

## LAW AS PALIMPSEST: CONCEPTUALIZING CONTINGENCY IN JUDICIAL OPINIONS

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### ABSTRACT

*Metaphors create conceptualizations, and for decades legal academics have employed metaphors to shape understandings of legal problems. But no metaphor in current use adequately conceptualizes the contingency of judicial opinions and the complexity of the relationship between opinions and precedent. This Article seeks to fill this void by introducing a new metaphor, the palimpsest, into the realm of legal analysis.*

*A palimpsest is a writing surface that can be cleared away for reuse, like a personal blackboard. What distinguishes a palimpsest from other writing surfaces is that its removed contents do not disappear, but remain, obscured yet recoverable: A writing on a palimpsest never goes away.*

*This Article argues that thinking of judicial opinions as being part of a shared, ever-evolving palimpsest underscores the fact that they are ultimately contingent and serves as a reminder of the multiple levels of interconnectedness between them and the cases they cite. Precedents—like the underlayers of a palimpsest—never go away, and they inform and shape the application of opinions in ways far more significant than simply serving as points of reference. A palimpsestic approach to understanding judicial decision making also helps to explain why even the oldest, most despised cases remain part of our national psyche—like underlayers of a palimpsest, they can never truly disappear, and their continued presence forces us to grapple with their existence. Finally, considering judicial opinions as part of a shared palimpsest reminds us that even the most troubling opinion is ultimately contingent, its application subject to reexamination and revision by future courts and future generations. Just as such an opinion replaces its precedents, it too will one day be replaced, like each of a palimpsest’s layers.*

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## INTRODUCTION

In its final decision of the 2007 Term, the Supreme Court again weighed in on our nation’s ongoing march toward racial integration. The case was *Parents Involved in Community Schools v. Seattle School District No. 1*,<sup>1</sup> and in it the Court struck down voluntary desegregation plans in Seattle and Jefferson County, Kentucky, because they relied on race to determine which schools certain schoolchildren could attend.<sup>2</sup> Though lauded in some quarters,<sup>3</sup> *Parents Involved in Community Schools* was widely condemned as a repudiation of the principles of *Brown v. Board of*

1. 551 U.S. 701 (2007). The Supreme Court decided *Parents Involved in Community Schools* together with *Meredith v. Jefferson County Board of Education*, a challenge to a Jefferson County, Kentucky, desegregation plan that classified students as “black” or “other” in order to make certain elementary school assignments.

2. *See id.* at 747–48.

3. *See, e.g.*, Editorial, *Diversity Without Decrees*, NAT’L REV. ONLINE, June 28, 2007, (search National Review Online for “Diversity Without Decrees”) (praising the opinion as “a victory for those who think race plays too large a role in public life”); Editorial, *Race and the Roberts Court*, WALL ST. J., June 29, 2007, at A14 (applauding *Parents Involved in Community Schools* for curbing “the excesses of the racial-classification policy that has been promoted by too many courts in recent decades” and more broadly praising the “incremental conservative judging that was [the] hallmark” of the first full term of the Roberts Court).

*Education*<sup>4</sup> and a victory for segregationists on par with *Plessy v. Ferguson*.<sup>5</sup> A *New York Times* editorial stated that in rendering the opinion the Court was “broadly ordering the public schools to become more segregated.”<sup>6</sup> The Editorial Board of the *San Francisco Chronicle* declared that “[t]he 1954 *Brown vs. Board of Education* decision, fortunately, drove a dagger into *Plessy*’s heart—until Thursday, when a court invigorated by two new conservative justices moved to resuscitate it.”<sup>7</sup> Upon reading these and some of the other stark editorials that appeared in the wake of *Parents Involved in Community Schools*,<sup>8</sup> a lay reader might well have surmised that the reemergence of the Jim Crow Era had been inaugurated the day the Court decided this case.

Such drastic reactions are symptomatic of a fundamental misunderstanding of the relationship between judicial opinions and precedent. Though it is common to view a significant opinion as the ultimate culmination of a line of cases—overtaking its predecessors via what David Cole has called “precedential incorporation”<sup>9</sup>—in reality opinions engage with precedent on a number of levels beyond merely relying upon and overtaking them. Though *Parents Involved in Community Schools* in one sense usurped *Brown* by relying upon it and curtailing its reach, its application and future interpretation will forever be informed by *Brown*, as well as by *Plessy* and the balance of the Supreme Court’s segregation/desegregation jurisprudence; precedents never go away. As important, because every opinion remains subject to future revision, assessing an opinion’s potential impact can be accomplished only by analyzing not just what it says, but the possibility of its being revisited and altered by future courts as well. Reactions to *Parents Involved in Community Schools* based only on what the opinion says therefore obscure the fact that it almost certainly will be revisited and have its meaning altered should it produce unforeseen results or have effects deemed undesirable by future Courts.

This Article advocates a more longitudinal, interpretive approach to assessing opinions such as *Parents Involved in Community Schools*: by thinking of them as being part of an ever-evolving, shared palimpsest. *The*

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4. 347 U.S. 483 (1954).

5. 163 U.S. 537 (1896).

6. Editorial, *Resegregation Now*, N.Y. TIMES, June 29, 2007, at A28 (“It has been some time since the court, which has grown more conservative by the year, did much to compel local governments to promote racial integration. But now it is moving in reverse, broadly ordering the public schools to become more segregated.”).

7. Editorial, *A Setback to Equality*, S.F. CHRON., June 29, 2007, at B10.

8. *E.g.*, Editorial, *Fracturing a Landmark*, L.A. TIMES, June 29, 2007, at A34 (“In the name of abiding by the letter of *Brown*, the court has dishonored its spirit.”); Editorial, *Race Matters*, ST. LOUIS POST-DISPATCH, July 2, 2007, at B8 (“The court’s decision Thursday, made in the name of a color-blind Constitution, pushes back the day when the nation itself will become color-blind.”).

9. David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 860 (1986) (noting that “precedential incorporation” is the “traditional account” of “reading cases and tracing legal development”).

*American Heritage Dictionary* defines *palimpsest* as “[a] written document, typically on vellum or parchment, that has been written upon several times, often with remnants of earlier, imperfectly erased writing still visible.”<sup>10</sup> Though it once meant any erasable, reusable writing surface,<sup>11</sup> *palimpsest* refers in current usage not only to any such material, but to both the material and the writings it contains.<sup>12</sup>

This meaning arose during the nineteenth century, when it was discovered that presumed erased writings upon palimpsests were not lost forever, but were instead recoverable via chemical processes.<sup>13</sup> Over the course of the century, “numerous palimpsests were discovered and many rare, ancient texts, formerly considered lost, were excavated from the forgotten depths of these manuscripts.”<sup>14</sup> Once the ability to rediscover buried texts was perfected, palimpsests were elevated from the quotidian—little more than used writing surfaces—to the extraordinary—writing surfaces able to reveal lost texts, document centuries of history, and create threads of cohesion across seemingly unconnected cultures.

Almost immediately, as George Bornstein notes in *Palimpsest: Editorial Theory in the Humanities*, “Romantic and Victorian writers seized upon the metaphorical implications of the word: in *Suspiria De Profundis* Thomas De Quincy [sic] used it as an emblem for the human brain, and in *Aurora Leigh* Elizabeth Barrett Browning [sic] applied it to the soul.”<sup>15</sup> By the latter part of the nineteenth century, the palimpsest had become “a recurrent metaphor . . . for the human psyche and for history.”<sup>16</sup> And in recent years, scholars have applied the palimpsest metaphor to an array of diverse fields, from feminist literary theory,<sup>17</sup> queer theory,<sup>18</sup> pedagogy,<sup>19</sup>

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10. THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 944 (William Morris ed., 1st ed. 1969). The Oxford English Dictionary explains that *palimpsest* derives from Latin and Greek—Latin *palimpsestus*, from Greek roots meaning “scraped again” and “to rub smooth” again. XI THE OXFORD ENGLISH DICTIONARY 95 (2d ed. 1989); see also George Bornstein, *Introduction to PALIMPEST: EDITORIAL THEORY IN THE HUMANITIES* 1, 1 (George Bornstein & Ralph G. Williams eds., 1993).

11. See OXFORD ENGLISH DICTIONARY, *supra* note 10; see also Bornstein, *supra* note 10, at 1.

12. See Bornstein, *supra* note 10, at 1.

13. See Josephine McDonagh, *Writings on the Mind: Thomas De Quincey and the Importance of the Palimpsest in Nineteenth Century Thought*, 10 PROSE STUD. 207, 210 (1987) (“Until the beginning of the nineteenth century a palimpsest, a term coming from the Greek word *παλιμψεστος*, meaning, literally, ‘to scrape again,’ was a piece of vellum whose surface had been erased of inscription for reuse. Developments in chemistry at the turn of the century enabled the recovery of the former inscriptions.”).

14. *Id.*

15. Bornstein, *supra* note 10, at 1.

16. McDonagh, *supra* note 13, at 208. This tradition continued into the twentieth century. For example, poet and novelist H.D., whose prose works consisted of “complex textual structures that combine autobiography and fiction,” titled her 1926 novel *Palimpsest*. Sarah Dillon, *Reinscribing De Quincey’s Palimpsest: The Significance of the Palimpsest in Contemporary Literary and Cultural Studies*, 19 TEXTUAL PRAC. 243, 256 (2005). Gore Vidal’s 1995 memoir is also titled *Palimpsest*. GORE VIDAL, *PALIMPEST: A MEMOIR* (Penguin Books 1996) (1995).

17. See, e.g., SANDRA M. GILBERT & SUSAN GUBAR, *THE MADWOMAN IN THE ATTIC: THE WOMAN*

and genealogy,<sup>20</sup> to genomics,<sup>21</sup> geography,<sup>22</sup> landscape studies,<sup>23</sup> and urban policy.<sup>24</sup>

This Article extends the reach of this well-traveled metaphor by applying it to the law. Though no prior scholar has broadly applied the palimpsest metaphor to the law,<sup>25</sup> the application of metaphorical lenses to legal

WRITER AND THE NINETEENTH-CENTURY LITERARY IMAGINATION 73 (1979) (“[W]omen from Jane Austen and Mary Shelley to Emily Brontë and Emily Dickinson produced literary works that are in some sense palimpsestic, works whose surface designs conceal or obscure deeper, less accessible (and less socially acceptable) levels of meaning.”); Mary-Ellen Jacobs, Petra Munro & Natalie Adams, *Palimpsest: (Re)Reading Women’s Lives*, 1 QUALITATIVE INQUIRY 327, 328 (1995) (“Focusing on women’s narrative strategies as a way to understand dominant social relations enables us to acknowledge how the layering—the palimpsest—of women’s lives permits us to reread the ‘deeper, less accessible levels of meaning.’” (quoting GILBERT & GUBAR, *supra*, at 73)).

18. See, e.g., Dillon, *supra* note 16, at 258 (“Identifying the structural similarities between the palimpsest and queer reveals that these terms must remain open to reinscription if they are to continue as viable critical currency, an openness precisely embodied in and by the palimpsest.”).

19. See, e.g., Kathleen Blake Yancey, *Postmodernism, Palimpsest, and Portfolios: Theoretical Issues in the Representation of Student Work*, 55 C. COMPOSITION & COMM. 738, 741 (2004) (arguing for the inclusion of the context in which teaching and learning take place as part of the palimpsest of factors used in assessing student portfolios).

20. See, e.g., Michel Foucault, *Nietzsche, Genealogy, History*, in LANGUAGE, COUNTER-MEMORY, PRACTICE 139, 139 (Donald F. Bouchard ed., Donald F. Bouchard & Sherry Simon trans., 1977) (“Genealogy is gray, meticulous, and patiently documentary. It operates on a field of entangled and confused parchments, on documents that have been scratched over and recopied many times.”).

21. See, e.g., Charles F. Delwiche, *The Genomic Palimpsest: Genomics in Evolution and Ecology*, 54 BIOSCIENCE 991, 991 (2004) (“The genome is like a palimpsest . . . , an ancient, recycled manuscript in which the traces of an earlier text can be discerned.”); David Haig & Steve Henikoff, *Genomes and Evolution: Deciphering the Genomic Palimpsest*, 14 CURRENT OPINION IN GENETICS & DEV. 599, 599, 602 (2004) (describing a genome as “a great compendium of interwoven texts written at different times by different authors” and noting that genomes, like palimpsests, “have multiple layers of text with significant information about the evolutionary past, if only the tools can be developed to read the message”).

22. See, e.g., Johan Kleman, *The Palimpsest Glacial Landscape in Northwestern Sweden*, 74 GEOGRAFISKA ANNALER 305, 305 (1992) (discussing a study dealing with “relative age sorting of landform assemblages in a palimpsest glacial landscape, the mountains of northern Sweden”).

23. See, e.g., David R. Wilson, *Reading the Palimpsest: Landscape Studies and Air-Photography*, 9 LANDSCAPE HIST. 5, 5 (1987) (noting the contribution of air-photography to landscape studies and observing that the parallel between a palimpsest “and the man-made landscape is so evident that it scarcely needs to be spelled out in detail”).

24. See, e.g., Phil McManus, *Writing the Palimpsest, Again; Rozelle Bay and the Sydney 2000 Olympic Games*, 22 URB. POL’Y & RES. 157, 161 (2004) (discussing the development of Sydney’s Rozelle Bay in connection with the 2000 Summer Olympics in the context of “the writing of the palimpsest of landscape”).

