 61) reported, these NSLs "are unique administrative subpoenas because the government orders the agents to carry out the subpoenas in secrecy without telling anyone that the FBI has issued an NSL." In *Doe v. Ashcroft* (2004), a citizen went public and challenged an NSL in court, and the Court struck down the provision "as a violation of the First and Fourth Amendments to the U.S. Constitution" (Wiener, 2004, p. 61). District Judge Marrero stated that,

> obviously viewed, it is improbable that an FBI summons invoking the authority of a certified investigation to protect against international terrorism or clandestine intelligence activities, and phrased in tones sounding virtually as biblical commandment, would not be perceived with some apprehension by an ordinary person and therefore elicit passive obedience from a reasonable NSL recipient. (*Doe v. Ashcroft,* 2004, p. 24)

These illustrations suggest that it has been the press and the people who have been first to voice Justice Stevens's reminder that "if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny" (*Rumsfeld v. Padilla,* 2004, p. 12).

Likely Consequences

The effects of the press are felt by the populace, and changes in popular sentiment are picked up and reported by the press. Yet the press and the populace, independently and jointly, affect all three branches of government. For example, exposés and chastising editorials bring to the public's attention the overreaching and missteps of the executive branch, the abdications of Congress, and the timidity of the Court. When worldwide public opinion and community defiance reveal that support for the executive branch's expansive duties claims and widespread rights restrictions is waning, then future actions that the executive branch may take are likely constrained. I have shown how public opinion and actions can provide cover and courage for legislators to debate, check, and balance, as reelection may hang in the balance. When citizens and noncitizens raise constitutional challenges in courts, judges are forced from sideline abstinence into decision making and into providing reasons for their decisions. When these effects come to pass, the debate is on, as it ought to be.

Debate has a number of virtues, as normativists and empiricists well know. It is one of the best ways of preventing great fears from becoming hydraulically out of control, when they may narrow and distort facts, reasons, values, . . . and what ought to be clear. Debate, when open and full, is likely to bring out the sound normative arguments and the most solid empirical facts so that both may serve to channel fears and challenge stereotypes. It is through debate, then, that a people may best understand what it wants and what it stands for, which may, in the end, be an artful integration (e.g., Dworkin, 1986) and balancing of rights and duties.

VI. Seesawing Toward Debate, Checks, and Balance

I am stopped (or perhaps estopped) from offering definitive outcome conclusions about enactments aimed at (a) turning bad Samaritans into civic-minded good Samaritans, (b) protecting the citizenry from moral monsters (SVPs), and (c) fighting alleged enemy combatants (terrorists) to preserve safety—because enactment outcomes in all three areas remain unsettled. Not enough time has elapsed for either a detached normative analysis or empirical research to amass on causes, correlates, and consequences. To twist T. S. Eliot's (1978) words, time past and time future are not yet contained in time present. For example, on the legislative side of the good Samaritan area, I do not know what those states without such laws will do in the future, and I do not know whether states with such laws will modify their reporting or intervening requirements. On the commonsense justice and legal fronts, I do not know (a) what jurors will decide in bad Samaritan cases or (b) how appellate courts will eventually rule. On the civic and consequential fronts, I do not know what effects these enactments, verdicts, and decisions will have on citizens' beliefs and actions. I am aware of anecdotal reports, some of which now make front-page news (e.g., "Horrific Attack, Heroic Rescue: Neighbors Subdue Man Stabbing Woman on NW Street," Wilber & Dvorak, 2005), but anecdotal reports are poor substitutes for data from sound research designs sampled across an array of cases.