25. Though law review articles that employ the term “palimpsest” are not numerous, the most common use among the few that do employ the term more than once or twice in passing is in the context of actual palimpsests that are considered art. See, e.g., Susan E. Brabenec, *The Art of Determining “Stolen Property:” United States v. Portrait of Wally, A Painting by Egon Schiele, 105 F. Supp. 2d 288 (S.D.N.Y. 2000)*, 69 U. CIN. L. REV. 1369, 1382–83 (2001); Patricia Youngblood Reyhan, *A Chaotic Palette: Conflict of Laws in Litigation Between Original Owners and Good-Faith Purchasers of Stolen Art*, 50 DUKE L.J. 955, 998–1002 (2001). Occasional metaphorical references to the palimpsest can be found in the legal literature as well. See, e.g., Mark Harris, *Mapping Australian Postcolonial Landscapes: From Resistance to Reconciliation?*, 7 L. TEXT CULTURE 71, 93 (2003) (discussing “the palimpsest of Australian space and place”); Boaventura de Sousa Santos, *The Heterogeneous State and Legal Pluralism in Mozambique*, 40 LAW & SOC’Y REV. 39, 47 (2006) (employing the palimpsest metaphor “to characterize the intricate ways in which very different political and legal cultures and very different historical durations are inextricably intertwined in contemporary Mozambi-

analysis has been persistent in modern legal scholarship. Metaphors can help to provide analytical clarity because a metaphor “is not simply an act of description; it is a way of conceptualization.”<sup>26</sup> Put differently, metaphors shape interpretations<sup>27</sup> by framing issues in a new, often unfamiliar way that casts them in a different light: “The essence of metaphor is understanding and experiencing one kind of thing in terms of another.”<sup>28</sup> Moreover, “[m]uch of our thinking about a problem involves the metaphors we use.”<sup>29</sup>

It should therefore come as no surprise that some of the leading legal scholars of our time have employed metaphors of interpretation to aid in thinking about legal problems and experiences: Owen Fiss has described as part of his interpretive framework a metaphorical “spiral of norms that increasingly constrain” a judge seeking to address an open-ended question;<sup>30</sup> Alex Aleinikoff has advocated what he calls a “nautical” approach to statutory interpretation, in which one understands that a statute is “an on-going process (a voyage) in which both the shipbuilder and subsequent navigators play a role”;<sup>31</sup> and most famously, Ronald Dworkin has likened deciding hard cases to participating in the composition of a chain novel, a work of fiction in which a series of authors write subsequent chapters with the goal of creating “a single, unified novel” suggesting one author.<sup>32</sup>

Each of these scholars has employed metaphor to shape a conceptualization: Fiss regarding constraints, Aleinikoff regarding statutory interpretation, and Dworkin regarding judicial coherence. But no legal metaphor in current use adequately conceptualizes judicial opinions in a manner that

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que”). But there is no indication that any scholar has applied the palimpsest metaphor more broadly to legal interpretation.

26. Daniel J. Solove, *Privacy and Power: Computer Databases and Metaphors for Information Privacy*, 53 STAN. L. REV. 1393, 1398 (2001).

27. The act of interpretation has long been an essential component of legal analysis. See T. Alexander Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 57 (1988) (“Interpreters are not reporters or historians, searching out the facts of the past. They are creators of meaning.”); Owen M. Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177, 178 (1985) (“Interpretation has always been a favorite topic for legal academics, but for the most part it has been confined to private law issues, such as wills and contracts. Within the last several years, however, it has moved to the great public law questions of the day and has engaged the attention of constitutional theorists.”). Regarding the importance of interpretation, Robert Cover has gone so far as to declare that “[l]egal interpretation takes place in a field of pain and death.” Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1601 (1986) (footnote omitted). “This is true in several senses,” he continues. “Legal interpretive acts signal and occasion the imposition of violence upon others: A judge articulates her understanding of a text, and as a result, somebody loses his freedom, his property, his children, even his life.” *Id.*

28. GEORGE LAKOFF & MARK JOHNSON, *METAPHORS WE LIVE BY* 5 (1980) (italics omitted) (quoted in Solove, *supra* note 26, at 1398).

29. Solove, *supra* note 26, at 1398. See also *id.* at 1419 (“Metaphors are instructive not for their realism but for the way they direct our focus to certain social and political phenomena.”).

30. Fiss, *supra* note 27, at 185.

31. Aleinikoff, *supra* note 27, at 21.

32. Ronald Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527, 542 (1982). See also RONALD DWORKIN, *LAW’S EMPIRE* 228–38 (1986).

illuminates the nature of their contingency and accounts for the complexity of their relationship with precedent. Interpreting cases through the lens of the palimpsest fills this gap.<sup>33</sup> By applying this interpretive approach one recognizes that rather than simply reaffirming, scaling back, or overturning prior cases through precedential incorporation,<sup>34</sup> judicial opinions interact with precedent in an evolving, contingent coexistence that ebbs and flows over time. More generally, applying the palimpsest metaphor to judicial decision making helps to diminish the relative importance of any one opinion, even one deemed to be as significant as *Parents Involved in Community Schools*.<sup>35</sup>

This Article proceeds in five Parts. Part I unpacks Bornstein's description of the palimpsest as a "master metaphor" and explains why scholars have been, and continue to be, drawn to applying it to so many diverse fields. Part II begins to apply the palimpsest metaphor to American judicial decision making through the language of De Quincey's *Suspiria de Profundis*, which contains the seminal meditation on the significance of the palimpsest's "contradictory capacities both to retain and erase texts."<sup>36</sup> This Part, in conjunction with Part III, distinguishes between what I have termed the soft form of palimpsestic decision making, in which judicial opinions merely restate precedent without further inquiry, and what I have termed the hard form of palimpsestic decision making, in which judicial opinions revisit and in some cases overturn precedent.

Again using De Quincey's meditation as a point of departure, Part IV posits a more expansive view of the palimpsest metaphor's applicability to

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33. The similarities between writing and rewriting upon a palimpsest and the interpretation and reinterpretation of precedent that is the hallmark of American jurisprudence are difficult to overlook. Just as a new writing on a palimpsest replaces each of the writings before it, so do opinions interpreting and applying earlier caselaw stand in the place of prior opinions. Yet in each case what has come before is never fully expunged; rather, it remains in the background, perhaps unseen and unnoticed, but looming nonetheless. On this point it is notable that even when a case is overturned, it remains "on the books" in the form of case reporters. These overturned cases could quite reasonably be expunged from case reporters, as they no longer represent current statements of the law. That they do not lends support to the proposition that such cases are not being fully replaced, but merely pushed into the background, where their presence remains. Indeed, the very process of reporting cases and reliance upon *stare decisis* so fundamental to the common law indicates a palimpsestic framework, as civil law jurisdictions report only selected, particularly notable cases.

34. See generally Cole, *supra* note 9, at 860–66.

35. Of course, numerous other cases have been met with widespread condemnation framed in sometimes-hyperbolic terms. See, e.g., James Oliphant & Jeff Coen, *Daley Vows To Fight for Chicago's Gun Ban: High Court Throws out D.C. Law*, CHI. TRIB., June 27, 2008, at C1 ("[W]hy don't we do away with the court system and go back to the Old West, you have a gun and I have a gun and we'll settle it in the streets?" (quoting Chicago Mayor Richard Daley's response in the wake of *District of Columbia v. Heller*, 128 S. Ct. 2783 (2008))); Roger Stenson, *The Value of Life*, BALTIMORE SUN, July 12, 1992, at 11A ("[T]he U.S. Supreme Court has ruled and reaffirmed in last week's [*Planned Parenthood v.*] *Casey* decision from Pennsylvania that responsibility need not be observed."); *Hundreds Protest Supreme Court Sodomy Ruling*, N.Y. TIMES, Aug. 12, 1986, at A20 (recounting Alan Dershowitz's telling a crowd that *Bowers v. Hardwick* "would open the way for the persecution of all people").

36. McDonagh, *supra* note 13, at 211.

judicial decision making in the United States. It argues that examining opinions from a perspective shaped by this analytical framework can both complicate and clarify understandings of how past opinions inform and lurk beneath a court's holdings. Finally, Part V illustrates how viewing American judicial decision making through the lens of the palimpsest can help ease some of the anxieties that arise out of controversial judicial opinions, using *Parents Involved in Community Schools* as a case study. The Article concludes by arguing in favor of applying the palimpsest metaphor to analyses of judicial opinions because it helps to properly contextualize their significance and to illuminate the complexity of the relationship between judicial opinions and precedent.

### I. THE "MASTER METAPHOR"

*Palimpsest: Editorial Theory in the Humanities*, a collection of essays edited by George Bornstein and Ralph G. Williams, arose out of an interdisciplinary conference held at the University of Michigan in November of 1991.<sup>37</sup> In his *Introduction to Palimpsest*, Bornstein explains the impetus for collecting the papers presented at the conference in one volume:

One of the biggest surprises to the participants in the "Palimpsest" conference that led to this book was the discovery that scholars from disparate fields of the humanities—from biblical and classical scholarship, from musicology and art history, from Renaissance drama and modern literature, from the history of the American Revolution and the history of the civil rights movement—were asking similar questions and coming to similar conclusions. The fact that scholars of events and monuments from different continents, centuries, or ethnic groups could come together speaking the same language and illuminating each other's problems seemed to us a sure guarantee of the interdisciplinary nature of editorial theory in the humanities at the present time. This book reflects that understanding.<sup>38</sup>

Reflecting the nature of the conference, *Palimpsest* contains an eclectic collection of essays, including: a meditation on implications on the then new, now pervasive, trend toward widespread availability of electronic

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37. PALIMPEST: EDITORIAL THEORY IN THE HUMANITIES, at v (George Bornstein & Ralph G. Williams eds., 1993). It is in his introduction to this volume that Bornstein refers to the palimpsest as a "master metaphor." See Bornstein, *supra* note 10, at 5 ("To us the idea of palimpsest functioned as a master metaphor for many areas of interdisciplinary concern, including the nature of authorship, the contingency of textuality, the process of cultural transmission, and the embedding of art in society.").

38. Bornstein, *supra* note 10, at 5.



texts and its effect on perceptions of textual integrity;<sup>39</sup> a thoughtful dispatch from an art historian about the challenges and pitfalls of cleaning and restoring a well-known and beloved piece of art, Michelangelo's *Sistine Ceiling*;<sup>40</sup> a detailed explanation of the difficulty of, and problems raised by, translating opera librettos from one language to another;<sup>41</sup> and a description of the frustration encountered by a scholar seeking to find the voice of W.B. Yeats, whose propensity for editing and re-editing his own work over the course of his life has made the corpus of his work particularly unstable.<sup>42</sup>

The unifying concern of these essays, and the balance of those included in *Palimpsest*, is with authority. As works increasingly "have come to seem contingent and constructed rather than unitary and received," authority, "which seeks to fix the form of the text (in the broad sense) and to place it in a mutually stabilizing relationship to social institutions," has been undermined.<sup>43</sup> For, as Bornstein notes, "[a]uthority seems to require a stable, unitary text rather than an unstable, multiple one."<sup>44</sup> Once we accept that there is no definitive Yeats or *Sistine Ceiling*—that they are, if not mutable, then at least not fixed—the effect can be destabilizing.<sup>45</sup> The realization that there can be, and often are, multiple versions of canonical texts or works, none necessarily more authoritative than any other, inevitably subverts prior appreciations and understandings, as they implicitly

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39. Peter L. Shillingsburg, *Polymorphic, Polysemic, Protean, Reliable, Electronic Texts*, in PALIMPSEST, *supra* note 37, at 29–43. "If the electronic version of the work ignores the type font, leading, line breaks, page breaks, running headlines, and so on of the original text and if one wishes to find these matters significant, the electronic text is no good." *Id.* at 39.

40. Kathleen Weil-Garris Brandt, *The Grime of the Centuries Is a Pigment of the Imagination: Michelangelo's Sistine Ceiling*, in PALIMPSEST, *supra* note 37, at 257–69. Brandt observes:

Through the Sistine murk, spectators were free to recreate the obscured and distant-seeming images through a personal exercise of fantasy. The grime of the centuries was a pigment of the imagination. The cleaned Ceiling assertively rejects this imaginative contribution by the viewer and requires a new kind of interaction, defined more highly by the image.

*Id.* at 265.

41. Philip Gossett, *Translations and Adaptations of Operatic Texts*, in PALIMPSEST, *supra* note 37, at 285–304. Gossett notes:

[I]n the absence of separate versions undertaken by the composer, there is no satisfactory solution to the problem of providing an appropriate translation for an early nineteenth-century opera from Italian to French or vice versa. In order to follow the musical line, it is imperative to create verse forms that have no place in the art of libretto construction from the period; in order to follow the verbal conventions of the period, it is necessary to create verse forms that distort the vocal lines of the original score.

*Id.* at 302.

42. George Bornstein, *What Is the Text of a Poem by Yeats?*, in PALIMPSEST, *supra* note 37, at 167–93. "Partly because of his own continual editorial intervention, the texts that compromise Yeats's poems and the book that should contain them remain remarkably unstable." *Id.* at 168.

43. Bornstein, *supra* note 10, at 2.

44. *Id.*

45. See Shillingsburg, *supra* note 39, at 29 ("A changing or changeable text, it probably goes without saying, is unstable and unreliable.").

rely on perceptions of fixedness and textual integrity. As Bornstein explains,

A theory of versions tends to shift our conception of the artwork itself from product to process. Emphasis centers on the multiplicity of versions themselves rather than on privileging a final one to which the others seem mere stepping-stones. Seen in that way, the palimpsest becomes less a bearer of a fixed final inscription than a site of the process of inscription, in which acts of composition and transmission occur before our eyes.<sup>46</sup>

Bornstein's "theory of versions" can readily be applied to how we understand significant judicial opinions. Though we customarily ascribe ultimate authority to such opinions—and though there is seldom debate over which version of an opinion is the final, authoritative version—the opinions themselves are ultimately contingent. That is to say that even as an opinion may have the final word on a given topic for a given time, it itself can never be said to be "final" insofar as that adjective is customarily understood. Rather, a significant judicial opinion remains subject to interpretation and reinterpretation in the future, just as it interprets and reinterprets precedent in reaching its resolution. In this way, the corpus of a given court's opinions can be viewed as a palimpsest, a mutable surface upon which the judges and justices over time write and rewrite their interpretations of the law with the understanding that each opinion can, and often will, one day be replaced as time marches on. This corpus is thus both contingent and inherently unstable, like each of the other projects discussed in *Palimpsest*.