Similarly, processes continue in the moral monster area. On the executive front, it was recently reported (Johnson, 2005) that the Justice Department has launched an online registry of sex offenders throughout the nation, providing

names, pictures, and information about an estimated 500,000 sex offenders and including the neighborhoods they live in and how close they are to schools. A week later, the legislative front made news (Lieb, 2005) with a report that four states (Florida, Missouri, Ohio, and Oklahoma) had enacted laws requiring lifetime electronic monitoring for some sex offenders whose sentences have expired, in which the Global Positioning System for tracking would be used, an approach that law professor John La Fond called "simply foolish" (Lieb, 2005). On the legal front, court cases challenging the invariant statutes have not run their course, and in regard to the involuntary commitment statutes and the irresistible impulse limb, I do not know what the courts (or the scientific community) will eventually do about expert testimony without sound scientific grounding. Finally, I do not know what effects scientific facts of variability (i.e., in terms of reoffending rates and treatment outcomes) will have on judicial decisions, legislative enactments, and public policy.

Regarding the war on terrorism, the present situation is in flux. Some foreign detainees, notably from allied nations, have recently been released from Guantanamo, and the Secretary of State has been sent to quell the fires among European Union nations about CIA renditions and the holding of terror suspects in secret prisons (Priest, 2005; Priest & White, 2005; Whitlock, 2005). These may be seen as signs that the executive branch is responding to international criticism of detentions without trials and reports of abuse and torture. Yet there are contrary signs as well, such as Vice President Cheney fighting for the detainee policy (Priest & Wright, 2005). Contradictions also rule in the courts over what sorts of trials and rights detainees ought to have (e.g., "Making Law at Guantanamo," 2004; Smith, 2005; White, 2005b).

Congress Seesaws Back Into the Debate

Although outcome conclusions are premature, some tentative conclusions about recurrent processes and themes are offered. For instance, the seesaw that brought instrumental duties to primacy has slowed, stopped, or swung toward rights and constitutive duties. The seesaw reversal is most clearly seen in Congress, which has apparently heeded the prods from the press (e.g., "A Need for Congress," 2005) and the populace and joined the debate. Recently, the Senate, led by Senator John McCain (R-Ariz.), a former prisoner of war himself, passed a veto-proof bill with bipartisan support (90–9) despite vigorous lobbying from Vice President Cheney against this ban on cruel, inhuman, and degrading treatment for all detainees held in U.S. and secret CIA prisons; this bill insists that interrogations conform to the U.S. Army Field Manual and the Geneva Convention and that prisoners not be hidden from the Red Cross ("End the Abuse," 2005; "Rebellion Against Abuse," 2005). Although this bipartisan-strength enactment is noteworthy, the supportive reasons for this legislation are most telling. Those reasons are not just in support of rights but in support of long-term, constitutive duties, with McCain's refrain being that "it's not about who our enemies are, it's about who we are" (Ignatius, 2005, p. A35). The House also passed this legislation with a veto-proof majority (308–122), and the administration, in a reversal, endorsed McCain's bill (White, 2005a). A *Washington Post* editorial ("A Blow Against Torture," 2005, p. A34) cautioned that whether "Mr. Bush will heed the

message, or the new legal standard, unfortunately remains open to question," given how the executive branch has "redefined both 'torture' and 'cruel, inhuman and degrading treatment'" in ways inconsistent with this bill. The editorial argued that there "must be an independent check on the administration's legal interpretations" ("A Blow Against Torture," 2005, p. A34). Despite the increasing number of interpretations and redefinitions in all three topical areas (i.e., whether in the dilating, constricting, or obscuring direction), I nonetheless do see an increased willingness of Congress to challenge suspect interpretations and definitions.

Two additional signs of congressional debate, checks, and balances can be seen: first, in the "Rising Support Cited for Limits on Patriot Act" (Eggen, 2005b) that led to the Senate's block on the renewal of the act (Babington, 2005b) until greater protections of civil liberties are put into this bill, and second, in the breaking story that "Bush Authorized Domestic Spying" (Eggen, 2005a), which has led "several senators to state that 'congressional and judicial curbs are needed on executive branch powers'," with Sen. Patrick Leahy (D-Vt.) thundering, "Mr. President, it is time to have checks and balances in this country," and "We are a democracy" (p. A5). Implicit in this thundering is an admission that Congress has not been checking the executive branch for quite some time, having issued too many blank checks instead.