The following Parts elaborate on these points, but for now it will suffice to note the following. First, the palimpsest metaphor can be usefully applied to numerous fields, particularly those that are in any way concerned with notions of authority. Second, viewing subjects through the lens of the palimpsest has the ultimate effect of undermining rather than promoting stability. Third, the palimpsest metaphor can aptly be applied to judicial decision making because it remains characterized by a "multiplicity of versions" that evolve over time and is a clear example of a realm "in which acts of composition and transmission occur before our eyes."<sup>47</sup>

## II. THE SOFT FORM OF PALIMPSESTIC DECISION MAKING

This Part begins to analyze De Quincey's description of the palimpsest in order to illustrate the extent to which it parallels judicial decision mak-

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46. Bornstein, *supra* note 10, at 3–4.

47. *See supra* note 46 and accompanying text.

ing in the United States. This Part focuses on what I have termed the soft form of palimpsestic decision making, where statements of law in judicial opinions replace earlier statements without attempting to challenge or reexamine them. As noted both here and in Parts III and IV, *infra*, a significant portion of De Quincey's language relates descriptively to the mechanics of American judicial decision making. But before beginning to examine this relationship, it is first necessary to situate *Suspiria de Profundis*, the meditation in which De Quincey's musings on the palimpsest occur.

#### A. *Thomas De Quincey and Suspiria de Profundis*

Best known for his *Confessions of an English Opium Eater*,<sup>48</sup> an autobiographical work published in 1821 and 1822,<sup>49</sup> Thomas De Quincey<sup>50</sup> was a prodigious talent whose writings extended into a broad array of genres.<sup>51</sup> Though struggles with opium abuse plagued De Quincey throughout his life,<sup>52</sup> his persistent use of the drug went hand-in-hand with the dreamlike prose-poetry style and distinctly empathetic worldview for

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48. *Confessions of an English Opium Eater*, his first contribution to *London Magazine*, earned De Quincey instant acclaim and launched his career "as a professional contributor to the great literary and political magazines of the day, first in London and later in Edinburgh." Grevel Lindop, *Introduction to CONFESSIONS OF AN ENGLISH OPIUM-EATER AND OTHER WRITINGS*, at viii (Grevel Lindop ed., 3d ed. 1998). See also 1 H.A. PAGE, *THOMAS DE QUINCEY: HIS LIFE AND WRITINGS* 237 (London, John Hogg & Co. 1877) ("Few magazine articles [other than *Confessions*] have ever produced a deeper or a more general impression.").

49. Ayse Agis, *Thomas De Quincey*, in 144 *DICTIONARY OF LITERARY BIOGRAPHY: NINETEENTH-CENTURY BRITISH LITERARY BIOGRAPHERS* 53, 56 (1994). *Confessions* appeared in *London Magazine* in 1821 and was reprinted as a book the following year. *Id.*

50. Born August 15, 1785, as Thomas Penson Quincey, De Quincey lived until December 8, 1859. *Id.* at 53, 60. De Quincey was a contemporary and friend of Samuel Taylor Coleridge and William Wordsworth, and at times he read and commented upon drafts of their work, including Wordsworth's posthumously published *The Prelude*, perhaps his most famous work. Linda Mills Woolsey, *Thomas De Quincey*, in 110 *DICTIONARY OF LITERARY BIOGRAPHY: BRITISH ROMANTIC PROSE WRITERS, 1789-1832*, 57, 61-62 (1991).

51. Included among De Quincey's published writings are biographical works on subjects ranging from Roman emperors to contemporaries like Coleridge, Robert Southey, Charles and Mary Lamb, and William and Dorothy Wordsworth; translations and adaptations of German works; *Encyclopedia Britannica* entries on Goethe, Milton, and Shakespeare; political articles and reviews; books and shorter works on political economy; fictions and historical narratives; and essays on literary theory. See, e.g., Agis, *supra* note 49, at 58; EDMUND BAXTER, *DE QUINCEY'S ART OF AUTOBIOGRAPHY* 93, 153 (1990); Woolsey, *supra* note 50, at 65-66, 68-69, 72, 74.

52. Notwithstanding this struggle, De Quincey's writings at times reference opium in the most exalted terms. See, e.g., Thomas De Quincey, *Confessions of an English Opium-Eater*, in *CONFESSIONS OF AN ENGLISH OPIUM-EATER AND OTHER WRITINGS*, *supra* note 48, at 38-39 ("But I took it:—and in an hour, oh! Heavens! what a revulsion! what an upheaving, from its lowest depths, of the inner spirit! what an apocalypse of the world within me! That my pains had vanished was now a trifle in my eyes:—this negative effect was swallowed up in the immensity of those positive effects which had opened before me—in the abyss of divine enjoyment thus suddenly revealed. Here was a panacea . . . for all human woes: here was the secret of happiness, about which philosophers had disputed for so many ages, at once discovered . . .").

which his writing is known.<sup>53</sup> These features of De Quincey's writing are on display in abundance in *Suspiria de Profundis*, the "fragmentary sequel" to *Confessions of an English Opium Eater*.<sup>54</sup>

Considered one of De Quincey's most challenging compositions, *Suspiria de Profundis* is a long, far-reaching meditation that defies traditional prose categorization.<sup>55</sup> Though De Quincey edited and re-edited it over the years,<sup>56</sup> the version that stands today consists essentially of an introduction followed by six parts,<sup>57</sup> of which *The Palimpsest* is but one of the six. Nonetheless, and though a mere eight pages in length,<sup>58</sup> *The Palimpsest* is both complex and comprehensive, and it is considered a foundational text in terms of applying the palimpsest as metaphor.<sup>59</sup>

*The Palimpsest's* opening paragraph is illustrative of the often-difficult syntax De Quincey employs throughout *Suspiria de Profundis*. It also displays the jocular tone De Quincey assumes at various times throughout the meditation. *The Palimpsest* begins:

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53. See, e.g., Agis, *supra* note 49, at 56 ("De Quincey's opium use led to overwhelming dreams during which he would sometimes feel as if he had lived through a century in a single night."); JOHN E. JORDAN, THOMAS DE QUINCEY, LITERARY CRITIC: HIS METHOD AND ACHIEVEMENT 43 (1952) ("The dreaming strain in De Quincey is pervasive and innate."); PAGE, *supra* note 48, at 3 ("What we are first of all concerned to make clear in reference to it is that De Quincey did not become a dreamer because he fell under the 'Circean spell of opium,' but rather that he fell under the spell of opium because of the excessive sensibility, that created for him a world in which, in a very special sense, he walked apart with creatures of his own creation—the images or shadows of those whom he had met and loved and lost. Every person that had come close enough to his sympathy was soon translated into an atmosphere of dream, whose presence immediately penetrated his views of life and of nature, imparting to all a shadowy spirituality and pathetic pomp of colouring. It was because of this element that his sympathy with Wordsworth and his insight into that great poet's purposes were at once so keen and so true; but this excessive sensibility, accompanied as it was with sensuous perceptions unduly exacting, rendered him dependent on the periodical gratification of certain senses or appetites."); Woolsey, *supra* note 50, at 58 (describing De Quincey's "rhythmic, labyrinthine prose that strings together books, personal experience, and dreams to produce powerful narratives").

54. Dillon, *supra* note 16, at 246. *Susperia's* full title is *Suspiria de Profundis: Being a Sequel to the Confessions of an English Opium-Eater*. See Thomas De Quincey, *Suspiria de Profundis*, in CONFESSIONS OF AN ENGLISH OPIUM-EATER AND OTHER WRITINGS, *supra* note 48, at 87 [hereinafter *Suspiria de Profundis*].

55. See Lindop, *supra* note 48, at xiv ("Of all De Quincey's works, *Susperia de Profundis* is the hardest to bring into focus. . . . [I]t defies classification: neither essay nor prose-poem, autobiography nor philosophical treatise, it straddles genres.").

56. See Grevel Lindop, *Note on the Text*, in CONFESSIONS OF AN ENGLISH OPIUM-EATER AND OTHER WRITINGS, *supra* note 48, at xxiv-xxv.

57. See Lindop, *supra* note 48, at viii.

58. See *Suspiria de Profundis*, *supra* note 54, at 139-46.

59. See Dillon, *supra* note 16, at 243 ("Coupling 'palimpsest' with the definite article 'the' (for the first time in a non-specific sense), De Quincey's essay *inaugurated*—that is, both introduced and initiated the subsequent use of—the substantive concept of the palimpsest. . . . [H]is inauguration of the concept of the palimpsest marks the beginning of a consistent process of metaphorization of palimpsests from the mid-nineteenth century . . . to the present day."); see also McDonagh, *supra* note 13, at 208, 222 (describing De Quincey's use of the palimpsest metaphor as the "fullest and most interesting" and noting its importance with respect to subsequent uses of the metaphor).

You know perhaps, masculine reader, better than I can tell you, what is a *Palimpsest*. Possibly you have one in your own library. But yet, for the sake of others who may *not* know, or may have forgotten, suffer me to explain it here: lest any female reader, who honours these papers with her notice, should tax me with explaining it once too seldom; which would be worse to bear than a simultaneous complaint from twelve proud men, that I had explained it three times too often. You therefore, fair reader, understand that for *your* accommodation exclusively, I explain the meaning of this word. It is Greek; and our sex enjoys the office and privilege of standing counsel to yours, in all questions of Greek. We are, under favour, perpetual and hereditary dragomans to you. So that if, by accident, you know the meaning of a Greek word, yet by courtesy to us, your counsel learned in that matter, you will always seem *not* to know it.<sup>60</sup>

De Quincey addresses the first portion of this opening paragraph to only the “masculine reader,” but midway through shifts his attention to the balance of his audience. He signals this transition by beginning his fourth sentence, “You therefore, fair reader,” and while the term “fair” might seem gender-neutral to modern readers,<sup>61</sup> context<sup>62</sup> makes clear that De Quincey has now shifted his attention to his female audience. It is for this audience that De Quincey endeavors to describe the writing surface in such detail, a decision that has proven fortuitous for modern readers, who

60. *Suspria de Profundis*, *supra* note 54, at 139.

61. “Fair reader” is reminiscent of fiction authors’ employing the phrase “gentle reader” to create a level of intimacy with their audience, male and female alike. This trope is often employed by satirical writers telling lavish tales, and, in addition to creating intimacy, this term also serves as a vehicle for self-deprecation and false modesty. *See, e.g.*, JONATHAN SWIFT, *GULLIVER’S TRAVELS* 89 (Robert DeMaria Jr. ed., Penguin Books 2003) (1726) (“I hope the gentle Reader will excuse me for dwelling on these and the like Particulars, which however insignificant they may appear to grovelling vulgar Minds, yet will certainly help a Philosopher to enlarge his Thoughts and Imagination . . . .”); LAURENCE STERNE, *THE LIFE AND OPINIONS OF TRISTRAM SHANDY, GENTLEMAN* 236 (Robert Folkenflik ed., 2d ed. Random House 2004) (1759–1767) (“Albeit, gentle reader, I have lusted earnestly, and endeavored carefully (according to the measure of such slender skill as God has vouchsafed me, and as convenient leisure from other occasions of needful profit and healthful pastime have permitted) that these little books, which I here put into thy hands, might stand instead of many bigger books . . . .”). *See generally* CLAUDE RAWSON, *GULLIVER AND THE GENTLE READER: STUDIES IN SWIFT AND OUR TIME* (1973) (noting Swift’s influence on other writers, satirical and nonsatirical alike, among them Laurence Sterne). Here, though “fair reader” could be read as a rephrasing of Swift’s term (as it might on a first read), a closer examination reveals that “fair” is employed in the sense of the “fairer sex.” De Quincey nonetheless retains his satirical forbearers’ tone of self-deprecation, as he suggests the pride he would feel should any female reader “honour[] these papers with her notice.” *See supra* text accompanying note 60.

62. For example, De Quincey writes: “[O]ur sex enjoys the office and privilege of standing counsel to yours, in all questions of Greek.” *See supra* note 60 and accompanying text. Having already stated (erroneously, of course) that only men know Greek, this excerpt juxtaposes Greek-reading men (“our sex”) with non-Greek-reading women (whom he refers to as “yours,” omitting the implied word “sex”).

might otherwise lack the requisite familiarity with palimpsests to fully appreciate his meaning.

“A palimpsest,” De Quincey explains in his next paragraph, “is a membrane or roll cleansed of its manuscript by reiterated successions.”<sup>63</sup> He continues that the palimpsest arose in the Middle Ages “as a considerable object for chemistry, to discharge the writing from the roll, and thus to make it available for a new succession of thoughts.”<sup>64</sup> The fact that palimpsests could be cleared away using chemicals and reused made them valuable curiosities in an era in which writing materials were scarce and expensive.<sup>65</sup> What is striking to De Quincey, however, is not that medieval scientists were able to achieve this feat of chemistry in spite of their primitive technology, but that they were only partially successful. He marvels,

monkish chemists succeeded; but after a fashion which seems almost incredible; incredible not as regards the extent of their success, but as regards the delicacy of restraints under which it moved; so equally adjusted was their success to the immediate interests of that period, and to the reversionary interests of our own.<sup>66</sup>

Albeit somewhat cryptically, what De Quincey is getting at is that although ancient chemists succeeded in creating a writing surface that could be cleared away, they did not succeed to such an extent that earlier writings were lost forever. Or as De Quincey generically puts it, “They did the thing; but not so radically as to prevent us, their posterity, from *undoing* it.”<sup>67</sup>

De Quincey’s fascination centers upon the fact that by employing then-modern techniques, contemporary scholars could peel back each layer of a palimpsest in order to reveal its prior writings; they could undo each earlier erasure. Thus, De Quincey’s focus is not on the monkish chemists’ success, but their failure: for though they succeeded in wiping away prior writings on palimpsests, they were unable to create a rewriteable surface that could render former writings lost forever. This trait lies at the core of scholars’ attraction to the palimpsest metaphor, and the notion of replacing without erasing is what first ties the palimpsest to American judicial decision making.

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63. *Suspria de Profundis*, *supra* note 54, at 139.

64. *Id.* at 141.

65. See Dillon, *supra* note 16, at 244.

66. *Suspria de Profundis*, *supra* note 54, at 141.