The latest admission by the executive branch of domestic spying circumventing the Foreign Intelligence Surveillance Act of 1978 and the executive branch's rationales in support of it (e.g., a so-called plenary power supposedly inherent in the executive branch's constitutional authority and the argument that Congress's vote for the Patriot Act allegedly gave implied authorization) have been sharply criticized by legal scholars, politicians, and columnists (e.g., Babington, 2005a; Lane, 2005; Will, 2005). However, the most dramatic sign that the seesaw has shifted is how quickly and hotly Congress and the Foreign Intelligence Surveillance Court (Leonnig & Linzer, 2005) have responded to the executive branch's "imperial assumptions" (Robinson, 2005), when in years past there was a long silence. The outcome of all this is not my main point: What is most noteworthy is the process swing to debate over rights and constitutive duties. From these discernible themes and processes, the outlines of a heuristic moral to the story emerge about rights, duties, and their balance in the worst of times.

The Passions: Fears, Ressentiment, and Moral Righteousness

In this worst of times, passions have run high. Of the various passions, I have focused on fear and the hydraulic pressures it produces. Also evident are those emotions and motives Nietzsche (1954) called *ressentiment*—anger, outrage, vindictiveness, malice, spite, and cruelty. These drive the desire to punish moral monsters and enemy combatants who inflict horrific and heinous harms and bad Samaritans who let them happen. When fearful and vindictive passions conjoin, research findings in the psychology of emotions and cognitions (e.g., Parrott, 1995) generally show a narrowing (and clouding) of what one sees and a widening of what one fails to see. Across these topical areas, I have found a blurring of distinctions; a greater reliance on stereotypes, myths, and heuristics; and a failure to see complexity, variance, and nuance. In addition, I have found a simplistic

framing of complex issues and less willingness to find facts contradicting the passionate position. That a thorough debate would be the first casualty during the worst of times would come as no surprise to psychological researchers . . . or Justice Holmes.

I have seen such results and heard the blurring of concepts in replaceability utterances. I have seen a primacy swing from rights toward a greater focus on safety and duties, which, paradoxically, has come about by ignoring, forgetting, or shirking constitutive duties that protect who people are. As Alan Stone (2004, p. 286) reminded readers, Americans have gone through "perilous times" before when, out of the hydraulic press of fear and anger, they interned 120,000 individuals of Japanese descent during World War II, when the stereotypic, indiscriminate, and offensive justification was "a Jap's a Jap." The subsequent regret and the long-belated apology came much too late. The philosopher Jeffrie Murphy (2003, p. 34) recalled Nietzsche's famous warning: "Take care that when you do battle with monsters that you do not become a monster." In these current battles, the press (popular, international, scholarly, and scientific) and the populace have taken heed of these reminders and warnings first, to push the Court and Congress to act and to restrain the executive branch.

The Effects of the Passions on Principles, Politics, and Pragmatics

Worst-of-times passions and pressures seem to uncouple the usual tandem relationship of rights and duties (Haskill, 2005). In all three areas, I have shown that duties took the driver's seat as rights were backseated, where rights talk could be ignored as one would a backseat driver. Also pushed to the backseat were duties central to fundamental values. Passions and pressures promote pragmatic actions, instrumental thinking, and quick assessments, cutting short the search for sound evidence and deeper, more complex analyses.

Another recurrent theme concerns the breakdown effects caused by passions on the checks and balances process, in which pressures produce overreaching and underreaching—or silence from the sidelines from those the people elect and/or expect to take a stand. Part of this hydraulic pressure results from perceptions of community sentiment and support, yet, under pressure, executives and legislators are more likely to read the results from simplistic polls picking up transient and overheated sentiments, which then unduly affect the weathervane-spinning pols (Dewar, 1992) who have been all too quick to forget what Madison clearly understood—that they are elected not merely to follow but to lead in the worst of times.

The pressures of passions may affect unwholesomely the pragmatics in all three enactment areas. They push for quick fixes to salve inflamed emotions. Yet, in the process of enacting quick fixes, legislatures have substituted the myth of invariance for the inconvenient ubiquity of variance, and the Supreme Court has turned a blind eye to the contradictions of the irresistible impulse limb and its *Daubert* standards while medico-psychological experts have proffered opinions without the backing of valid facts. Most of all, pragmatic pressures for quick fixes distort those fundamental principles relating to who people believe they are and what they aspire to be as individuals and as a nation.

The Other Face of Passions and the Question of Balance

This picture, however, is too simplistic. There is another side to these passions that is far more laudatory, and one must see this face to find an informing moral to the story, rather than settling for another simplistic fiction. Consider the horrors and heinous acts in all three topical areas and the what-if possibility—that these acts produce no great passions. One might respond, "But that wouldn't be human." What would be meant by that? One knows that some humans do respond to outrageous harms with indifference, by turning the other cheek, or even by quickly forgiving and that they might respond with a version of Alexander Pope's (1709/1962) "To err is human; to forgive, divine," whereas others might use the adage to avoid hard problems. These responses are human too. What one probably means is "But that isn't the sort of human I would respect." The philosopher Jeffrie Murphy (2003, p. 19) made this point when he reiterated S. J. Perelman's twist on the poet's phrase: "To err is human; to forgive, supine." In Murphy's own words,

> A person who never resented any injuries done to him might be a saint. It is equally likely, however, that his lack of resentment reveals a servile personality—a personality lacking in respect for himself and respect for his rights and status as a free and equal moral being. (Murphy, 2003, p. 19)

Those feelings, then, the passions of *ressentiment,* including vindictiveness, motivate people to act and do so for at least three positive values: "self-respect, self-defense, and respect for the moral order" (Murphy, 2003, p. 19). These three positive values, proponents would argue, are present in all three of the topical areas.

The emotions, to Murphy and many psychologists, are neither irrational nor devoid of cognition and beliefs. As Murphy (2003) put it, "I want instead to portray vindictiveness as complex—a mixture of good and bad elements—and thereby avoid the simplistic reductionism often found in those who condemn this passion" (p. 31). This side of emotions brings balance to the picture, but it also brings a warning reminder from Murphy that within this admixture, the negative side includes "vindictiveness so out of control that it actually becomes a kind of malice" (Murphy, 2003, p. 34) and the possibility that vindictiveness, when seen as righteous anger with all its certainty, involves a self-deception, with its baser motives unseen and thus unchecked.

Checks and Balance

The founding fathers established checks and balances within this tripartite government they created. Achieving the right balance between rights and duties was critically important. Yet the right balance had to be flexible for unusual times and circumstances, like the worst of times, and for unforeseeable events in a history yet to come. Swings would inevitably happen in a nonstatic world, as primacy would seesaw from time to time. The built-in checks needed to work to restore balance and remind people of their fundamental values and purposes.

If the outline of a positive moral to the story could be seen, I believe it would highlight the roles of the fourth and fifth branches of government, the press and the people. I have put forth a wider view of the press here, one that goes beyond

traditional media sources to include the scholarly and scientific press. My view of the people also encompasses more than is traditionally considered: not just citizens voting or voicing their general views to pollsters and not just jurors rendering their verdicts on defendants and the law, but citizens expressing their deeper notions of commonsense justice and fairness (Finkel, 1995, 2001a).

Both the people and the press have played a key part in restoring debate and balance to events and enactments that went unchecked. They have held feet to the fire, objected and editorialized, and even taken nullifying actions. To paraphrase Stone's (2004, p. 14) words, I have seen evidence that some within the fourth and fifth branches acted to preserve the spirit of liberty in times of crisis, when the executive branch, Congress, and the Court had failed to do so.

For both safety and rights to grow more secure and for "the law of peoples" (Rawls, 1999) to flourish, rights and duties need balancing, as people "take men and women as they are" (Rousseau, 1950, p. 3). Yet these airy precepts must be enacted on the ground, where some must speak up lest patriotic enactments—those that undermine fundamental principles and values—have a longer reign than they should. I have found such voices and actors on these grounds, although they are not the ones I might have thought would be leading the fight. Even if this is not a brand-new lesson, it remains a gratifying one.

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