67. *Id.*

### B. Replacing Without Erasing in Judicial Opinions

The phenomenon of replacing without erasing what has come before is most acutely reflected in our legal system by statements of legal propositions that paraphrase or repeat verbatim earlier versions of the same.<sup>68</sup> In making such statements, judges simultaneously both establish a new status quo and deprive the earlier versions they cite of some of their prominence, nudging them ever so slightly closer toward precedential obscurity. This is what I have termed the soft form of palimpsestic decision making, where layer upon layer of restatements of settled legal propositions progressively eclipse older statements,<sup>69</sup> though neither analyzing nor revisiting any of them.

A quick example illustrates this phenomenon in operation.<sup>70</sup> In the 2006 case *Couden v. Duffy*,<sup>71</sup> the Third Circuit observed, “Our review of a grant of summary judgment is plenary, and we apply the same standard that the district courts apply at summary judgment.”<sup>72</sup> In support of that well-settled proposition, the court cited a Third Circuit case from the year before, *Dilworth v. Metropolitan Life Insurance Co.*<sup>73</sup> The *Dilworth* opinion, relying on an earlier Third Circuit case,<sup>74</sup> framed this proposition as follows: “On an appeal from an order entering summary judgment, we undertake a de novo review and apply the same standard the district court applies on such motions,”<sup>75</sup> a statement virtually identical to *Couden’s*.

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68. See, e.g., 181 South Inc. v. Fischer, 454 F.3d 228, 231 n.4 (3d Cir. 2006) (“In reviewing grants of summary judgment, our standard of review is plenary.”) (quoting *Hampe v. Butler*, 364 F.3d 90, 93 (3d Cir. 2004)). Here *181 South* is stating anew a proposition that is well-settled within the Third Circuit without analyzing or revisiting it. In so doing, *181 South* layers its statement of the Third Circuit’s summary judgment standard of review on top of *Hampe’s* earlier statement of the same, thereby reducing the latter’s prominence.

69. Though the standard of review for—for example—a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure may be well-established and unchanged for decades, with the progression of time older articulations stating that it is *de novo* become less cited and thus less prominent. This is because, as we are all taught, finding the most recent articulation of the proposition one is citing to increases the likelihood that said proposition is still “good law.” Though there is no requirement to cite a recent articulation of any such proposition, that judges and lawyers alike have assumed this practice insures the reduced prominence of older articulations. In this way they begin to fade away, like washed-over layers on a palimpsest.

70. Because they so frequently reference well-settled legal propositions such as standards of review, Courts of Appeals’ opinions tend to provide the clearest examples of this form of palimpsestic layering. I have thus chosen to provide an example from the Third Circuit.

71. 446 F.3d 483 (3d Cir. 2006).

72. *Id.* at 491 n.3.

73. 418 F.3d 345 (3d Cir. 2005).

74. *Petruzzi’s IGA Supermarkets, Inc. v. Darling-Del. Co.*, 998 F.2d 1224 (3d Cir. 1993). The court in *Petruzzi’s IGA* stated the standard as follows: “We review the district court’s summary judgment determination *de novo*, applying the same standard as the district court. As this court recently reiterated, ‘A non-movant’s burden in defending against summary judgment in an antitrust case is no different than in any other case.’” *Id.* at 1230 (quoting *Big Apple BMW, Inc. v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992) (footnote omitted)).

75. *Dilworth*, 418 F.3d at 349. Plenary and de novo review are the same. See 9 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE ¶ 50.92 (3d ed. 1997) (“De novo review is often referred to as

Though *Couden* placed itself in front of *Dilworth* by citing and restating one of its propositions, by doing so in nearly the same language it did not undertake to reexamine or challenge *Dilworth* in any way.

The Third Circuit's standard of review in *Couden* (2006) arose out of *Dilworth* (2005), which in turn arose out of *Petruzzi's IGA* (1993) and *Big Apple BMW* (1992). In each case, the earlier legal statement did not simply disappear once a new articulation came into being. Rather, it remained (and remains) valid precedent that can be cited by lawyers and judges in the future. Indeed, the *Couden* court could have skipped over *Dilworth* (and other recent statements of the same proposition), citing either of the prior cases upon which *Dilworth* had relied, or any number of even older cases stating the same proposition. And yet it did not. Rather, as nearly all courts and lawyers do, the *Couden* court looked for a recent articulation of this rote standard, settling on a case from a year prior. And so it goes that with each new articulation of the Third Circuit's standard of review of motions for summary judgment, all prior ones become less prominent and drift further toward precedential obscurity. But like the replaced underlayers of a palimpsest, these prior articulations remain, perhaps obscured, but still legible in the background.

As this example illustrates, palimpsestic layering can be observed in instances where judges make no attempt to analyze or revisit that which has come before. Each statement of law in a judicial opinion nudges all earlier articulations of the same to the background, as the new articulation takes center stage as the most recent statement of the law. And much like a palimpsest, as layer upon layer of the same proposition builds up, older versions become increasingly remote,<sup>76</sup> even as they never disappear and remain good law. Though this parallel between the palimpsest metaphor and our system of judicial decision making is fairly pedestrian, a more complex and interesting illustration of palimpsestic layering can be observed where judicial opinions revisit and analyze prior holdings. I will discuss the relationship between the palimpsest metaphor and such opinions in the following Part.

### III. THE HARD FORM OF PALIMPESTIC DECISION MAKING

His basic framework set out as described above in Part II, De Quincey expounds on his fascination with the palimpsest by way of example. Describing a well-worn palimpsest that once related a tale from ancient Greece, he writes:

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'plenary review.'").

76. Query: How often does one observe a judge or lawyer citing a statement of standard of review or jurisdiction from thirty or forty years prior?



Here, for instance, is a parchment which contained some Grecian tragedy, the Agamemnon of Aeschylus, or the Phoenissae of Euripides. This had possessed a value almost inappreciable in the eyes of accomplished scholars, continually growing rarer through generations. But four centuries are gone by since the destruction of the Western Empire. Christianity, with towering grandeurs of another class, has founded a different empire; and some bigoted yet perhaps holy monk has washed away (as he persuades himself) the heathen's tragedy, replacing it with a monastic legend; which legend is disfigured with fables in its incidents, and yet, in a higher sense, is true, because interwoven with Christian morals and with the sublimest of Christian revelations. Three, four, five, centuries more find man still devout as ever; but the language has become obsolete, and even for Christian devotion a new era has arisen, throwing it into the channel of crusading zeal or of chivalrous enthusiasm. The *membrana* is wanted now for a knightly romance . . . .<sup>77</sup>

As this passage illustrates, the palimpsest can serve as a reflection of history, of society's changing tastes, customs, and ideals. Here the ancient Greek epic, a treasure to scholars of "a value almost inappreciable" and a text "continually growing rarer through generations," is washed away by a "bigoted yet perhaps holy" monk because the passage of four centuries has rendered its author a "heathen." Upon the clean slate the monk inscribes a monastic legend of his own, which is in turn "disfigured" by a later generation, and on and on, each generation supplanting the prior's text upon determination that its "language has become obsolete."<sup>78</sup>

This phrase in particular neatly parallels an important aspect of American judicial decision making. What better reason could there be to revisit a prior opinion<sup>79</sup> than the fact that its "language has become obsolete"—

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77. *Suspiria de Profundis*, *supra* note 54, at 142.

78. Judicial opinions in which the phrase "language has become obsolete" can most easily be applied are those in which the Supreme Court revisits one of its earlier decisions after the passage of time and repudiates its prior holding. *See, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (repudiating its holding in *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (repudiating its holding in *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

79. The Supreme Court, exercising discretion over its docket as the nation's highest court, may hear and decide any case jurisdictionally and procedurally before it, including those requiring that it revisit and possibly overturn a prior Supreme Court opinion. *See* SUP. CT. R. 10. Though the circuit courts, being inferior courts, do not exercise the same discretion—they may neither choose which appeals to adjudicate nor revisit Supreme Court opinions—they may revisit and overturn prior opinions from within their own circuit. Traditional, three-judge panels generally do not have the authority to overturn precedential intracircuit opinions; the law is clear in most circuits that the court of appeals must sit en banc in order to hand down a decision contrary to precedent. *See, e.g.*, *Lacy v. Gardino*, 791 F.2d 980, 985 (1st Cir. 1986); *Chappell & Co. v. Frankel*, 367 F.2d 197, 199–201 (2d Cir. 1966) (en banc); *Pardini v. Allegheny Intermediate Unit*, 524 F.3d 419, 426 (3d Cir. 2008); *Doe v. Charleston Area Med. Ctr., Inc.*, 529 F.2d 638, 642 (4th Cir. 1975); *Soc'y of Separationists, Inc. v. Herman*,

that American preferences and ideals have changed in such a way that the prior holding is no longer aligned with the will of the populace?<sup>80</sup> Though De Quincey is talking about a palimpsest here, he could just as well be describing the Supreme Court's peculiarity of revisiting and sometimes overturning precedent based in no small part upon the passage of time and evolving societal preferences.<sup>81</sup> Here is where the palimpsest metaphor is perhaps most pointedly applicable to our legal system. I have thus termed such instances of revisiting precedent the hard form of palimpsestic decision making because the citing opinion either overturns or reaffirms that which has come before, rather than merely restating earlier propositions without any analysis, as was the case above.

To highlight the Supreme Court's use of a palimpsestic approach to deciding cases, I have chosen to reinterpret two familiar and widely-taught cases: *Lawrence v. Texas*<sup>82</sup> and *Planned Parenthood v. Casey*.<sup>83</sup> Both cases employ palimpsestic language in revisiting prior cases, and though *Lawrence* overturns precedent while *Casey* merely reshapes it, both help to illustrate the manner in which De Quincey's observation that obsolete language often serves as a catalyst for change can inform understandings of how and why courts reassess and sometimes disturb precedent. These cases show that the Supreme Court is at times responsive to evolving societal norms, that it is willing to reexamine its precedents to determine whether their language has become obsolete, and to alter them if that be the case. I address *Lawrence* and *Casey* in turn.

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939 F.2d 1207, 1211 (5th Cir. 1991) *aff'd en banc*, 959 F.2d 1283, 1288–89 (5th Cir. 1992); *Darrah v. City of Oak Park*, 255 F.3d 301, 309–10 (6th Cir. 2001); *Baker v. Delta Air Lines, Inc.*, 6 F.3d 632, 637 (9th Cir. 1993); *Haynes v. Williams*, 88 F.3d 898, 900 n.4 (10th Cir. 1996); *United States v. Steele*, 147 F.3d 1316, 1317 (11th Cir. 1998); *Teva Pharm. USA, Inc. v. Novartis Pharm. Corp.*, 482 F.3d 1330, 1338 (Fed. Cir. 2007). The Tenth and D.C. Circuits also permit panels to overturn precedent with en banc approval rather than a full en banc hearing. *See United States v. Taylor*, 828 F.2d 630, 633 (10th Cir. 1987); *Irons v. Diamond*, 670 F.2d 265, 267–68, 268 n.11 (D.C. Cir. 1981). Other circuits grant their panels greater leeway, authorizing them to overturn precedent under circumstances other than via an en banc hearing, such as for a “compelling reason,” *see Russ v. Watts*, 414 F.3d 783, 788 (7th Cir. 2005), or where the prior panel made a clearly erroneous decision, *see United States v. Minnesota*, 113 F.2d 770, 774–75 (8th Cir. 1940).

80. *See supra* note 79 and accompanying text.

81. *See Roy B. Fleming & B. Dan Wood, The Public and the Supreme Court: Individual Justice Responsiveness to American Policy Moods*, 41 AM. J. POL. SCI. 468, 493 (1997) (showing that “the individual justices follow shifts in public mood; the liberalism of justices’ voting decisions varies with movements in the policy mood of Americans”); and Kevin T. McGuire & James A. Stimson, *The Least Dangerous Branch Revisited: New Evidence of Supreme Court Responsiveness to Public Preferences*, 66 J. POL. 1018, 1033 (2004) (finding that the “public opinion is a powerful influence on the decisions of the Supreme Court” and that its “policy outcomes are . . . affected by public opinion . . . to a degree far greater than previously documented”). *Cf. Runyon v. McCrary*, 427 U.S. 160, 191 (1976) (Stevens, J., concurring) (“If judges have woefully misinterpreted the *mores* of their day, or if the *mores* of their day are no longer those of ours, they ought not to tie, in helpless submission, the hands of their successors.”) (quoting BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 149 (1921)).

82. 539 U.S. 558 (2003).

83. 505 U.S. 833 (1992).

## A. Lawrence v. Texas

## I. Bowers

Prior to *Lawrence*, *Bowers v. Hardwick*<sup>84</sup> stood as the leading Supreme Court opinion relating to the manner in which states could proscribe consensual sodomy.<sup>85</sup> The Georgia statute at issue in *Bowers* was gender-neutral, making it a crime for any person to perform or submit to any sex act “involving the sex organs of one person and the mouth or anus of another.”<sup>86</sup> Though the Georgia sodomy statute did not single out such sexual behavior between persons of the same gender, Michael Hardwick was charged with violating the statute “by committing that act with another adult male in the bedroom of [his] home.”<sup>87</sup>

Notwithstanding the statute’s gender-neutral language, Justice White explicitly noted in his majority opinion that “[t]he only claim properly before the Court . . . is Hardwick’s challenge to the Georgia statute as applied to consensual homosexual sodomy.”<sup>88</sup> Thus, though it had arisen out of a statute proscribing all forms of consensual sodomy, *Bowers*, like *Lawrence*, clearly relates only to the rights of states to proscribe consensual sodomy between individuals of the same gender. Putting it in different terms, the *Bowers* court framed the issue as follows: “The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.”<sup>89</sup> The Court held that the Constitution conveys no such right, and that “the laws of the many States” making consensual homosexual sodomy illegal could thus withstand constitutional scrutiny.<sup>90</sup>

By framing the issue in *Bowers* as it did, the Court granted itself license to review the long and persistent history of anti-homosexual discrimination. Such was the case for two reasons. First, citing *Palko v. Connecticut*,<sup>91</sup> Justice White observed that the category of “fundamental rights”—those “not readily identifiable in the Constitution’s text”—includes “those

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84. 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

85. *Bowers* related to the interpretation of a Georgia statute, *see Bowers*, 478 U.S. at 188 n.1, which provided:

(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another. . . .

(b) A person convicted of the offense of sodomy shall be punished by imprisonment for not less than one nor more than 20 years. . . .

GA. CODE ANN. § 16-6-2 (1984) (amended in 2000 and 2006).

86. *Bowers*, 478 U.S. at 188 n.1.

87. *Id.* at 188.

88. *Id.* at 188 n.2.

89. *Id.* at 190.

90. *See id.* at 190–91.

91. 302 U.S. 319 (1937), *overruled by* Benton v. Maryland, 395 U.S. 784 (1969).

fundamental liberties that are ‘implicit in the concept of ordered liberty,’ such that ‘neither liberty nor justice would exist if [they] were sacrificed.’”<sup>92</sup> Second, the Court put forth an alternative vision in which it defined fundamental liberties as those that are “‘deeply rooted in this Nation’s history and tradition.’”<sup>93</sup> In order to apply either mode of analysis, the Court by necessity had to examine how homosexuals have been treated historically. And so it did.

Having reviewed his history, Justice White declared flatly: “It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots.”<sup>94</sup> In reaching this conclusion, the Court noted that sodomy was a crime at common law, that each of the thirteen original states forbade sodomy, that the vast majority of the thirty-seven states in the Union at the time of the passage of the Fourteenth Amendment criminalized sodomy, that until 1961 all fifty states outlawed sodomy, and that in 1986, when the Court decided *Bowers*, “24 states and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults.”<sup>95</sup> “Against this background,” the Court concluded, “to claim that a right to engage in such conduct is ‘deeply rooted in this Nation’s history and tradition’ or ‘implicit in the concept of ordered liberty’ is, at best, facetious.”<sup>96</sup> Michael Hardwick’s challenge to the Georgia statute accordingly failed, and in the wake of *Bowers* it remained lawful for states to criminalize consensual homosexual sodomy, as it always had been.

## 2. *Revisiting Bowers*

In the wake of *Bowers*, one thing was certain: The United States Constitution did not bar states from criminalizing homosexual sodomy. Yet when a case raising that very issue came before the Court in December of 2002, the Court granted certiorari,<sup>97</sup> thereby offering to revisit this settled issue. That case was, of course, *Lawrence v. Texas*.

The statute at issue in *Lawrence* provided: “A person commits an offense if he engages in deviate sexual intercourse *with another individual of the same sex*.”<sup>98</sup> The statute defined “deviate sexual intercourse” as “(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the

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92. *Bowers*, 478 U.S. at 191–92 (quoting *Palko*, 302 U.S. at 325–26).

93. *Id.* at 192 (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

94. *Id.*

95. *Id.* at 193–94.

96. *Id.* at 194.

97. 537 U.S. 1044 (2002).

98. TEX. PENAL CODE ANN. § 21.06(a) (2003) (emphasis added).

anus of another person with an object.”<sup>99</sup> It is clear based on the language of the statute that *Lawrence* stood as a direct challenge to the Court’s holding in *Bowers*, a point the Court made explicit in its third question presented: “Whether *Bowers v. Hardwick* . . . should be overruled.”<sup>100</sup>

Before examining the manner in which the Court addressed this question, I pause briefly to discuss the doctrine of stare decisis.<sup>101</sup> As Chief Justice Rehnquist has written, “*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.”<sup>102</sup> “Adhering to precedent,” he continues, “is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right.”<sup>103</sup> Finality is essential, the wisdom goes, and it is a cornerstone of American jurisprudence that in all but the narrowest circumstances, judicial decisions are, and must be, final.

Given the importance of finality in relation to the “integrity of the judicial process”<sup>104</sup> and the general significance of precedent in common law decision making, the Court’s revisiting the constitutionality of criminal prohibitions of homosexual sodomy a mere sixteen years after it decided *Bowers* is particularly notable. Why would the Court revisit this issue so soon in light of its strong, frequently articulated institutional preference for leaving matters already having been decided as they stand? Put simply, the Court revisited *Bowers* because its “language ha[d] become obsolete.”<sup>105</sup>

Between 1986 and December of 2002 when the Supreme Court granted *Lawrence* certiorari, the American cultural landscape had changed significantly, ushering in an era of considerably greater tolerance for homosexuals. Accounts of the coming out of prominent celebrities such as Ellen DeGeneres, George Michael, and Rosie O’Donnell appeared in newspapers throughout the country during this period,<sup>106</sup> helping to bring homosexuality more into the mainstream. O’Donnell’s post-outing an-

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99. TEX. PENAL CODE ANN. § 21.01(1) (2003).

100. *Lawrence v. Texas*, 539 U.S. 563, 564 (2003) (internal citation omitted).

101. “*Stare decisis* is the policy of the court to stand by precedent; the term is but an abbreviation of *stare decisis et non quieta movere*—‘to stand by and adhere to decisions and not disturb what is settled.’” *In re Osborne*, 76 F.3d 306, 309 (9th Cir. 1996).

102. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

103. *Id.* (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (1932) (Brandeis, J., dissenting)).

104. *Payne*, 501 U.S. at 827.

105. *See supra* note 80 and accompanying text.

106. *See, e.g.*, Bruce Handy, *Roll Over, Ward Cleaver; and Tell Ozzie Nelson the News. Ellen DeGeneres Is Poised To Become TV’s First Openly Gay Star. Is America Ready or Not?*, TIME, Apr. 14, 1997, at 78; Richard Roeper, *Who Cares Whose Sex George Michael Wants?*, CHI. SUN-TIMES, Apr. 14, 1998, at 11; *Report: O’Donnell To Come Out in Book*, ST. PETERSBURG TIMES, Jan. 29, 2002, at 2B.

nouncement that she wanted to adopt a child helped to launch a national debate over bans on gay adoption in early 2002.<sup>107</sup> Newspaper announcements of same-sex unions became more common during that year as well,<sup>108</sup> further normalizing the notion of couples of the same gender throughout the country. And in May of 2002, little more than six months before the Court granted *Lawrence* certiorari, the venerable Ted Koppel's *Nightline* ran a five-part series exploring the lives of gay and lesbian Americans, the program's "first in-depth look at a non-AIDS gay issue in its 22-year history."<sup>109</sup> In short, change was in the air.

The *Lawrence* Court noted a number of societal changes since it had decided *Bowers* as well. Writing for the majority, Justice Kennedy observed:

In our own constitutional system the deficiencies in *Bowers* became even more apparent in the years following its announcement. The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private. The State of Texas admitted in 1994 that as of that date it had not prosecuted anyone under those circumstances.<sup>110</sup>

Justice Kennedy added:

In the United States criticism of *Bowers* has been substantial and continuing, disapproving of its reasoning in all respects, not just as to its historical assumptions. The courts of five different States have declined to follow it in interpreting provisions in their own state constitutions parallel to the Due Process Clause of the Fourteenth Amendment.<sup>111</sup>

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107. See Bruce Alpert, *Debate over Ban on Gay Adoptions Grows; Both Sides Pushing for Changes in Laws*, TIMES-PICAYUNE, Mar. 30, 2002, at 1.

108. Lisa Singhanian, *More Papers Announcing Gay Unions*, HOUS. CHRON., Aug. 30, 2002, at A25 (discussing recent decisions by newspapers such as the *New York Times* to include same-sex union announcements and asserting that this change is reflective of a "shift in society, which is becoming more accepting of homosexuality as same-sex couples gain legal protections and job benefits, and prominent people such as celebrities Rosie O'Donnell and Ellen DeGeneres disclose that they are gay").

109. Gail Shister, "*Nightline*" To Begin Its Series on Gay and Lesbian Life, PHILADELPHIA INQUIRER, May 20, 2002, at D8.

110. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

111. *Id.* at 576 (citations omitted).

These passages suggest that underlying the Court's decision to hear *Lawrence* was a concern about the extent to which its holding in *Bowers* appeared to be out of line with the evolving American cultural and legal landscape.

Regardless of this concern, the Court still had to address the historical discrimination against homosexuals that had proven so significant in justifying its earlier holding in *Bowers*; if criminal prohibitions against homosexual sodomy had always been a part of American law enforcement, as the *Bowers* Court observed, how could the right to engage in such an act be a fundamental right? Justice Kennedy solved this apparent quandary by narrowing his definition of "history," privileging recent developments over earlier ones. "In all events," he declared after a critique of the historical underpinnings of the *Bowers* opinion and Chief Justice Burger's concurrence, "we think that our laws and traditions in the past half century are of most relevance here."<sup>112</sup> Looking to only the past fifty years, Justice Kennedy recognized and acknowledged "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."<sup>113</sup> This "emerging awareness," abundantly clear when one focuses on the jurisprudential and social developments of the half-century prior to *Lawrence*, counseled in favor of overturning *Bowers* in the name of individual liberty.<sup>114</sup>

Justice Kennedy closes the *Lawrence* opinion with praise for the drafters of the Fifth and Fourteenth Amendments. Had those drafters "known the components of liberty in its manifold possibilities," he writes, "they might have been more specific. They did not presume to have this insight."<sup>115</sup> Rather, "[t]hey knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every

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112. *Id.* at 571–72.

113. *Id.* at 572.

114. That courts in other nations had shunned the reasoning of *Bowers* was not lost on Justice Kennedy. He observed:

To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision in *Dudgeon v. United Kingdom*. Other nations, too, have taken action consistent with an affirmation of the protected right of homosexual adults to engage in intimate, consensual conduct.

*Id.* at 576 (citations omitted). Thus it seems that the "emerging awareness" Justice Kennedy recognized exists beyond the United States, a consideration of some importance to him, though not necessarily to other members of the Court. *See, e.g., Foster v. Florida*, 537 U.S. 990, 990 n.\* (2002) (Thomas, J., concurring in denial of certiorari) ("While Congress, as a *legislature*, may wish to consider the actions of other nations on any issue it likes, this Court's Eighth Amendment jurisprudence should not impose foreign moods, fads, or fashions on Americans."); *Thompson v. Oklahoma*, 487 U.S. 815, 869 n.4 (1998) (Scalia, J., dissenting) ("[W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.").

115. *Lawrence*, 539 U.S. at 578–79.

generation can invoke its principles in their own search for greater freedom.”<sup>116</sup> This quest for “greater freedom” requires a palimpsestic approach to constitutionalism. As *Lawrence* illustrates, each generation must look at the Constitution through its own lens and in the context of its own circumstances. Upon such an examination, Justice Kennedy, like the recorder of Aeschylus and the “holy monk” and author of the knightly romance before him,<sup>117</sup> felt compelled to cast aside that which had come before upon determination that its language had become obsolete.

### 3. Conclusion

*Lawrence* provides an example of the Supreme Court’s addressing and overturning recent precedent that had found itself out of step with evolving approaches to constitutional analysis. By overturning *Bowers*, the *Lawrence* Court repudiated its prior holding unequivocally, illustrating the harshest application of the hard form of palimpsestic decision making. It should be noted, however, that palimpsestic revisiting of precedent can be observed not only where a new case directly overturns an earlier one, but also where the Court revisiting an earlier opinion deems only part of it to have become obsolete. I provide one such example in the following section.

#### B. Planned Parenthood v. Casey

Decided in 1992, *Planned Parenthood v. Casey* is perhaps the best known revisiting of *Roe v. Wade*.<sup>118</sup> Though *Roe* is one of the most widely read and controversial opinions of the twentieth century, a brief review of its other holdings is necessary before discussing its relationship with *Casey*.

##### 1. Roe

The pseudonymous petitioner in *Roe*, a pregnant, single woman, brought suit in federal court to challenge Texas statutes making it a crime to procure or attempt an abortion for any purpose other than saving the life of the mother.<sup>119</sup> Though the procedural posture of *Roe* had become complex by the time it reached the Supreme Court,<sup>120</sup> the case’s ultimate

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116. *Id.* at 579.

117. *See supra* note 79 and accompanying text.

118. 410 U.S. 113 (1973).

119. *Id.* at 117–18, 118 n.1 (citing TEX. CODE CRIM. PROC. ANN. arts. 1191–94, 1196 (Vernon 1972)).

120. *Roe*’s case had been consolidated with a lawsuit brought by a childless couple, the wife of which was not pregnant, also challenging the Texas statute. That couple’s suit was ultimately dismissed by the district court on standing grounds, a dismissal that the Supreme Court ultimately affirmed. *Id.* at



holdings were not. Faced with Roe's challenge that the Texas statutes "improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy,"<sup>121</sup> the Court held as follows:

First, the Texas statutes were deemed unconstitutional because they criminalized abortion "without regard to pregnancy stage and without recognition of the other interests involved,"<sup>122</sup> in particular the interest of the mother in exercising autonomy over her body. Nonetheless, acknowledging the state's legitimate interest in promoting the health of the mother and the "potentiality of human life,"<sup>123</sup> the Court did not grant mothers full autonomy in deciding whether to have an abortion. Rather it created a framework for balancing these competing interests.

Thus arose the second, and here more important, part of the Court's holding. The Court delineated the respective rights of the states and pregnant women as follows:

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life, may, if it chooses, regulate and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.<sup>124</sup>

Part (a) thus grants mothers significant latitude to have an abortion at any point during the first trimester, a holding directly contrary to the stricken down Texas statutes. Part (b)—clearly written in the language of compromise—grants states permission to regulate a woman's decision making process under the aegis of maternal health once she enters the second trimester of her pregnancy. Examples of such constitutional regula-

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129. Prior to consolidation, a Dr. Hallford sought and was granted leave to intervene in Roe's case, on the grounds that, as a provider of abortions, he would be subject to prosecution under the statutes at issue, which he argued were unconstitutionally vague. *Id.* at 121. Though the district court granted Dr. Hallford relief, the Supreme Court dismissed his complaint in intervention. *Id.* at 127. Thus, the only action deemed justiciable was that of petitioner Roe.

121. *Id.* at 129.

122. *Id.* at 164.

123. *Id.*

124. *See id.* at 164–65.

tion include requirements as to the “qualifications of the person who is to perform the abortion,” “licensure of that person,” “facility in which the procedure is to be performed,” and “licensing of the facility.”<sup>125</sup> Finally Part (c) grants states the right to ban all abortions after viability except in situations where the life or health of the mother is at risk.

In handing down its decision, the *Roe* Court analyzed the historical underpinnings of anti-abortion laws in the United States from Antiquity to the present.<sup>126</sup> Finding considerable weakness in the argument that the United States has long permitted states to ban abortion, it concluded that:

[A]t common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. . . . [A] woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today.<sup>127</sup>

It was this conclusion more than any other that most strongly supported the Court’s decision to grant women the broad latitude during the first trimester described above.<sup>128</sup>

But the weight of history could only carry abortion rights so far. For as we have seen, though the Court granted women substantial autonomy during the first trimester, it stopped there. The Court observed that “appellant and some *amici* argue that the woman’s right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree.”<sup>129</sup> The Court explained:

As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute.<sup>130</sup>

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125. *Id.* at 163.

126. *See id.* at 129–141.

127. *Id.* at 140.

128. *See id.* at 140–41 (“At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity to make this choice [to terminate a pregnancy] was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.”).

129. *Id.* at 153.

130. *Id.* at 154.

The Court pegged that “some point” as being at the end of the first trimester, after which state regulation of the abortion decision was deemed constitutional. The Court made this determination in large part due to the greater risk of medical complications in abortions taking place after the first trimester.<sup>131</sup>

It was on the basis of this historical and medical analysis that the Court decided *Roe* as it did. Sound as it may have thought its holdings to have been, however, the Court took the unusual step of offering something of an apology toward the end of its opinion. “This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day.”<sup>132</sup> By focusing on the opinion’s suitability for the “present day”—early 1973—the Court left open the possibility of revisiting its *Roe* opinion at a later date. And knowing that the *Roe* opinion would be unlikely to resolve once and for all the numerous permutations of a woman’s right to choose, the Court seems to have felt compelled to acknowledge, at least tacitly, that some future reassessment of the issue would be inevitable.

## 2. *Revisiting Roe*

### i. *Reaffirming*

Though the Court revisited the issue of a woman’s right to choose several times in subsequent years,<sup>133</sup> *Planned Parenthood v. Casey* represents the clearest example of palimpsestic revisiting of *Roe*. Writing for the Court, Justice O’Connor made it clear at the outset of her opinion that the continuing vitality of *Roe* rested squarely at the heart of this case.<sup>134</sup>

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131. *Id.* at 149–50. The *Roe* Court made much of proffered evidence suggesting that “[m]odern medical techniques” have made it such that “abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe.” *Id.* at 149. As a result, “any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared.” *Id.* This understanding of the relative safety of first-trimester abortions, as compared to later ones, played a significant role in the regulatory framework announced in *Roe*.

132. *Id.* at 165.

133. *See, e.g.*, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) (majority of the Court either declining to address or reaffirming the constitutionality of *Roe*’s holding); *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986) (expressly affirming *Roe*’s holding), *overruled by Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) (same), *overruled by Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

134. *Casey*, 505 U.S. at 844 (noting that the United States, joining respondents as amicus curiae, “again asks us to overrule *Roe*”).

*Casey* arose out of the Pennsylvania Abortion Control Act of 1982.<sup>135</sup> Planned Parenthood, several other abortion clinics, and one physician challenged each of the provisions of the Act as “unconstitutional on its face.”<sup>136</sup> The District Court held each of the provisions to be unconstitutional and entered a permanent injunction barring Pennsylvania from enforcing them.<sup>137</sup> The Third Circuit affirmed in part and reversed in part, upholding the constitutionality of each of the provisions, save the one relating to spousal notification.<sup>138</sup>

*Casey* thus came to the Court as something of a mixed bag, as the trial and appellate courts that had addressed the constitutionality of the Pennsylvania Act had reached different conclusions. Justice O’Connor prefaced her opinion by explaining the necessity of the Court’s opining on the constitutionality of the Act:

State and federal courts as well as legislatures throughout the Union must have guidance as they seek to address this subject in conformance with the Constitution. Given these premises, we find it imperative to review once more the principles that define the rights of the woman and the legitimate authority of the State respecting the termination of pregnancies by abortion procedures.<sup>139</sup>

Though *Roe* may have been the final word for the “present day” in 1973,<sup>140</sup> the present of *Casey* proved a different matter.

At the heart of the case was the seemingly clear contradiction between Pennsylvania’s statutory consent provisions<sup>141</sup> and the far-reaching autonomy granted to women in the first trimester of pregnancy under *Roe*. Something had to give, it seemed, but the Court was able to reach a compromise by reshaping, but not overruling, *Roe*.

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135. 18 PA. CONS. STAT. §§ 3203–3220 (1990). Under the Act: a woman seeking an abortion was required to give her informed consent prior to the procedure, which consent required that she be provided with certain information at least 24 hours prior to the performance of the abortion, 18 PA. CONS. STAT. § 3205 (1990); a minor seeking an abortion could proceed only with the informed consent of one of her parents (subject to a judicial bypass option), 18 PA. CONS. STAT. § 3206 (1990); absent certain exceptions, a married woman seeking an abortion was required to sign a statement indicating that she had notified her husband of her intention to have an abortion, 18 PA. CONS. STAT. § 3209 (1990); and facilities providing abortion services were required to abide by certain reporting requirements that kept the identities of the women they served confidential, 18 PA. CONS. STAT. §§ 3207(b), 3214(a), and 3214(f) (1990). The Act exempted compliance with the informed consent, spousal consent, and parental consent requirements in the event of a “medical emergency.” *See Casey*, 505 U.S. at 844.

136. *Casey*, 505 U.S. at 845. *See supra* note 137 for a list of the provisions.

137. *Planned Parenthood v. Casey*, 744 F. Supp. 1323 (E.D. Pa. 1990), *aff’d in part and rev’d in part* by 947 F.2d 682 (3d Cir. 1991), *aff’d in part and rev’d in part* by 505 U.S. 833 (1992).

138. *Planned Parenthood v. Casey*, 947 F.2d 682 (3d Cir. 1991), *aff’d in part and rev’d in part* by 505 U.S. 833 (1992).

139. *Casey*, 505 U.S. at 845.

140. *See supra* text accompanying note 134.

141. *See supra* note 137.

As was the case between *Bowers* and *Lawrence*, much had changed in the years between *Roe* and *Casey*. On five separate occasions since 1973, the United States had submitted briefs asking the Court to overrule *Roe*.<sup>142</sup> Public outcry against abortion rights had grown to a fever pitch, and several members of the Court had written opinions advocating overruling *Roe* by the time *Casey* was to be heard.<sup>143</sup> On the other hand, by 1992 the rights outlined in *Roe* had been the law of the land for nearly twenty years. As such, by the time *Casey* reached the Court, “[a]n entire generation ha[d] come of age free to assume *Roe*’s concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions.”<sup>144</sup>

Faced with harmonizing these divergent strains of law and culture, the Court undertook a robust *stare decisis* analysis to determine under what circumstances it would be appropriate to overrule *Roe*. Justice O’Connor explained:

[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case.<sup>145</sup>

In gauging these respective costs, the Court may ask:

whether the rule has proven to be intolerable simply in defying practical workability, whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, or whether facts have so changed, or come to be seen so differently, as to

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142. *Casey*, 505 U.S. at 844.

143. *See, e.g.*, *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 532 (1989) (Scalia, J., dissenting) (“As to Part II–D, I share Justice BLACKMUN’s view . . . that it effectively would overrule *Roe v. Wade*. I think that should be done, but would do it more explicitly.”) (citation omitted); *Thornburgh v. Am. Coll. Of Obstetricians & Gynecologists*, 476 U.S. 747, 788 (1986) (White, J., dissenting) (“In my view, the time has come to recognize that *Roe v. Wade* . . . ‘departs from a proper understanding’ of the Constitution and to overrule it.”); *Doe v. Bolton*, 410 U.S. 179, 207 (1973) (Rehnquist, J., dissenting) (echoing his dissent in *Roe* by reasserting that the “compelling-state-interest standard” is “an inappropriate measure of the constitutionality of state abortion laws”). *See also Casey*, 505 U.S. at 944 (Rehnquist, C.J., concurring in part and dissenting in part) (“We believe that *Roe* was wrongly decided, and that it can and should be overruled . . .”).

144. *Casey*, 505 U.S. at 860.

145. *Id.* at 854.

have robbed the old rule of significant application or justification.<sup>146</sup>

Each of these questions can be fairly described as asking a slightly different version of the same broad question: Has the prior opinion's language become obsolete?

Justice O'Connor summarily determined that the answers to each of these questions counseled in favor of upholding *Roe*.<sup>147</sup> Based on this determination, the *Casey* court declined to overrule *Roe*. Notably, it did so in palimpsestic terms, observing twice that *Roe*'s language, though in some ways problematic, had not become obsolete: "No development of constitutional law since the case was decided has implicitly or explicitly left *Roe* behind as a mere survivor of obsolete constitutional thinking",<sup>148</sup> "no change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it."<sup>149</sup>

## ii. *Reshaping*

*Roe* was nonetheless not without fault in the estimation of the *Casey* court. Though *Roe*'s central holding remained good law, the Court chose to undertake mending it in order to account for *Roe*'s mistaken factual assumptions<sup>150</sup> and internal inconsistency. Justice O'Connor took greatest issue with the trimester framework established in *Roe*.<sup>151</sup> Recounting this framework, she wrote:

Under this elaborate but rigid construct, almost no regulation at all is permitted during the first trimester of pregnancy; regulations

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146. *Id.* at 854–55 (citations omitted).

147. "Although *Roe* has engendered opposition, it has in no sense proven 'unworkable.'" *Casey*, 505 U.S. at 855. "[W]hile the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe* for people who have ordered their thinking and living around that case be dismissed." *Id.* at 856. "No evolution of legal principle has left *Roe*'s doctrinal footings weaker than they were in 1973." *Id.* at 857. And finally, though "time has overtaken some of *Roe*'s factual assumptions: . . . the divergences from the factual premises of 1973 have no bearing on the validity of *Roe*'s central holding." *Id.* at 860.

148. *Id.* at 857.

149. *Id.* at 860.

150. In the time between *Roe* and *Casey*, advances in maternal health allowed for safer abortions later in pregnancy and advances in neonatal care rendered the point of fetal viability earlier than it had been in 1973. *See Casey*, 505 U.S. at 860.

151. Justice O'Connor had been critical of *Roe*'s trimester framework in the past. *See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting) (describing *Roe*'s trimester framework as "outmoded") *overruled by Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 453–54 (1983) (O'Connor, J., dissenting) ("The trimester or 'three-stage' approach adopted by the Court in *Roe* . . . cannot be supported as a legitimate or useful framework for accommodating the woman's right and the State's interests.") (footnote omitted) *overruled by Gonzales v. Carhart*, 550 U.S. 124 (2007).

designed to protect the woman's health, but not to further the State's interest in potential life, are permitted during the second trimester; and during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake.<sup>152</sup>

The Court found fault with this framework for its failure to account for the State's legitimate interest in promoting fetal life. Though "it is a constitutional liberty of the woman to have some freedom to terminate her pregnancy," Justice O'Connor conceded, "[t]he woman's liberty is not so unlimited . . . that from the outset the State cannot show its concern for the life of the unborn."<sup>153</sup> As a result, *Roe's* permitting "almost no regulation at all . . . during the first trimester"<sup>154</sup> constituted an unconstitutional infringement of the powers of the State. Similarly, *Roe's* permitting only "regulations designed to protect the woman's health, but not to further the State's interest in potential life"<sup>155</sup> also impermissibly constrained the State's valid authority.

Based on these principles, the *Casey* Court abandoned *Roe's* trimester framework.<sup>156</sup> In its place, the Court shifted the focus of its abortion jurisprudence more squarely upon fetal viability. This new focus at first appears simple: "[w]e conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy."<sup>157</sup> But what of the State's right to promote its interest in potential life? Addressing this question proved more complex.

Weighing the competing interests and rights, the Court observed:

Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term and that there are procedures and institutions to allow adoption of unwanted children as well as a certain

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152. *Casey*, 505 U.S. at 872.

153. *Id.* at 869.

154. *Id.* at 872.

155. *Id.*

156. *See id.* at 873 ("We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*.").

157. *Id.* at 870.

degree of state assistance if the mother chooses to raise the child herself.<sup>158</sup>

So while a woman has the right to terminate her pregnancy prior to viability under *Casey*, she does not have the right to be free from state rules and regulations promoting its interest in potential life during this period. The obvious question is at what point should such rules and regulations be deemed to rise to the level of being so oppressive as to infringe upon a woman's constitutional right to choose to terminate her pregnancy.

The Court answered this question by adopting the undue burden test.<sup>159</sup> "A finding of an undue burden," it explained, "is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."<sup>160</sup> Thus, "[a] statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it."<sup>161</sup> Similarly, "a statute which, while furthering the interest in potential life or some other valid state interest, has the effect of placing a substantial obstacle in the path of a woman's choice cannot be considered a permissible means of serving its legitimate ends."<sup>162</sup>

Thus the Court redrew abortion's battle lines. When does a statute inform a woman's free choice rather than hinder it? Just how substantial must a "substantial obstacle in the path of a woman's choice"<sup>163</sup> be in order to be deemed unconstitutional? These and questions like them remained after *Casey* to be litigated in courts throughout America in the years to come.<sup>164</sup> But for the time being, the Court's work was done: *Roe* had been reaffirmed and its questionable trimester framework replaced by one the Court deemed more appropriate for contemporary society.<sup>165</sup>

Foreshadowing Justice Kennedy's opinion in *Lawrence*,<sup>166</sup> Justice O'Connor endorsed a palimpsestic approach to constitutionalism near the

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158. *Id.* at 872.

159. *See id.* at 876 ("Not all burdens on the right to decide whether to terminate a pregnancy will be undue. In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

160. *Id.* at 877.

161. *Id.*

162. *Id.*

163. *Id.*

164. A number of such cases ultimately reached the Supreme Court. *See, e.g.*, *Gonzales v. Carhart*, 550 U.S. 124, 167–68 (2007) (upholding the constitutionality of the Partial-Birth Abortion Ban Act of 2003); *Stenberg v. Carhart*, 530 U.S. 914, 921 (2000) (striking down a Nebraska statute criminalizing the performance of so-called "partial birth abortion"); *Mazurek v. Armstrong*, 520 U.S. 968, 975–76 (1997) (per curiam) (upholding a Montana statute prohibiting nonphysicians from performing abortions).

165. Applying the undue burden test to the Pennsylvania Act, the Court upheld each of its provisions except for the one requiring spousal consent. *See Casey*, 505 U.S. at 879–901.

166. *See supra* notes 112–19 and accompanying text.



end of her *Casey* opinion. “Our Constitution is a covenant running from the first generation of Americans to us and then to future generations,”<sup>167</sup> she wrote. “It is a coherent succession. Each generation must learn anew that the Constitution’s written terms embody ideas and aspirations that must survive more ages than one.”<sup>168</sup> As prior opinions’ language becomes obsolete—as they no longer represent prevailing views or come to be out of step with contemporary society—the Supreme Court is duty-bound to revisit and update them as it deems appropriate, with the ultimate goal of doing whatever it can within its authority “to define the freedom guaranteed by the Constitution’s own promise, the promise of liberty.”<sup>169</sup> Here that promise counseled in favor of affirming *Roe*’s central holding, while at the same time checking a woman’s liberty interest in terminating her pregnancy by permitting States to enforce certain rules and regulations designed to discourage her from doing so.

### C. Conclusion

Taken together, *Lawrence* and *Casey* illustrate two ways that American courts can revisit earlier opinions upon recognizing that they might have become out of step with evolving societal and cultural norms. In *Lawrence*, the Court held that its holding in *Bowers* permitting the criminalization of consensual homosexual sodomy had become obsolete, and thus repudiated it in the name of promoting “greater freedom.” In *Casey*, while explicitly stating that *Roe*’s central holding had not become obsolete<sup>170</sup> and reaffirming a woman’s liberty interest in terminating her pregnancy prior to viability, the Court granted the State significantly more leeway to discourage her from exercising that right. In each case, the Court took the unusual step of revisiting a settled constitutional issue in order to reassess its earlier opinion in light of contemporary notions of freedom and liberty. Like a writer upon a palimpsest, the Justices endeavored to improve upon what had come before once a prior writing’s relevance and vitality had come into question.

What is important to note in closing is that it is the act of reexamination alone that ties American judicial decision making to the palimpsest metaphor. The ultimate result—repudiation in one instance, reaffirming but reshaping in the other—is in many ways irrelevant. What matters most is that in each case the Court evidenced its willingness to revisit prior opinions where the need arose and to resolve present-day disputes in a man-

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167. *Casey*, 505 U.S. at 901.

168. *Id.*

169. *Id.*

170. *See supra* text accompanying notes 150–51.

ner it deemed appropriate for contemporary society.<sup>171</sup> Given this willingness, no point of law can ever be said to be fully settled, and each opinion a court writes, no matter how significant or seemingly dispositive, will always remain subject to being replaced on the palimpsest that is the corpus of judicial opinions. Having illustrated the hard version of the palimpsestic decision making at work, I now move on to Part IV, which addresses a more expansive application of the palimpsest metaphor to judicial decision making.

#### IV. THE JURISPRUDENTIAL MIND

##### A. *Parts of a Coexistence*

As remarkable as De Quincey has explained the palimpsest to be—a marvel of chemical ingenuity; a chronicler of history and culture—it is far more than that. Near the end of *The Palimpsest*, De Quincey finally lets us in on the true purpose of his meditation. His admiration for the writing surface already firmly established, he turns to us and asks rhetorically, “What else than a natural and mighty palimpsest is the human brain?”<sup>172</sup> De Quincey immediately answers, “Such a palimpsest is my brain; such a palimpsest, O reader! is yours. Everlasting layers of ideas, images, feelings, have fallen upon your brain softly as light. Each succession has seemed to bury all that went before. And yet in reality not one has been extinguished.”<sup>173</sup> In this way the palimpsest stands as a metaphor for evolution’s greatest achievement, the human brain.<sup>174</sup>

So, too, can the palimpsest stand as a metaphor for what I have termed our nation’s Jurisprudential Mind. This Mind is made up of all caselaw

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171. Though both of these cases related to the right to privacy, the Supreme Court’s willingness to address instances where prior opinions’ language has become obsolete extends beyond this realm. As Justice O’Connor noted in *Casey*, both the “line of cases identified with *Lochner v. New York*,” and *Brown v. Board of Education* are exemplars of this tradition. *Casey*, 505 U.S. at 861–64. Referencing *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), which effectively ended the *Lochner* era, Justice O’Connor noted how it and *Brown* responded to the obsolete language of prior opinions:

*West Coast Hotel* and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each case was comprehensible as the Court’s response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive.

*Casey*, 505 U.S. at 863.

172. *Suspiria de Profundis*, *supra* note 54, at 144.

173. *Id.*; Cf. Sigmund Freud, *A Note upon the “Mystic Writing-Pad,”* in GENERAL PSYCHOLOGICAL THEORY 210 (Phillip Rieff ed., Simon & Schuster Inc. 1997) (1963) (comparing a mystic writing-pad, a modern rewritable surface functionally similar to a palimpsest, to “the perceptive apparatus of the mind”).

174. See generally Bruce T. Lahn et al., *Accelerated Evolution of Nervous System Genes in the Origin of Homo Sapiens*, 119 CELL 1027 (2004) (illustrating the extraordinarily accelerated evolution of the human brain).

going back to our nation's founding.<sup>175</sup> Analytically overwhelming as this Mind might seem, what we are concerned with primarily is the very top layer, the current state of the law as determined by the courts. This top layer represents the culmination of the interaction and discourse among all caselaw to date, encapsulated in one fluid, constantly evolving expression of the law. What we are left with is a shorthand summary of our jurisprudential history: "In a moment, in the twinkling of an eye,<sup>176</sup> every act—every design . . . lived again—arraying themselves not as a succession, but as parts of a coexistence."<sup>177</sup> Taken as a whole, this top layer of our nation's Jurisprudential Mind—this snapshot "coexistence"—represents not only the general passage of time, but also courts' categorical rejection of ideas that "once had possessed an interest for *them*,"<sup>178</sup> "but which, under changes of opinion or of taste, ha[ve] faded [from] their feelings or ha[ve] become obsolete for their understandings."<sup>179</sup>

Among other things, this top layer of our collective Jurisprudential Mind details the rights we have acquired as citizens over time, rights guaranteed by the Constitution, but the contours of which have been shaped by courts. What is important to note is that as obvious and fundamental as these rights might seem to us today, their development has often been hard-fought and painfully incremental—each right that appears on this top layer has a historical palimpsest of its own.

For example, any fan of police procedurals can probably recite the Miranda rights police officers must explain to suspects under arrest.<sup>180</sup> Yet those rights—rights the majority of citizens know well and now take for granted—did not exist in their current form until the Supreme Court decided *Miranda v. Arizona*<sup>181</sup> in 1966.

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175. Just as amended statutes are removed from hard copies of the U.S. Code, so too could overturned cases be simply discarded. Yet they do not, but remain as a testament to prior generations' wisdom, even as that wisdom is rejected. *See supra* note 33.

176. *See 1 Corinthians* 15:52 ("In a moment, in the twinkling of an eye, at the last trump: for the trumpet shall sound, and the dead shall be raised incorruptible, and we shall be changed."). This verse relates to the Rapture, when the saved dead shall be raised to the Kingdom of Heaven. In the case of the girl De Quincey is describing, however, she does not die, surviving this liminal moment in which her life flashes before her eyes.

177. *Suspiria de Profundis*, *supra* note 54, at 145. De Quincey is describing a near-death child's experiencing the whole of her life flashing instantly before her eyes.

178. *Id.* at 140. The "them" De Quincey references here is a given populace that has written and rewritten upon a palimpsest. *See id.* Here I use the term to describe judicial decision makers, who in turn are reflective of the contemporary populace as a whole.

179. *Id.*

180. *See Miranda v. Arizona*, 384 U.S. 436, 454 (1966) ("[Y]ou have the right to remain silent.").

181. The *Miranda* Court imposed constitutional requirements protecting the accused with uncommon specificity: "Prior to any questioning, the [accused] person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Id.* at 444. Note how closely this language reflects the words arresting officers on television and film use when arresting a suspect.

The Miranda rights we now cherish only came into being by way of incremental palimpsestic layering. *Miranda* itself explicitly overturned two criminal procedure cases the Court had decided less than a decade prior that were clearly violative of its principles,<sup>182</sup> one which had upheld the conviction of a defendant who had requested counsel and been denied it until after he had confessed,<sup>183</sup> and another in which the requests of both the defendant and his counsel to see one another had been denied until after the police had extracted a confession.<sup>184</sup> In between, the Court took incremental steps toward its *Miranda* opinion by overturning convictions that had arisen as a result of coercive confessions,<sup>185</sup> but stopped short of articulating the constitutional rights of the accused until 1966. So while Miranda rights might feel like bedrock principles of criminal procedure and the true meaning of the Fifth Amendment, one should always bear in mind that for 190 years the Constitution did not require that they be read to the accused. In this way *Miranda* rights represent the culmination of nearly two centuries of jurisprudence, and *Miranda* stands as a shorthand summary of “every act” that has come before it, a unitary representation of a centuries old coexistence.<sup>186</sup>

Other such examples abound. The notion of having to pay a tax in order to vote seems unimaginable today, yet states were free to impose poll taxes until 1966.<sup>187</sup> Lest we forget, the Constitution did not grant blacks and whites the freedom to marry one another until 1967.<sup>188</sup> And it was only in 2005 that the Supreme Court determined that it was unconstitution-

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182. *Id.* at 479 n.48 (“In accordance with our holdings today and in *Escobedo v. State of Illinois*, 378 U.S. 478, 492 [(1964)], *Crooker v. State of California*, 357 U.S. 433 . . . (1958) and *Cicenia v. La Gay*, 357 U.S. 504 . . . (1958) are not to be followed.”) (citations omitted).

183. *Crooker v. California*, 357 U.S. 433, 434 (1958), *overruled by Miranda v. Arizona*, 384 U.S. 436 (1966).

184. *Cicenia v. La Gay*, 357 U.S. 504, 508 (1958) (“The contention that petitioner had a constitutional right to confer with counsel is disposed of by *Crooker v. California*, 357 U.S. 433, decided today.”) (citation omitted), *overruled by Miranda v. Arizona*, 384 U.S. 436 (1966).

185. *See, e.g.*, *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964) (overturning the conviction of a suspect that was based on incriminating statements made while he was being interrogated by police where the suspect had not been warned of his right to remain silent and his request to consult with his lawyer had been denied); *Massiah v. United States*, 377 U.S. 201, 207 (1964) (overturning the conviction of a suspect who made incriminating postindictment statements that were elicited by the government and made in the absence of counsel).

186. *See supra* text accompanying note 179. The Supreme Court revisited *Miranda* in 2000, upholding it on stare decisis grounds and holding that “*Miranda* and its progeny in this Court govern the admissibility of statements made during custodial interrogation in both state and federal courts.” *Dickerson v. United States*, 530 U.S. 428, 432 (2000).

187. *See Harper v. Va. Bd. of Elections*, 383 U.S. 663, 670 (1966) (striking down Virginia’s statutory poll tax as violative of the Equal Protection Clause). *Harper* overruled *Breedlove v. Suttles*, 302 U.S. 277 (1937), to the extent it sanctioned poll taxes as “a prerequisite of voting.” *Harper*, 383 U.S. at 669 (quoting *Breedlove*, 302 U.S. at 283).

188. *See Loving v. Virginia*, 388 U.S. 1, 12 (1967) (clarifying for the first time that “[u]nder our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State”).

al to execute individuals for crimes they had committed as minors.<sup>189</sup> As was the case in *Miranda*, the Justices in each of these cases rejected notions that “once had possessed an interest for *them*” and altered the meaning of the Constitution because “changes of opinion or of taste” had rendered past contrary holdings “obsolete for their understandings.”<sup>190</sup> Accordingly, each of these holdings—and the constitutional rights they created—should not be analyzed in isolation, but rather as a representation of the coexistence formed by the palimpsest of prior holdings underlying its ultimate resolution in favor of greater individual freedom.

One final point bears mentioning. Though courts are unlikely to retreat from barring poll taxes, permitting blacks and whites to marry,<sup>191</sup> or prohibiting the execution of minor offenders, the palimpsests in other areas of the law are further from apparent resolution. The individual rights established in *Harper*, *Loving*, and *Roper* relate to issues that had long vexed courts throughout the country. Though these rights might now seem to be settled,<sup>192</sup> this apparent resolution has come about only as a result of a historical back and forth that created a synthesized coexistence. The rich, layered history of these rights thus makes it rather simple to apply palimpsestic analysis. It would be a mistake, however, to view only opinions creating hard-fought rights such as these through the lens of our collective Jurisprudential Mind. Rather, even cases of first impression can produce opinions that represent a coexistence with precedent reflective of palimpsestic layering.

*Kyllo v. United States*,<sup>193</sup> a Fourth Amendment case from 2001, illustrates this point. There the question presented was “whether the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a ‘search’ within the meaning of the Fourth Amendment,”<sup>194</sup> an issue that could not have come before the courts of earlier generations. In *Kyllo*, unlike in the three cases referenced above, the Court was tasked not with resolving an issue that had vexed courts for generations, but one of relatively recent vintage, for though it had wrestled with the meaning of “search” under the Fourth

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189. See *Roper v. Simmons*, 543 U.S. 551 (2005). *Roper* revisited and overturned *Stanford v. Kentucky*, 492 U.S. 361 (1989), which held that the imposition of the death penalty for sixteen and seventeen-year-old offenders did not violate the Eighth Amendment. *Roper*, 543 U.S. at 574.

190. See *supra* note 181 and accompanying text.

191. *But see* *Cote-Whitacre v. Dep’t of Pub. Health*, 844 N.E.2d 623, 644 (2006) (Spina, J., concurring) (relying on the Jim Crow era Uniform Marriage Evasion Act, which forbade Massachusetts from contracting a marriage of out-of-state parties if such marriage would be void if contracted in their home state, in support of the holding that nonresident, same-sex couples could not be married in Massachusetts).

192. They are of course not definitively settled, and remain subject to future revision, qualification, or even abdication.

193. 533 U.S. 27 (2001).

194. *Id.* at 29.

Amendment throughout the 20th century,<sup>195</sup> it had never examined these issues layered upon the novel technology employed by the government in *Kyllo*.

Answering the question presented, the *Kyllo* court held that the use of a thermal-imaging device to examine a suspect's home from a public street does constitute a "search" under the Fourth Amendment<sup>196</sup> and that the warrantless use of such a device accordingly amounts to a violation of the Constitution. Thus, the Court resolved this tension between the government and suspects in favor of the latter. But the larger challenge of defining "search" under the Fourth Amendment going forward remained unsettled.

*Kyllo* shows us that as technology evolves, what constitutes an "unreasonable" search or seizure in violation of the Fourth Amendment will remain in flux.<sup>197</sup> And, as technology continues to press forward, additional cases requiring courts to balance the interests of law enforcement officers with Fourth Amendment protections are bound to arise. Nonetheless, as matters currently stand, *Kyllo* represents the Court's best effort to strike this balance given evolving technology and the corpus of Fourth Amendment jurisprudence that has come before. In this way, it too represents a culmination of a historical coexistence, even as a new layer of the Fourth Amendment palimpsest will one day replace it as technology advances.

### B. *The Deep Tragedies of Infancy*

Our collective's Jurisprudential Mind persists in moving forward every day, growing and evolving each step of the way. Yet it too, like all other palimpsests, can never move completely beyond its past, for though the top layer of the Jurisprudential Mind represents a snapshot of current law's coexistence with precedent, what has come before—both good and bad—can never be erased.

As De Quincey describes the human brain palimpsest, "the deep deep tragedies of infancy, as when the child's hands were unlinked for ever

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195. See, e.g., *Winston v. Lee*, 470 U.S. 753, 755 (1985) (holding that the government may not compel a suspect to undergo surgery to remove a bullet that would help connect him to a crime, as such a procedure would be an unreasonable search in violation of the Fourth Amendment); *Dalia v. United States*, 441 U.S. 238, 258–59 (1979) (holding that the Fourth Amendment does not prohibit covert entry into a private premises for the purpose of installing otherwise legal electronic surveillance equipment); *Michigan v. Tyler*, 436 U.S. 499, 511–12 (1978) (holding that while entries into a store to put out a fire and conduct an initial investigation do not require a warrant under the Fourth Amendment, subsequent entries days later to gather evidence for a possible prosecution do); *Burdeau v. McDowell*, 256 U.S. 465, 475–76 (1921) (holding that the Fourth Amendment protection against unreasonable searches and seizures applies only to government actors, not private individuals acting without the knowledge or participation of any government official).

196. See *Kyllo*, 533 U.S. at 40.

197. See *id.* at 33–34 ("It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.").

from his mother's neck, or his lips for ever from his sister's kisses, these remain lurking below all, and these lurk to the last."<sup>198</sup> Just as the traumas of our past remain imbedded in our brains, so do the tragedies of our judicial infancy continue to lurk: "[a]lchemy there is none of passion or disease that can scorch away these immortal impresses."<sup>199</sup> Under the American judicial system, reported cases never go away,<sup>200</sup> even those that have been rebuked, overturned, or systematically rejected. Our case reporters thus stand as a witness to the history that has come before, documenting both the law as it stands today as well as our long since rejected judicial missteps.

As much as many of us would like to forget that our Supreme Court once denied blacks citizenship,<sup>201</sup> or sanctioned the discriminatory exclusion of Japanese-Americans,<sup>202</sup> or held that the Constitution permits racial segregation,<sup>203</sup> we cannot, should not, and never will, for *Dred Scott*, *Korematsu*, and *Plessy* are as much a part of our shared legal heritage as the subsequent cases and statutes that ultimately rejected them. To overlook or ignore these uncomfortable precedents would do our nation a grave disservice, dooming us to repeat the mistakes of our past. And so they remain, these tragedies of our national infancy, looming in the shadows of American memory as we continue to write and rewrite upon our shared jurisprudential palimpsest.

#### V. REVISITING *PARENTS INVOLVED IN COMMUNITY SCHOOLS*

Viewed through the lens of the palimpsest, the hue and cry provoked by *Parents Involved in Community Schools*<sup>204</sup> begins to look significantly overstated. This opinion, like all others, cannot be analyzed in isolation, but rather as the representation of the coexistence for which it stands. The palimpsest beneath it is rich and longstanding, encompassing in addition to *Plessy* and *Brown*, such notable cases as *Bakke*,<sup>205</sup> *Gratz*,<sup>206</sup> and *Grutter*.<sup>207</sup>

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198. *Suspiria de Profundis*, *supra* note 54, at 146.

199. *Id.*

200. The qualifier "reported" takes on far less significance today than it did even ten years ago. With the emergence of widespread access to online databases and the proliferation of materials being made available online by courts throughout the country, "unpublished" decisions and routine orders can now often be found as easily as reported cases. Now they too bear witness to history.

201. *See Scott v. Sandford*, 60 U.S. 393 (1857) (holding that Scott is not a citizen because he is an unemancipated slave of African descent), *abrogated by* U.S. CONST. amend XIV, *as recognized in* *United States v. Summers*, 2007 U.S. Dist. LEXIS 98797 (E.D. Mich. 2007).

202. *See Korematsu v. United States*, 323 U.S. 214 (1944) (upholding an executive order calling for the exclusion of Japanese-Americans from a designated military area); *see also Hirabayashi v. United States*, 320 U.S. 81 (1943) (upholding the constitutionality of curfews imposed on Japanese-Americans during World War II).

203. *See Plessy v. Ferguson*, 163 U.S. 537 (1896).

204. *See supra* notes 6–8 and accompanying text.

205. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (striking down a California medical school's special admissions program that set aside a percentage of the places in each of its classes for

This line of cases has ebbed and flowed over time, first on the axis of permitting segregation (*Plessy*) or deeming it unconstitutional (*Brown*), then post-*Brown* to the more complicated question of what state-sponsored efforts at remedying segregation can pass constitutional muster (*Bakke*, *Gratz*, and *Grutter*). Over the years, each side has at times claimed victory, and both American society and the makeup of the Supreme Court have changed significantly as this palimpsest has been created.

*Parents Involved in Community Schools* is but the latest contribution to this persistent line of cases, and though it did strike down the Seattle and Jefferson County desegregation plans, it was in no way dispositive as to the future of such efforts in jurisdictions across the country. An analysis of the Court's opinions reveals as much. First and foremost, Chief Justice Roberts' opinion only commanded a four-Justice plurality. It is this opinion, joined by Justices Scalia, Thomas, and Alito, that has drawn the most fire, as it implies that any use of race whatsoever in determining admission to a public school violates *Brown* and is unconstitutional on its face.<sup>208</sup> But Justice Kennedy, who joined the 5–4 majority in striking down the Seattle and Kentucky plans, did not join the section of the Chief Justice's opinion in which he implied this interpretation of *Brown*.

In fact, Justice Kennedy wrote a separate opinion distancing himself from such a far-reaching implication. Concurring in part and concurring in the judgment, he noted that “parts of the opinion by THE CHIEF JUSTICE imply an all-too-unyielding insistence that race cannot be a factor in instances when, in my view, it may be taken into account.”<sup>209</sup> He added: “[t]he plurality opinion is at least open to the interpretation that the Constitution requires school districts to ignore the problem of *de facto* resegregation in schooling. I cannot endorse that conclusion.”<sup>210</sup> Rather, though agreeing that the Seattle and Jefferson County plans ran afoul of the Constitution, Justice Kennedy left the door open for future desegregation plans that do not focus solely on race, but also do not ignore it entirely:

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students from certain minority groups, but not prohibiting the school from taking race into account and considering certain races or ethnicities a “plus” in future admissions decisions).

206. *Gratz v. Bollinger*, 539 U.S. 244 (2003) (striking down University of Michigan's undergraduate affirmative action program for being too mechanistic in awarding twenty points—one fifth the number required to guarantee admission—to all underrepresented minority candidates and all but guaranteeing admission to all such candidates who were minimally qualified).

207. *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding the constitutionality of the University of Michigan Law School's policy of considering membership of an underrepresented minority group a plus among several other factors and endorsing the view that student body diversity is a compelling state interest that can justify the use of race in admission decisions).

208. *See Parents Involved in Cmty. Sch. v. Seattle Sch.*, 551 U.S. 701, 747–48 (2007) (“What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis? . . . The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

209. *Id.* at 787.

210. *Id.* at 788.



School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. *These mechanisms are race conscious but do not lead to different treatment based on a classification that tells each student he or she is to be defined by race,* so it is unlikely any of them would demand strict scrutiny to be found permissible.<sup>211</sup>

For Justice Kennedy, it was not the use of race that doomed the Seattle and Jefferson County plans, but the use of race alone. He notes that the two school districts could have “achieved their stated ends through different means,” be they race-neutral or by means of a “more nuanced, individual evaluation of school needs and student characteristics that might include race as a component.”<sup>212</sup> “The latter approach,” Kennedy writes in all but handing school districts a constitutional desegregation playbook, “would be informed by *Grutter*,<sup>213</sup> though of course the criteria relevant to student placement would differ based on the age of the students, the needs of the parents, and the role of the schools.”<sup>214</sup> So at the end of the day, though *Parents Involved in Community Schools* struck down two desegregation plans, Justice Kennedy set forth an action plan for school districts to achieve desegregation and thereby fulfill the mission of *Brown*, one likely to pass constitutional muster if implemented given the four dissenters who would have upheld the Seattle and Jefferson County plans. In that regard, the Court’s holding is in reality not unlike its holdings in *Gratz* and *Grutter*, and is a far cry from being a harbinger of the dire scenarios envisioned by its critics. Thus it can be viewed as but the latest expression

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211. *Id.* at 789 (emphasis added).

212. *Id.* at 790.

213. See *Grutter v. Bollinger*, 539 U.S. 306 (2003):

Here, the Law School engages in a highly individualized, holistic review of each applicant’s file, giving serious consideration to all the ways an applicant might contribute to a diverse educational environment. The Law School affords this individualized consideration to applicants of all races. There is no policy, either *de jure* or *de facto*, of automatic acceptance or rejection based on any single “soft” variable. Unlike the program at issue in *Gratz v. Bollinger*, the Law School awards no mechanical, predetermined diversity “bonuses” based on race or ethnicity. . . . [T]he Law School’s admissions policy “is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.”

*Id.* at 337 (internal citations omitted).

214. *Parents Involved in Cmty. Sch. v. Seattle Sch.*, 551 U.S. 701, 790 (2007).

of the coexistence of this line of cases, reflective of the past and not without effect, but in no way determinative as to the future of desegregation.

But even if one were to accept the premise that *Parents Involved in Community Schools* “dishonored” *Brown*, “resuscitated” *Plessy*, and ordered “public schools to become more segregated,”<sup>215</sup> from a palimpsestic standpoint, all is not lost. To the extent the *Parents Involved in Community Schools* Court handed down a death-blow to state-sponsored desegregation efforts, that holding is no more permanent than *Bowers* or *Roe*, or any other Supreme Court opinion for that matter. Just as the Supreme Court revisited those two opinions—overturning the former and reshaping the latter—it will have every opportunity to revisit *Parents Involved in Community Schools* should it one day begin to suspect that its “language has become obsolete.”<sup>216</sup> The Supreme Court has done this time and again in the past, and there is no reason to think that its most recent decision, in so historically significant an area of American constitutional law as school desegregation, would be immune from such revisiting.<sup>217</sup>

Further support for this possibility comes in the form of *Plessy v. Ferguson*, the tragedy of our infancy that looms large over *Parents Involved in Community Schools*. The specter of *Plessy*, which upheld de jure segregation, lurks in the shadows beneath all desegregation opinions, acting as the subtextual baseline to which our society can never return. Though *Parents Involved in Community Schools* addresses de facto rather than de jure segregation, the more our society trends toward *Plessy* and away from *Brown*, the more likely opinions rejecting efforts at desegregation will appear obsolete, hence ripe for revisiting. Thus *Plessy*, the base layer of the desegregation palimpsest—having been thoroughly rejected, first by *Brown*, then by the country as a whole—remains significant, as it reminds us and future generations of the tragedy of our past and of the limits of our Constitution’s ability to tolerate segregation.

As we move forward, the desegregation palimpsest will continue to be written upon by courts throughout the country. Though *Parents Involved in Community Schools* represents a setback for desegregation proponents, state-sponsored desegregation plans are not dead, and Justice Kennedy has laid out the blueprint for how interested states may design plans for integrating their schools without running afoul of the Constitution. As important, this issue is far from final resolution, as the Court can, and most likely will, revisit *Parents Involved in Community Schools* in the future, ex-

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215. Editorial, *Resegregation Now*, N.Y. TIMES, June 29, 2007, at A28.

216. See, e.g., *supra* notes 80 and 107 and accompanying text.

217. See *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (noting that constitutional cases in particular are ripe for revisiting “because in such cases ‘correction through legislative action is practically impossible’”) (quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407 (1932)).

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amining whether it remains a valid expression of the contemporary meaning of the Constitution or whether it has become obsolete.

#### CONCLUSION

Be it with respect to a rote restatement of a standard, revisiting precedent, or describing the current state of the law, the palimpsest metaphor successfully captures the contingency that is the hallmark of our unique judicial system. Recognizing the extent to which judicial decision making mirrors palimpsestic layering engenders an understanding of the law as a fluid work-in-progress reflective of our evolving societal needs, preferences, and expectations. The law as it stands today represents both a shorthand summary of the coexistence between modern opinions and the precedents they cite and a rejection of prior notions that have become obsolete. And regardless of whether prior opinions have been embraced or rejected, they, like underlayers of a palimpsest, never disappear, even as they grow increasingly remote over time. Viewing cases through the lens of the palimpsest can thus serve as a valuable tool in assessing the true meaning and significance of judicial opinions and help to shed light upon their relationship with the law of the past, present, and future.